

# European Law on the Energy Communities

## European Law on the Energy Communities: a Long Way to a Direct Legal Framework

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### Abstract

*In 2016, the European Commission presented a legislative package: “Clean Energy for all Europeans”, with the proposal for a new Directive on common rules for the internal market in electricity (recast) as its part. The package is aimed at setting consumers as the “active and central players on the energy markets of the future”. This issue is subjected to the analysis in this paper, which is intended to discuss its collective approach, i.e. the generation of electricity in energy communities. The research covers the analysis of previous European policy documents and programmes, repealed and to be amended legislation that indirectly addresses (or could address) the issue of energy communities, as well as the legislation that will regulate (or may regulate) it directly (i.e. the new Directive on common rules for the internal market in electricity). Seen in this light, the paper is aimed at proving that the idea for cooperation of energy consumers and local production of electricity from renewable energy sources, is deeply rooted in the European agenda for the internal energy market.*

### I. Introduction and the Spirit of the Energy Communities

On November 30th, 2016, the European Commission presented a complex legislative package designed to reform the European Union’s energy sector: “Clean Energy for all Europeans”.<sup>1</sup> Based on three pillars: “energy efficiency first”, “global leadership in renewable energies”, and “a fair deal for consumers” the package is aimed at setting consumers as the “active and central players on the energy markets of the future”.<sup>2</sup> As a result, the consumers will “have a better choice of supply, access to reliable energy price comparison tools and the possibility to produce and sell their own electricity”.<sup>3</sup> This last issue is subjected to the analysis in this paper, which is intended to discuss its collective approach, i.e. the generation of electricity in energy communities.

The research covers the analysis of previous European policy documents and programmes, repealed and to be amended legislation that indirectly addresses (or could address) the issue of energy

communities. “If you want to travel fast use the old roads” says a Vietnamese proverb. Hence, this paper is aimed at proving that the idea for cooperation of energy consumers and local production of electricity from renewable energy sources, is deeply rooted in the European agenda for the internal energy market.<sup>4</sup> Therefore, a historical methodology is applied to delve into the former approach to civic energy structures. It is combined with a classical approach to analyse the legal text, with legal methods of interpretations: the literal, systematic, and functional. The latter is particularly important for providing an open interpretation (*in favorem libertatis*) for the needs of argumentation that could have been used by energy communities in the past.

Another saying, this time a well-known Chinese one tells us that “a journey of a thousand miles begins with a single step”. Paradoxically, let the last of these steps, be the first one for our journey. Let us begin with the latest achievement on the road to full legal recognition of energy communities at the European level. These are the drafted provisions of a proposed revision for the Electricity Directive.<sup>5</sup> As a result of a discussion in the Council, in December 2017, the initial proposal of the European Commission was changed.<sup>6</sup> At a point which, in the current version, can be described as “the spirit of energy communities” or “a rationale for civic energy structures”<sup>7</sup> it goes as follows:

Distributed energy technologies and consumer

<sup>1</sup> Commission proposes new rules for consumer centred clean energy transition, <https://ec.europa.eu/energy/en/news/commission-proposes-new-rules-consumer-centred-clean-energy-transition> (accessed 5 Feb. 2018).

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> The research has a top-down approach. Naturally, the idea of energy communities/cooperatives is developed and known legal solution in national legislation, e.g. the energy cooperatives have a long tradition in Germany, see Angela Pohlmann, *Situating Social Practices in Community Energy Projects: Three Case Studies about the Contextuality of Renewable Energy Production*, 22 (Springer 2018), however this paper is aimed at discussing its European viewpoint.

<sup>5</sup> Proposal for a Directive of the European Parliament and of the Council on common rules for the internal market in electricity, COM (2016) 864 final, Brussels, 30.11.2016.

<sup>6</sup> Council’s provisional position on the proposal, 15886/17, Brussels, 20 December 2017.

<sup>7</sup> Cooperatives (energy communities) are an important part of the “new economy movement” to “democratise energy”, which is “a cornerstone in the struggle for climate resilience and an essential step towards building a more just equitable, and sustainable future”. Lynn Benander, Diego Angarita Horowitz & Isaac Baker, “New Economy Energy Cooperatives Bringing Power to the People”, in Denise Griffin Fairchild & Al Weinrub (eds), *Energy Democracy: Advancing Equity in Clean Energy Solutions*, 195 (Island Press 2017).

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empowerment have made community energy an effective and cost-efficient way to meet citizens' needs and expectations regarding energy sources, services and local participation. Community energy offers an inclusive option for all consumers to have a direct stake in producing, consuming or sharing energy between each other. Community energy initiatives focus primarily on providing affordable energy of a specific kind, such as renewable energy, for their members or shareholders rather than prioritising profit-making like a traditional energy company. By directly engaging with consumers community energy initiatives are demonstrating their potential in facilitating the up-take of new technologies and consumption patterns, including smart distribution grids and demand response, in an integrated manner. Community energy can also advance energy efficiency at household level and help fight energy poverty through reduced consumption and lower supply tariffs. Community energy also enables certain groups of household consumers to participate in the energy market who otherwise might not have been able to do so. Where they have been successfully operated such initiatives have delivered economic, social and environmental value to the community that goes beyond the mere benefits derived from the provision of energy services.

Despite the fact that the legislative process has not yet finished, the above-mentioned proposal reveals the nature of energy communities and the manner in which they are to be regulated by European law. Keeping these assumptions in mind, let us move on to analyse some of the milestones of the evolutionary road towards the energy market in the European Union, starting from a strategic European document on energy from the 1990s.

## II. "Energy for the Future: Renewable Sources of Energy" and a Space for Energy Communities

The Communication from the Commission: White Paper for a Community Strategy and Action Plan "Energy for the Future: Renewable Sources of Energy" ("White Paper 1997") is one of the very first EU documents addressing renewable energy in a complex way.<sup>8</sup> Aimed at drafting a "comprehensive strategy for renewables" the White Paper, together with its Action Plan, established a deep and broad policy background for the development of renewable installations in Europe. The "depth" refers to the role that the renewable generation should perform in the nearest future of the Community ("renewable energy sources as they are presented in this White Paper are of major importance for the Union as we enter the 21st century"<sup>9</sup>). The White Paper's wide character stems from a range of policies that were to be involved in the

promotion of renewable sources. This concerns both industrial as well as social policies, where such areas were distinguished: energy, environment, employment, taxation, competition, research, technological development and demonstration, agriculture, regional and external relations.<sup>10</sup>

Interestingly, many of the remarks included in the White Book 1997 concerned local energy issues. Firstly, as described in the White Book, the local approach to the strategy for renewable energy relates to the mechanisms of coordination of the broad policies engaged in the process of promoting renewable generation. These horizontal structures of different policies also have vertical elements. These were the European (i.e. the whole Community), national (Member States) and local levels. The coordination conducted on both levels (horizontal and vertical) should ensure the full implementation and consistency of actions devoted to renewable energy.

Secondly, the local and regional levels are assessed in the White Book 1997 as the "prime examples" of the synergy effect of different policies: energy, structural, and regional, that can interact with one another to great extent, bringing crucial developments in the area of renewable energy sources. This relation is illustrated by a case of isolated communities where renewable generation could replace inefficient small-scale energy units powered by fossil fuels, leading to the support of sustainable development, better living standards, and new jobs.<sup>11</sup> Furthermore, a great role in facilitating a growth in renewable capacity was to be played by regional and local public authorities and other bodies.<sup>12</sup> Their decision-making process was to be evaluated to include "criteria that reflect the importance of renewables' potential for less favoured regions (which are in general dependent on energy imports), peripheral and remote areas, islands, rural areas, in particular those lacking traditional energies".<sup>13</sup>

<sup>8</sup> COM (97) 599 final, 26 November 1997. Naturally the White Paper 1997 was not the first European policy document that concerned the renewable generation. Here one may mention, *inter alia*, "Communication from the Commission to the Council 'Member States' energy policies: main issues for the future" COM (84) 693 final, 13 December 1984, Communication from the Commission to the Council "New Community energy objectives", COM (85) 245 final, 28 May 1985, or Council Resolution of 16 September 1986 concerning the new Community energy policy objectives for 1995 and the convergence of the policies of Member States, OJ C 241, 25 September 1986, 1–3. However, it was the White Paper 1997 that in late 1990s addressed the renewable energy sources comprehensively.

<sup>9</sup> White Paper, *supra* 8, at 13.

<sup>10</sup> *Ibid.*, 7.

<sup>11</sup> *Ibid.*, 9.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*, 20.

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This “predominantly decentralised implementation of most renewable technologies” was to be strengthened under the framework of the EU’s regional policy 2000-2007. “The next multi-annual funds negotiation package will be the occasion to extend, consolidate, and clarify the aid opportunities available for renewable energies and, above all, to increase the weight given to RES within the energy programmes”, as written in the White Paper 1997.<sup>14</sup> Moreover, the initiatives under the ALTENER programme<sup>15</sup> as well as the RES implementation plans included in the programmes submitted to the structural funds for co-financing (ERDF and accompanying Community Support Frameworks), were targeted to boost the development of regional and local renewable projects.<sup>16</sup> This bottom-up approach was set to reach a renewable energy consumption objective for 2010 at national level (i.e. by Member States). However, as assessed in the White Paper 1997, it required greater involvement of structural funds, which needed a decision of each Member State.<sup>17</sup>

Therefore, the Commission underlined the necessity of “explaining the possibilities for RES funding and raising awareness on their potential and benefits for the regions”.<sup>18</sup> The argumentation for it was based on the following assumptions:

[i]t is important for the Commission to highlight that regional funds invested in renewable energy sources development could contribute to increased standards of living and income in less favoured, peripheral, island, remote or declining regions in different ways:

- favouring the use of local resources and therefore indigenous development;
- being usually labour intensive, they could contribute to the creation of local permanent jobs;
- contributing to reduce the dependency on energy imports;
- reinforcing energy supply for local communities, green tourism, preserved areas, etc.;
- contributing to develop the local R&TD and Innovation potential, through the promotion of specific research-innovation projects adapted to local needs.<sup>19</sup>

This broad agenda was to be enhanced by the newly introduced mechanism related to planning and financing the development of renewable generation capacity. Actions addressed in the White Paper 1997 were, *inter alia*, implemented in the ALTENER II programme. Set for four years (starting from 1998 to 2002), ALTENER II enabled full-financing and co-financing of a range of tools to strengthen the growth of renewable generation. Those tools included studies intended to: implement measures taken to develop the potential of renewable energy sources, develop information, education and training structures, and encourage the exchange of experience and know-how on renewable energy.<sup>20</sup>

Nevertheless, the ALTENER II programme did not

introduce a holistic legal regime concerning the development of renewable capacity, including local energy structures. ALTENER II (same as ALTENER I<sup>21</sup>) had executive character, which fully corresponded to the form of the legal act by which the programme was implemented (a decision). The same concerns the SAVE II programme<sup>22</sup> which, to some extent, contributed to the growth renewable capacity, in the 1990s.<sup>23</sup> However, at that time, the European Union still had a few more years to wait for a more complex regulatory system.

### III. Energy Communities in the Renewable Energy Directives

The situation changed at the beginning of the 21st century. In 2001, Directive 2001/77/EC on the promotion of electricity produced from renewable energy sources in the internal electricity market, was passed.<sup>24</sup> Aimed at ensuring that the potential of renewable energy sources “is better exploited within the framework of the internal electricity market” Directive 2001/77/EC established a “needed” legislative framework for the renewables.<sup>25</sup> Apart from being “needed”, new legislation was rather general than

<sup>14</sup> *Ibid.*

<sup>15</sup> In 1998 a new legal frame for the ALTENER programme was passed. This was the Council Decision 98/352/EC of 18 May 1998 concerning a multiannual programme for the promotion of renewable energy sources in the Community (Altener II), OJ L 159, 3.6.1998, 53–57.

<sup>16</sup> White Paper, *supra* 8, at 22–21.

<sup>17</sup> *Ibid.*, 21.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

<sup>20</sup> See Article 2 of Council Decision 98/352/EC.

<sup>21</sup> Council Decision 93/500/EEC of 13 September 1993 concerning the promotion of renewable energy sources in the Community (ALTENER programme), OJ L 235, 18.9.1993, 41–44.

<sup>22</sup> Council Decision 96/737/EC of 16 December 1996 concerning a multiannual programme for the promotion of energy efficiency in the Community - SAVE II, OJ L 335, 24.12.1996, 50–53.

<sup>23</sup> Actions concerning renewable energy sources within the framework of the SAVE programme were addressed in the White Paper 1997. They can also be found among the eligible measures/nature of the activities of the SAVE programme, see European Commission, *SAVE II Programme: Creation of energy management agencies* <http://ec.europa.eu/agriculture/rur/leader2/rural-en/euro/p11-1-1.htm> (accessed 5 Feb. 2018).

<sup>24</sup> Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market was passed, OJ L 283, 27.10.2001, 33–40.

<sup>25</sup> See recitals 1 and 13 of the preamble to Directive 2001/77/EC.

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detailed. Including only eleven articles, four new definitions, and one annex, the Directive has addressed only some of the issues related to renewable capacity (like eliminating administrative burdens in renewable sector). However this does not diminish the role that the legislation of 2001 has played in building the presence of renewable energy sources on the European energy market. Being the very first trial to organise the European energy sector in the field of renewables, the Directive introduced legal institutions currently acknowledged as very basic elements of energy markets (e.g. support schemes or guarantees of origin).

However, did Directive 2001/77/EC give any specific grounds for creating local or civic energy structures, including communities/ cooperatives? The answer is: rather not. Even a cursory reading of the provisions could lead to a totally negative answer: no, the Directive did not provide such rules. The hesitation expressed by the word “rather” results from possibilities of various interpretations of the preamble to Directive 2001/77/EC. As stated in the recitals 19 and 20:

(19) When favouring the development of a market for renewable energy sources, it is necessary to take into account the positive impact on regional and local development opportunities, export prospects, social cohesion and employment opportunities, especially as concerns small and medium-sized undertakings as well as independent power producers.

(20) The specific structure of the renewable energy sources sector should be taken into account, especially when reviewing the administrative procedures for obtaining permission to construct plants producing electricity from renewable energy sources.

As previously mentioned, an open interpretation (*in favorem libertatis*) allows the concept of local energy structures of a civic character (like energy cooperatives, energy communities) to be inserted between the verses of Directive. Seen in this light, one could attempt to make the following assumptions. Firstly, the energy communities/cooperatives, being different from classic energy utilities, are elements of “the specific structure of the renewable energy sources sector”. Similarly, “the administrative procedures for obtaining permission to construct plants producing electricity from renewable energy sources” in energy communities, being different from big scale renewable energy companies,<sup>26</sup> should be adjusted to their nature. Secondly, the different nature of energy communities could be (or even should be) noticed “[w]hen favouring the development of a market for renewable energy sources” as their impact on “regional and local development opportunities”, “social cohesion and employment opportunities” would vary from other types of renewable energy generation. Therefore, the provided interpretation, seen from

today’s point of view reveals the possibilities of understanding the initial European law dedicated to renewable energy sources as a tool for promoting and supporting local energy structures, including energy communities.

In 2009, Directive 2001/77/EC was replaced by Directive 2009/28/EC.<sup>27</sup> The reason for this action – driven by the assumptions of the European Climate and Energy Package – was to strengthen and extend the EU regulatory framework as well as provide harmonisation of measures to increase the renewable energy capacity in all Member States.<sup>28</sup> This involved the introduction of new, more developed solutions regulating the use of renewable energy sources. As outlined in the Article 1 of Directive 2009/28/EC, it included setting mandatory national renewable goals (in gross final consumption of energy and in transport), and laying down rules on statistical transfers between Member States and joint projects with third countries, guarantees of origin, administrative procedures, information and training, access to the electricity grid as well as sustainability criteria for biofuels and bioliquids. However, has this extended regulatory framework, passed in 2009, addressed the local energy cooperation, including energy communities? Does Directive 2009/28/EC give any priorities to such initiatives? Are there any grounds for such an interpretation?

When answering these questions, it may be useful to refer to those provisions of Directive 2009/28/EC where local approach is applied. Here, as stated in recital 3 of the preamble to Directive, it is the role of the Commission and countries involved to support national and regional development measures in regional and local production of energy from renewable sources. Therefore, the Commission and the Member States should encourage the exchange of best practices between local and regional development initiatives as well as promote the use of structural funding regarding renewables. The regional and local opportunities related to the develop-

<sup>26</sup> An idea of community energy may diverge on the matter of scale, however it is characterised by the community’s participation and financial stake, see Stanford Gaines, “Community Wind and Solar: Regional Renewable Energy in the United States”, in Marjan Peeters & Thomas Schomerus (eds.), *Renewable Energy Law in the EU: Legal Perspectives on Bottom-up Approaches*, 267–271 (Edward Elgar 2014).

<sup>27</sup> Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, OJ L 140, 5.6.2009, 16–62.

<sup>28</sup> See Proposal for a Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources, COM (2008) 19 final, Brussels, 23.1.2008.

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ment of renewable capacity are also addressed in recital 4 of the preamble to Directive 2009/28/EC, which is a copy of the wording of Directive 2001/77/EC (quoted recital 19).

Nevertheless, Directive 2009/28/EC offers also a new approach, related to the necessity of supporting “demonstration and commercialisation phase of decentralised renewable energy technologies”. The argumentation for this move is underlined in recital 6 to Directive 2009/28/EC. As expressed there, “decentralised energy production has many benefits, including the utilisation of local energy sources, increased local security of energy supply, shorter transport distances and reduced energy transmission losses; [s]uch decentralisation also fosters community development and cohesion by providing income sources and creating jobs locally”.

On the one hand, the provisions of Directive 2009/28/EC in aspects concerning local energy structures and energy communities are rather of a soft character. For instance, according to recital 23 of the preamble to Directive 2009/28/EC “Member States may encourage local and regional authorities to set targets in excess of national targets and to involve local and regional authorities in drawing up national renewable energy action plans and in raising awareness of the benefits of energy from renewable sources”. Involving local and regional authorities that are important actors in developing renewable generation is elaborating renewable energy action plans is just a possibility, not a legal obligation. Also, the provisions of Article 4 of the Directive do not change it, as only the duties of Member States are regulated there (so a top-down approach).<sup>29</sup> The same concerns the “strategic cooperation” mentioned in recital 34 of Directive 2009/28/EC. “To obtain an energy model that supports energy from renewable sources there is a need to encourage strategic cooperation between Member States, involving, as appropriate, regions and local authorities”. Here also, a voluntary model left to the Member States’ decisions, is applied.<sup>30</sup>

On the other hand, Directive 2009/28/EC regulates the administrative procedures related to renewable generation in a more elaborated manner.<sup>31</sup> Thus, it is both, a strengthening of the already known approach, expressed in the previous Directive, and an answer to the problem of the lack of transparency and coordination mechanism related to administrative procedures. In this context “the specific structure of the renewable energy sector” should be considered by the authorities at all levels (national, regional, and local), in different administrative procedures related to renewable energy.<sup>32</sup> This also applies to permissions to construct and operate renewable installations as well as actions regarding the transmission and distribution of infrastructures constructed and operated for the needs of the renewables.<sup>33</sup> Moreover, these procedures should have a deadline.<sup>34</sup> Additionally, Directive 2009/28/EC proposes a pro-renewable

<sup>29</sup> According to Article 4, “[e]ach Member State shall adopt a national renewable energy action plan. The national renewable energy action plans shall set out Member States’ national targets for the share of energy from renewable sources consumed in transport, electricity and heating and cooling in 2020, taking into account the effects of other policy measures relating to energy efficiency on final consumption of energy, and adequate measures to be taken to achieve those national overall targets, including cooperation between local, regional and national authorities, planned statistical transfers or joint projects, national policies to develop existing biomass resources and mobilise new biomass resources for different uses, and the measures to be taken to fulfil the requirements of articles 13 to 19”. Seen in this light, these are the Member States that have to elaborate on their action plans, which, at the national level may impose their vision of development of renewable generation. Naturally, the relation between national-regional-local authorities is regulated by the national law, however at the European level a direct involvement of regional and local authorities could be helpful to boost the development of dispersed energy sources. To some extent, Article 13 (3) of Directive 2009/28/EC addresses this issue, although it keeps the soft of its disposition (i.e. Member States “encourage” and “recommend”).

<sup>30</sup> The scope of the cooperation is outlined in recital 35 of the preamble to Directive. As stated there, “[w]hilst having due regard to the provisions of this Directive, Member States should be encouraged to pursue all appropriate forms of cooperation in relation to the objectives set out in this Directive. Such cooperation can take place at all levels, bilaterally or multilaterally. Apart from the mechanisms with effect on target calculation and target compliance, which are exclusively provided for in this Directive, namely statistical transfers between Member States, joint projects and joint support schemes, cooperation can also take the form of, for example, exchanges of information and best practices, as provided for, in particular, in the transparency platform established by this Directive, and other voluntary coordination between all types of support schemes”.

<sup>31</sup> See Tom Howes, *The EU’s New Renewable Energy Directive (2009/28/EC)*, in Sebastian Oberthür, Marc Pallemmaerts & Claire Roche Kelly (eds.), *The New Climate Policies of the European Union: Internal Legislation and Climate Diplomacy*, 136–137 (Brussels University Press 2010).

<sup>32</sup> As listed in recital 41 to the preamble to Directive “electricity, heating and cooling or transport fuels from renewable energy sources”.

<sup>33</sup> Under Article 13(1) of Directive 2009/28/EC. Member States shall ensure that any national rules concerning the authorisation, certification and licensing procedures that are applied to plants and associated transmission and distribution network infrastructures for the production of electricity, heating or cooling from renewable energy sources, and to the process of transformation of biomass into biofuels or other energy products, are proportionate and necessary.

<sup>34</sup> According to Article 13 (1)(a), “Member States shall, in particular, take the appropriate steps to ensure that subject to differences between Member States in their administrative structures and organisation, the respective responsibilities of national, regional and local administrative bodies for authorisation, certification and licensing procedures including spatial planning are clearly coordinated and

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approach regarding planning rules and guidelines, although in a soft way.<sup>35</sup>

Finally, in the Directive 2009/28/EC the issue of costs for connecting the renewable energy sources is covered. As provided in recital 62 to the preamble of Directive “[t]he costs of connecting new producers of electricity and gas from renewable energy sources to the electricity and gas grids should be objective, transparent and non-discriminatory and due account should be taken of the benefit that embedded producers of electricity from renewable energy sources and local producers of gas from renewable sources bring to the electricity and gas grids”. This approach finds its confirmation in the Article 16 (3) which requires the Member States to impose an obligation to establish and publish rules on costs of grid connection of renewable capacity on system operators (transmission and distribution).<sup>36</sup>

As one may observe, Directive 2009/28/EC fills in some gaps in the area of regulation, which were addressed only briefly in the previous legislation. Directive 2009/28/EC is more accurate and specific in many points. Nevertheless, in some of the fields it has rather soft character, offers solutions that can be implemented at the national level without a universal European incentive. The issue of providing “suitable information, awareness-raising, guidance or training programmes in order to inform citizens of the benefits and practicalities of developing and using energy from renewable sources” is a good example of this attitude. Article 14 (6) of Directive 2009/28/EC gives such directions to Member States, local and regional authorities; however nothing really happens if such approach is implemented poorly or not at all.<sup>37</sup>

To answer the question about special possibilities for establishing energy structures of a civic character, such as cooperatives, it should be frankly admitted that this issue was not directly regulated even in 2009. Even though the word “cooperatives” in the Directive – which may be used in the context of facilitating administrative procedures – this does not change the general perception of the character of Directive 2009/28/EC.<sup>38</sup> To conclude however, one must also honestly admit that the regulatory framework of Directive 2009/28/EC has strengthened the position of renewable energy sources on the European market. In this sense, with the helpful interpretation of the provisions of the Directive, it has been possible to refer to the European regulations in the process of creation and operation of energy structures at the local level. Seen in this light, the local energy structure, like energy communities and energy cooperatives – if they are of a renewable character – may, when necessary, find support in the provisions of Directive 2009/28/EC, e.g. in terms of connection to the grid or reducing administrative burdens.

### IV. Energy Communities Under the Rules of the Electricity Directives

The European law that could have influenced the energy structures, such as energy communities/cooperatives, does not refer only to renewable energy. Apart from renewable energy pillar of the energy policy of the European Union, one may find the comprehensive regulatory solutions dedicated to the whole internal energy market, which renewable energy is a part of. These are the directives concerning the common rules for the internal market in electricity and gas, included in the framework of the European energy (liberalisation) packages.<sup>39</sup> Let us analyse how they could affect the situation of energy communities.

The first of the three Electricity Directives, i.e. Directive 96/92/EC<sup>40</sup> contained two groups of pro-

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defined, with transparent timetables for determining planning and building applications”.

<sup>35</sup> As previously mentioned, according to Article 13 (3) of Directive 2009/28/EC, Member States should “recommend” “all actors, in particular local and regional administrative bodies to ensure equipment and systems are installed for the use of electricity, heating and cooling from renewable energy sources and for district heating and cooling when planning, designing, building and renovating industrial or residential areas” as well as should “encourage” “local and regional administrative bodies to include heating and cooling from renewable energy sources in the planning of city infrastructure, where appropriate”.

<sup>36</sup> “Those rules shall be based on objective, transparent and non-discriminatory criteria taking particular account of all the costs and benefits associated with the connection of those producers to the grid and of the particular circumstances of producers located in peripheral regions and in regions of low population density. Those rules may provide for different types of connection.”

<sup>37</sup> These are the Member States that decide how the process of providing information and building awareness goes on. Moreover, the Directive neither provides any detailed criteria for these activities nor specifies what the “suitable information” is.

<sup>38</sup> The “cooperatives” mentioned here relate to the verification of the compliance with the sustainability criteria for biofuels and bioliquids regulated in Article 18. One may link these provisions with the general context of Article 13, as according to Article 18 the Commission, when establishing the list of appropriate and relevant information concerning sustainability criteria for biofuels and bioliquids, shall take into account “that the provision of that information does not represent an excessive administrative burden for operators in general or for smallholder farmers, producer organisations and cooperatives in particular”.

<sup>39</sup> Maciej M. Sokolowski, *Regulation in the European Electricity Sector*, 36–39 (Routledge 2016).

<sup>40</sup> Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity, OJ L 27, 30.01.1997, 20–29.

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visions that could have been used with respect to the civic energy structures. These were pro-renewable and pro-market approaches. The pro-renewable approach was based on the possibility to “give priority to generating installations using renewable energy sources or waste or producing combined heat and power”.<sup>41</sup> In regard to the pro-market approach, one should mention the rules concerning auto-producers and their access to the grid. Defined in Article 3 of Directive 96/92/EC as “a natural or legal person generating electricity essentially for his own use”, auto-producers together with independent producers<sup>42</sup> were to be embraced by measures giving them a possibility to negotiate access to the system.<sup>43</sup> In those days cooperatives of a renewable character, or those producing electricity for their own usage, could have used those measures for the needs of connection.

At the beginning of the 21st century, there came a new wave of the European regulatory tools. In 2003, Directive 2003/54/EC, concerning common rules for the internal market in electricity, was passed.<sup>44</sup> Being a part of the Second Energy Package, Directive 2003/54/EC repealed the First Electricity Directive (Directive 96/92/EC), establishing a much more regulated energy law system than its predecessor. Did it also cover the local energy structures such as energy communities/ cooperatives? Here, again, the answer is: rather not; however, with respect to the already discussed legislation, one may also find a place for the pro-civic approach. This concerns mainly a pro-competition approach, expressed in the Second Electricity Directive, which enabled the operation of small market players and not just large, classic energy companies.

Firstly, Directive 2003/54/EC addressed “access to the network, tariffication issues and different degrees of market opening between Member States” as the main problems in reaching “a fully operational and competitive internal market”.<sup>45</sup> In order to complete the internal energy market, it was necessary to ensure a non-discriminatory, transparent and fairly priced network access.<sup>46</sup> Local energy structures like cooperatives could have used this approach when having grid disputes with operators. Here, the technical rules, elaborated under Article 5 of Directive, were also helpful, as they were to cover “the minimum technical design and operational requirements for the connection to the system of generating installations, distribution systems, directly connected consumers’ equipment, interconnector circuits and direct lines”, based objective and non-discriminatory criteria.

Secondly, less excessive rules on administrative procedures were confirmed. It was correlated with the exemptions from the legal distribution unbundling requirements offered in the Article 15(2)(d) to “integrated electricity undertakings serving less than 100000 connected customers, or serving small isolated systems”, “[t]o avoid imposing a disproportionate financial and administrative burden on small distribu-

tion companies”, as stated in recital 11 to the Directive. The local energy structures meeting these conditions could benefit from this exception.

Thirdly, an important element of this approach, and one guaranteeing the implementation of obligations imposed on entities on the energy market, was the energy regulator which had to be established in each Member State.<sup>47</sup> Under Article 23 of Directive 2003/53/EC, the energy regulator, being “wholly independent from the interests of the electricity industry” was to “at least be responsible for ensuring non-discrimination, effective competition and the

<sup>41</sup> This was expressed in recital 28 of the preamble to Directive (“[w]hereas, for reasons of environmental protection, priority may be given to the production of electricity from renewable sources”), as well as confirmed in Article 8(3) (“[a] Member State may require the system operator, when dispatching generating installations, to give priority to generating installations using renewable energy sources or waste or producing combined heat and power”), and Article 11(3), which contained same rules as in Article 8(3), but for the distribution system operator.

<sup>42</sup> According to Article 3(4) “independent producer” shall mean: (a) a producer who does not carry out electricity transmission or distribution functions in the territory covered by the system where he is established; (b) in Member States in which vertically integrated undertakings do not exist and where a tendering procedure is used, a producer corresponding to the definition of point (a), who may not be exclusively subject to the economic precedence of the interconnected system”.

<sup>43</sup> In this respect, under Article 20 of Directive 96/92/EC Member States were, *inter alia*, obliged to “ensure that the parties negotiate in good faith and that none of them abuses its negotiating position by preventing the successful outcome of negotiations”. See Petri Mäntysaari, *EU Electricity Trade Law: The Legal Tools of Electricity Producers in the Internal Electricity Market*, 101–103 (Springer 2015).

<sup>44</sup> Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC, OJ L 176, 15.7.2003, 37–56.

<sup>45</sup> See recital 5 of the preamble to Directive.

<sup>46</sup> This was expressed in recital 6 (“[f]or competition to function, network access must be non-discriminatory, transparent and fairly priced), recital 7 ([i]n order to complete the internal electricity market, non-discriminatory access to the network of the transmission or the distribution system operator is of paramount importance. A transmission or distribution system operator may comprise one or more undertakings), and recital 13 (“[f]urther measures should be taken in order to ensure transparent and non discriminatory tariffs for access to networks. Those tariffs should be applicable to all system users on a non discriminatory basis”) of the preamble to Directive 2003/54/EC.

<sup>47</sup> As expressed in recital 15 of the preamble to Directive 2003/54/EC “[t]he existence of effective regulation, carried out by one or more national regulatory authorities, is an important factor in guaranteeing non-discriminatory access to the network”.

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efficient functioning of the market”.<sup>48</sup> As regulators were to be responsible for monitoring such issues as, among others, “the terms, conditions and tariffs for connecting new producers of electricity . . . taking full account of the costs and benefits of the various renewable energy sources technologies, distributed generation and combined heat and power” as well as “the level of transparency and competition”. This constituted a possibility for the energy cooperatives to refer to the regulator when problems with the connection to the grid occurred. This particularly concerned newly established cooperatives of a renewable character, being distributed generators *per se*.

Finally, Directive 2003/54/EC was designed to open the internal energy market. As underlined in its preamble:

(4) The freedoms which the Treaty guarantees European citizens – free movement of goods, freedom to provide services and freedom of establishment – are only possible in a fully open market, which enables all consumers freely to choose their suppliers and all suppliers freely to deliver to their customers.

This liberalising assumption was reinforced by the subsequent provisions of the Directive. It was Article 21, which enforced the market opening in a binding manner. In practice this enabled the customers to purchase electricity from the supplier of their choice, at first partially, divided into groups, with two cut-off dates: July 1st, 2004 and July 1st, 2007. These were selected customers, who qualified as eligible under the criteria published on the basis of Directive 98/92/EC<sup>49</sup> (could choose suppliers freely before July 1st, 2004), all non-household customers (starting from July 1st, 2004, at the latest), and lastly, all customers to begin with July 1st, 2007. By bringing the competition to the internal energy market in the EU,<sup>50</sup> and thus providing the opportunity to draw customers out of the arms of the incumbent suppliers, there appeared a field for transferring customers to the energy structures, such as cooperatives.

The analysed regulatory framework of the Second Electricity Directive, still has not noticed the energy structures of a civic character. However, it boosted the competitive processes in the internal energy market, creating a place for the development of actors other than the traditional energy entities. The next phase of the energy market reform in the European Union began with the adoption of the Third Energy Package, with the Third Electricity Directive as its part.<sup>51</sup> Here, let us pose another question: does the current Directive 2009/72/EC recognise the issue of civic energy structures such as energy communities/cooperatives?<sup>52</sup>

As in the previously discussed cases, the Directive does not regulate the issue of energy cooperatives directly. Also, as in the previous cases, one may find the examples of indirect approach within the argumentation in favour of the energy structures of a civic

character. Among them, one can quote a strong belief in the power of the internal market in electricity which, if well-functioning, “should provide producers with the appropriate incentives for investing in new power generation, including in electricity from renewable energy sources, paying special attention to the most isolated countries and regions in the Community’s energy market”.<sup>53</sup> Such an attitude matches the assumptions of the cooperative movement, based on the investments in the new capacity of a renewable character, often placed in remote regions of the European Union. Nevertheless, because Directive 2009/72/EC was accompanied by the previously discussed Renewable Energy Directive 2009/28/EC,<sup>54</sup> some of the provisions enhancing the position of the energy cooperatives are included in the latter legislation. Despite this, a catalogue of provisions that may support the energy cooperatives provided by Directive 2009/72/EC is quite big.

<sup>48</sup> See Sokolowski, *supra* 39, 129–132.

<sup>49</sup> Commission Decision 1999/791/EC provides the following explanation “[h]owever, the intention is to introduce third party access based on published tariffs. The group of eligible customers will be defined as the largest customers required to meet the market opening in any year (see the minimum requirements for the market opening defined in Article 19(1) and (2) of Directive 96/92/EC)”, see Commission Decision 1999/791/EC of 8 July 1999 concerning the application of the United Kingdom of Great Britain and Northern Ireland for a transitional regime under Article 24 of Directive 96/92/EC of the European Parliament and of the Council concerning common rules for the internal market in electricity, OJ L 319, 11.12.1999, 1–5.

<sup>50</sup> See Hannes Weigt, *A Review of Liberalization and Modeling of Electricity*, Electricity Markets Working Papers WP-EM-34, 2, 8–9, <http://dx.doi.org/10.2139/ssrn.1483228> (accessed 6 Feb. 2018).

<sup>51</sup> The reasons for it laid out the shortcomings in the process of development of real competitive energy markets that were far from complete. “In practice, far too many of the EU’s citizens and businesses lack a real choice of supplier. Market fragmentation along national borders, a high degree of vertical integration and high market concentration are at the root of the lack of a truly internal market” as recalled in Proposal for a Directive of the European Parliament and of the Council amending Directive 2003/54/EC concerning common rules for the internal market in electricity, COM (2007) 528 final, Brussels, 19.9.2007.

<sup>52</sup> Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, OJ L 211, 14.8.2009, 55–93.

<sup>53</sup> Recital 6 of the preamble to Directive 2009/72/EC.

<sup>54</sup> Moreover, a close relationship between these two legal acts may be observed. This concerns, for example, the priority given to renewable installations. According to Article 35 (4) “[a] Member State may require the distribution system operator, when dispatching generating installations, to give priority to generating installations using renewable energy sources or waste or producing combined heat and power”.

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Firstly, this relates to the security of energy supply (“an essential element of public security and is therefore inherently connected to the efficient functioning of the internal market in electricity and the integration of the isolated electricity markets of Member States”<sup>55</sup>). The energy communities/cooperatives, especially those of a local character, strengthen in bottom-up perspective, related to the concept of dispersed energy sources. It is correlated with these provisions of the Directive that refer to introducing smart grids “which should be built in a way that encourages decentralised generation and energy efficiency”.<sup>56</sup>

Secondly, as previously, Directive 2009/72/EC enables a less-regulated treatment of small energy systems. “To avoid imposing a disproportionate financial and administrative burden on small distribution system operators, Member States should be able, where necessary, to exempt the undertakings concerned from the legal distribution unbundling requirements”, as provided in recital 29 of the preamble to the Directive. Moreover, it established a possibility to reduce administrative burdens for distribution system operators. However, the energy communities/cooperatives are not mentioned among “[i]ndustrial, commercial or shared services sites such as train station buildings, airports, hospitals, large camping sites with integrated facilities or chemical industry sites” listed in recital 30 of Directive 2009/72/EC. However, due to “the specialised nature of their operations” they could be qualified as “closed distribution systems” using Article 28 of Directive.<sup>57</sup> Such interpretation derives from “the particular nature of the relationship between the distribution system operator and the users of the system” (as mentioned in recital 30), which also occurs in case of relationships inside an energy cooperative.

Thirdly, in the same way as its predecessors, Directive 2009/72/EC is based on the principle of easier access to the energy market and the grid. It concerns authorisation procedures that “should not lead to an administrative burden disproportionate to the size and potential impact of electricity producers”, as “[u]nduly lengthy authorisation procedures may constitute a barrier to access for new market entrants”,<sup>58</sup> as well as the connection to the grid, where “[f]urther measures should be taken in order to ensure transparent and non-discriminatory tariffs for access to networks”.<sup>59</sup> Seen in this light, Member States are obliged to adopt objective, transparent and non-discriminatory authorisation procedures for the new generating capacity, taking into account, *inter alia*, the contribution to the EU climate and energy policy.<sup>60</sup> Energy communities/cooperatives, as producers of renewable energy, find there the argumentation for easier access to the market and grid. The same applies to specific authorisation procedures that may be granted to “small decentralised and/or distributed generation”.

Finally, Directive 2009/72/EC strengthens the posi-

tion of energy regulators.<sup>61</sup> As well as providing a common approach to their role in the energy markets of member countries they have been given a clear list of their basic powers and duties. It included granting them entitlements to issue binding decisions and penalties on electricity undertakings. Apart from that, as “[e]nergy regulators should also be granted the power to decide ... on appropriate measures ensuring customer benefits through the promotion of effective competition necessary for the proper functioning of the internal market in electricity”.<sup>62</sup> It is linked to a general pro-competition approach expressed in the Third Electricity Directive, where supporting consumers and enabling easy access for different suppliers together with new electricity generators are the core of the Directive. Seen in this light, “[p]romoting fair competition ... should be of the utmost importance for Member States in order to allow consumers to take full advantage of the opportunities of a liberalised internal market in electricity”.<sup>63</sup>

<sup>55</sup> Recital 25 of the preamble to Directive 2009/72/EC.

<sup>56</sup> Recital 27 of the preamble to Directive 2009/72/EC. In addition, as provided in Article 3(11) “In order to promote energy efficiency, Member States or, where a Member State has so provided, the regulatory authority shall strongly recommend that electricity undertakings optimise the use of electricity, for example by providing energy management services, developing innovative pricing formulas, or introducing intelligent metering systems or smart grids, where appropriate”.

<sup>57</sup> As stated in Article 28, “Member States may provide for national regulatory authorities or other competent authorities to classify a system which distributes electricity within a geographically confined industrial, commercial or shared services site and does not, without prejudice to paragraph 4, supply household customers, as a closed distribution system if: (a) for specific technical or safety reasons, the operations or the production process of the users of that system are integrated; or (b) that system distributes electricity primarily to the owner or operator of the system or their related undertakings.” In terms of energy cooperatives, the feature of supplying household customers may be a problem. Nevertheless the paragraph 4 of Article 4 enables qualifying a system as a closed distribution also in case of “[i]ncidental use by a small number of households with employment or similar associations with the owner of the distribution system and located within the area served by a closed distribution system”. Here an open interpretation of “similar associations” to employment as coownership of a cooperative would be necessary.

<sup>58</sup> Recital 30 of the preamble to Directive 2009/72/EC.

<sup>59</sup> Recital 31 of the preamble to Directive 2009/72/EC.

<sup>60</sup> According to Article 7(2) of Directive 2009/72/EC, Member States, in determining appropriate criteria, shall take into account, among others, “(f) energy efficiency”, “(g) the nature of the primary sources”, or “(k) the contribution of generating capacity to reducing emissions”.

<sup>61</sup> See Sokolowski, *supra* 39, 154–155, 162–165.

<sup>62</sup> Recital 37 of the preamble to Directive 2009/72/EC.

<sup>63</sup> Recital 57 of the preamble to Directive 2009/72/EC.

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As in the case of previous European legislation, also under the Third Electricity Directive, it is possible to elaborate on the argumentation that could be used by the civic energy structures in finding their place in the energy sector of the Member States. Due to the more comprehensive approach associated with the strengthening competition, it seems to be even easier. By providing solutions for promoting renewable capacity, enhancing local energy security, accelerating access to the grid, reducing administrative burdens, and reinforcing the position of energy regulators Directive 2009/72/EC creates, at the European level, an environment in which the energy communities/cooperatives could occur.

However, the current European legislation does not address the civic energy structures directly. Energy communities/cooperatives develop only in those Member States which enable this development. In some Member States this model is widespread,<sup>64</sup> whereas in others it is limited. Its absence in national law makes it necessary to resort to varied interpretation or to using the European law. Sometimes this causes the need to apply certain legal structures of a general nature or to seek solutions in civil or general cooperative law (which addresses agricultural or production cooperatives). This, however, can cause difficulties related to such issues as permits, the connection to the grid or taxes, etc. In such situations the analysed argumentation could be useful.

### V. Proposal for the Fourth Electricity Directive and the Closing Remarks

The previous, indirect approach to the issue of civic energy statutes changed with the adoption of the proposal for a new Directive on common rules for the internal market in electricity (recast). As mentioned at the beginning of this paper, in November 2016 the European Commission presented the first version of the new legislation. Driven by the pro-consumer philosophy, the new proposal provides a separate place on the internal electricity market for energy communities/cooperatives. As the legislative process has not been finished, the provisions concerning these energy structures evolve. Nevertheless, this does not change the fact that the cooperation between energy users will be addressed at the European level.

In this context, in December 2017 the initial proposal of the European Commission was revised.<sup>65</sup> Even though the phrase “energy cooperatives” was deleted from the drafted legislation, the concept of “community energy” addressed the energy structures of a civic character in a broad way. In the currently discussed proposal it is defined as:

a legal entity which is based on voluntary and open participation, effectively controlled by shareholders or members who are natural persons, local autho-

rities, including municipalities, or small enterprises and microenterprises. The primary purpose of an energy community is to provide environmental, economic or social community benefits for its members or the local areas where it operates rather than financial profits. An energy community can be engaged in electricity generation, distribution and supply, consumption, aggregation, storage or energy efficiency services, generation of renewable electricity or provide other energy services to its shareholders or members.

Apart from the definition, which emphasises both the civic and local character of energy communities the proposal<sup>66</sup> of the new Directive also introduces a joint approach to energy communities. The main rules are set in Article 16. They provide open and voluntary participation in the energy communities with a freedom to leave them without fees. Under the drafted Article 16 household customers or active customers keep their status, combining it with participation in the energy communities.<sup>67</sup> The new approach imposes duties on the distribution system operators who “cooperate with energy communities to facilitate electricity transfers within energy communities”. It is correlated with the necessity to ensure a non-discriminatory, fair regulatory processes related to registration, licensing, grid operation or access to it by the energy communities. Finally, those energy communities may be granted a possibility to manage the distribution grid in use.<sup>68</sup> It can be combined with treating such a system as a “closed distribution system” – as established in Article 38 – although it is a matter of whether the national law allows this option. If so, a relevant national regulatory authority

<sup>64</sup> See Cooperatives Europe, “The Power of Cooperation Cooperatives Europe Key Figures 2015”, 31–31 <https://coopseurope.coop/sites/default/files/The%20power%20of%20Cooperation%20-%20Cooperatives%20Europe%20key%20statistics%202015.pdf> (accessed 5 Feb. 2018).

<sup>65</sup> Council’s provisional position, *supra* 6.

<sup>66</sup> As given in the proposed recital 30a of the preamble to Directive “decision-making powers within an 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. Energy communities, as defined in the Directive, are deemed a category of citizens’ initiatives that should be subject to recognition and protection under the Union law”.

<sup>67</sup> Moreover, the energy communities themselves may be treated as active consumers, see Article 16 (2a)(d) of the draft version of the Directive. See Cecilia Katzeff & Josefin Wangel, *Social Practices, Households, and Design in the Smart Grid*, in Lorenz M. Hilty & Bernard Aebischer (eds), *ICT Innovations for Sustainability*, 353 (Springer 2015).

<sup>68</sup> In such case the “energy communities do not discriminate or harm customers remaining connected to the distribution system”, as expressed in drafted Article 16 (2b)(2).

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may exempt the operator of a closed distribution system from the operator's duties.<sup>69</sup>

In conclusion, the presented framework is still being discussed at the European level, as the legislative process has not finished. This provides a space for improvements. Some of the new Directive's provisions could be clearer and more detailed. For example, when it concerns the potential conflicts of the energy communities/cooperatives and distribution system operators. Providing the energy communities with a possibility for signing an agreement with relevant grid operators (distribution or transmission) on the operation of the energy community's grid without setting a framework for this type of contract, may result in the operators' abuse of power when contracting and executing the agreement. The financial burdens, including the costs for the imbalances which the energy communities may cause as well as the network charges are also a matter for discussion.<sup>70</sup> Firstly, smaller energy communities could be exempted from the costs for the imbalances.<sup>71</sup> Secondly, the exemption could also cover the network charges, or at least this issue could be regulated in more detail: network charges are currently described as "appropriate", "cost reflective", and "non-discriminatory".

Nevertheless, even without such changes, the currently proposed approach, where energy communities are regulated at the European level, should be evaluated positively. As one may observe, the way to the current situation was long, and civic energy structures had to wait for their direct recognition in the EU law. Howbeit, this does not mean that energy communities appeared in the European legislation as completely independent legal institutions. On the contrary, the

analysis carried out in this study indicates that with a proper interpretation of the previous legislation (as well as the current one) one could not only find the rationale for establishing energy structures, mainly of a local and renewable character, but also use the European legislation for the needs of any possible disputes under national law. In this sense, the energy communities derive from *acquis communautaire*,<sup>72</sup> being inscribed in the essence and nature of the reforms of the European common energy market.

<sup>69</sup> According to Article 38(2)(a)-(b) this refers to "(a) the requirement under Article 31(5) to procure the energy it uses to cover energy losses and the non-frequency ancillary services in its system according to transparent, non-discriminatory and market based procedures; (b) the requirement under Article 6 (1) that tariffs, or the methodologies underlying their calculation, are approved prior to their entry into force in accordance with Article 59 (1)".

<sup>70</sup> See Craig A. Hart, *Climate Change and the Private Sector: Scaling Up Private Sector Response to Climate Change*, 37–38 (Routledge 2013).

<sup>71</sup> Under Article 4(2)(b) of the Proposal for a Regulation of the European Parliament and of the Council on the internal market for electricity (recast) the derogations are given to "power generating facility, using renewable energy sources or high-efficiency cogeneration with a total installed electricity capacity of less than 250 kW". The current version of the Proposal (15879/17, Brussels, 20 December 2017) decreased it from 500 kW to 250 kW.

<sup>72</sup> Peter D. Cameron, *Competition in Energy Markets: Law and Regulation in the European Union*, 105–08 (2nd edn, Oxford University Press).