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Hoops, Björn

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# EU Directives on the internal governance of energy communities and their exclusionary effects

Björn Hoops  \*

## ABSTRACT

If already existing energy cooperatives and other citizen-led initiatives are to benefit from energy sharing and other privileges under the EU Internal Electricity Market and Renewable Energy Directives, their internal governance will have to adhere to the requirements set by these Directives. This contribution combines legal-doctrinal and empirical research on German energy communities to determine the extent to which different interpretations of the Directives respect established governance structures. It goes on to evaluate which interpretation creates the least disruptive incentives for communities to adapt their internal governance to the Directives. The contribution argues that the Directives should tolerate that energy communities pursue financial goals in addition to economic, environmental, or social benefits. It finds that the exclusion of energy companies, large enterprises, and non-local authorities from membership under the Renewable Energy Directive deters a desirable skill transfer. An exiting member should not be entitled to an immediate reimbursement, to preserve the financial viability of the community. The interpretation of autonomy and effective control should respect the indirect democracy in most communities with few active members leading the way and taking the most important decisions. Finally, the activities and size of the community should inform the interpretation of the proximity requirement.

## INTRODUCTION

To decarbonize our economies and societies, we need an enormous amount of renewable energy. Communities of citizens that together produce renewable energy can facilitate and substantially contribute to this energy transition. Through the opportunity for citizens to participate in decentralized and small-scale energy projects,<sup>1</sup> such communities make additional private capital available and increase the local acceptance of renewable energy projects, such as solar roofs and windfarms.<sup>2</sup> However, national energy regulation still limits the opportunities for these ‘energy

\* Björn Hoops, Chair of Private Law and Sustainability at the Faculty of Law of the University of Groningen, The Netherlands. Email: b.hoops@rug.nl. From April 2022 to March 2024, he is Marie Curie Fellow at the University of Turin. This contribution is a result of the project ‘Private Law and the Energy Commons’, which has received funding from the European Union’s Horizon 2020 research and innovation programme under the Marie Skłodowska-Curie grant agreement No. 101024836. The author is indebted to Lea Diestelmeier for her comments on an earlier version of this contribution.

<sup>1</sup> S Lenhart and others, ‘Comparing and Contrasting the Institutional Relationships, Regulatory Frameworks, and Energy System Governance of European and US Electric Cooperatives’ in AM Feldpausch-Parker and others (eds), *Routledge Handbook of Energy Democracy* (Routledge 2021) 34, 34–35.

<sup>2</sup> See, for instance, AL Vernay, C Sebi and F Arroyo, ‘Energy Community Business Models and their Impact on the Energy Transition: Lessons Learnt from France’ (2023) 175 *Energy Policy* 113473; VJ Schwanitz and others, ‘Statistical Evidence for the Contribution of Citizen-led Initiatives and Projects to the Energy Transition in Europe’ (2023) 13 *Scientific Reports* 1342; and

communities' to act on the energy market and/or make use of their electricity or other forms of energy. For instance, while energy communities may generally feed their electricity into the national grid, most jurisdictions do not allow the members to share energy, unless they have their own grid, such as a local heating network, or live in the same building or in physically connected buildings.<sup>3</sup> The European Union (EU) seeks to remove these regulatory obstacles through the recognition of 'citizen energy communities' under the Internal Electricity Market Directive (IEMD; Directive (EU) 2019/944) and 'renewable energy communities' under the Renewable Energy Directive (RED II; Directive (EU) 2018/2001).<sup>4</sup> The IEMD seeks to give citizen energy communities access to the electricity market on an equal footing with other energy suppliers and enable, amongst others, the sharing of energy among the members.<sup>5</sup> The RED II seeks to promote the generation of renewable electricity and heat through similar measures.

In practice, energy communities display diverging characteristics, in terms of, amongst others, purposes, membership, and governance structures. Through rules on different legal persons, such as cooperatives, and other forms of collaboration, national private law gives energy communities considerable space to devise their own internal organization. The IEMD and RED II primarily define 'citizen energy communities' and 'renewable energy communities' through requirements for their internal organization regarding permissible purposes, membership, and governance structures.<sup>6</sup> The EU Directives do not directly impact private-law rules, and the transposition of the Directives are unlikely to change them since they have a scope of applicability that extends far beyond the energy sector. However, by attaching certain privileges, such as the abolition of regulatory obstacles, market access and energy sharing, to the legal status of the energy community, the Directives are, in effect, an attempt at homogenizing the diversity of citizen initiatives in the energy sector.<sup>7</sup> They create an incentive for energy communities to change the organizational arrangements within their community to obtain the desired status and privileges. If the community decide not to adapt or struggle to adapt, the Directives risk excluding valuable contributors to the energy transition from their privileges or inducing painful transitions when the community decide to adapt their internal organization. In this sense, the Directives regulate private relationships in the public interest; they are 'regulatory private law'.<sup>8</sup>

The goal of this contribution is to determine where the Directives may force already existing energy communities to alter their internal organization and governance, and to evaluate interpretations of the Directives that may accommodate more energy communities. It merges qualitative and quantitative research on the internal governance of energy communities generating renewable energy with legal-doctrinal research on the regulation thereof under the IEMD and RED II. This contribution builds on relevant empirical research that has investigated, amongst others, the type of renewable energy source used by energy communities, the generation capacity of their installations, employed legal forms, number and income of members, forms of financial participation, voting rights of members, degrees of professionalization, and the involvement of local authorities, energy suppliers, and financial institutions.<sup>9</sup> This literature lacks specific information on certain aspects regulated by the Directive, particularly statutory purposes, membership requirements,

F Goedkoop and P Devine-Wright, 'Partnership or Placation? The Role of Trust and Justice in the Shared Ownership of Renewable Energy Projects' (2016) 17 *Energy Research & Social Science* 135, 135.

<sup>3</sup> J Roberts, 'Power to the People? Implications of the Clean Energy Package for the Role of Community Ownership in Europe's energy transition' (2020) 29 *RECIEL* 232, 240.

<sup>4</sup> art 16 Directive (EU) 2019/944; and art 22 Directive (EU) 2018/2001.

<sup>5</sup> Roberts (n 3) 234–35.

<sup>6</sup> art 2, no 11 Directive (EU) 2019/944; art 2, no 16 Directive (EU) 2018/2001.

<sup>7</sup> S Chaudhry and others, 'Renewable Energy Communities as Modes of Collective Prosumership: A Multi-Disciplinary Assessment Part II—Case Study' (2022) 15 *Energies* 8936. Formally, the Directives do not preclude the existence of other citizen initiatives in the energy sector: Recital 44 Directive (EU) 2019/944.

<sup>8</sup> See, for instance, HW Micklitz, 'European Regulatory and Private Law—between Neoclassical Elegance and Postmodern Pastiche' in M Kuhli and M Schmidt (eds), *Vielfalt im Recht* (Duncker & Humblot 2021) 75–99.

<sup>9</sup> Refer to, amongst others, MB Punt and others, 'Institutional Relatedness and the Emergence of Renewable Energy Cooperatives in German Districts' (2022) 56 *Regional Studies* 548; A Wierling and others, 'The Contribution of Energy Communities to the Upscaling of Photovoltaics in Germany and Italy' (2021) 14 *Energies* 2258; C Candelise and G Ruggieri, 'Status and Evolution of the Community Energy Sector in Italy' (2020) 13 *Energies* 1888; S Soeiro and M Ferreira Dias, 'Energy Cooperatives in Southern European Countries: Are they Relevant for sustainability targets?' (2020) 6 *Energy Reports* 448; E Caramizaru and A Uihlein, *Energy Communities: An Overview of Energy and Social Innovation* (Publications Office of the European Union 2020); Ö Yildiz and others,

requirements for an exit from the community, decision-making powers, the composition of the membership and the management board, and the disbursement of profits. For this reason, this contribution complements the literature through interviews with representatives of energy communities, the analyses of statutes of energy communities and filled-in questionnaires concerning the aspects of the internal organization regulated by the Directives. The geographical focus of this empirical research is Germany, because it has the largest energy community sector in the EU in terms of number of initiatives and generation capacity.<sup>10</sup> There is also already a body of legal-doctrinal research on the Directives' requirements regarding the internal organization of energy communities.<sup>11</sup> This contribution is novel in that it confronts the legal interpretation of the Directives with the actual internal governance of energy communities and explores alternative interpretations that may accommodate more energy communities.

This contribution first roughly embeds the exclusionary effect of the Directives into the literature on 'regulatory private law' ('Energy communities in regulatory private law' section). Then, this contribution discusses how the Directives create undesirable incentives for energy communities to adapt their organizational arrangements or exclude energy communities that may make a valuable contribution to the energy transition ('How the directives may create undesirable incentives or exclude energy communities' section). The last section concludes this article.

## ENERGY COMMUNITIES IN REGULATORY PRIVATE LAW

EU law has regulated various private relationships, for example by safeguarding certain rights of consumers in relation to businesses and of employees in relation to employers, to ensure that the parties can transact on a level playing field and to perfect the EU internal market. At least as far as the IEMD is concerned, the intention behind the rules on energy communities appears similar. Citizen-led, small-scale energy initiatives face disadvantages, such as very high costs for complying with energy regulations per potential energy consumer, vis-à-vis traditional players in the energy market.<sup>12</sup> By guaranteeing access to the energy market on a level playing field for citizen energy communities and renewable energy communities, the Directives seek to remedy these disadvantages and perfect the energy market.<sup>13</sup>

The field of 'regulatory private law' examines the relationship between EU law regulating private relationships and national private law. In a recent article, *Cherednychenko* describes three types of interactions.<sup>14</sup> Under the first type, the 'separation' of EU law and national private law,<sup>15</sup> EU law regulates the private relationship in the public-law sphere and does not confer rights or remedies on private parties. When applying national private law, national courts do not take EU law into account. Under the second type, the 'substitution' of national private law with EU law,<sup>16</sup> EU law replaces (and harmonizes) national private law, through regulations or the transposition of Directives. Under the third type, the 'complementarity' of national private law with EU law,<sup>17</sup> EU law does not replace national private law but does influence the interpretation and application of national private law by courts, for example through standards set for certain activities in the public-law sphere.

'Renewable Energy Cooperatives as Gatekeepers or Facilitators? Recent Developments in Germany and a Multidisciplinary Research Agenda' (2015) 6 *Energy Research & Social Science* 59.

<sup>10</sup> Caramizaru and Uihlein *ibid* 5.

<sup>11</sup> See, for instance, J Roberts, 'What Are Energy Communities Under the EU's Clean Energy Package?' in FHJM Coenen and T Hoppe (eds), *Renewable Energy Communities and the Low Carbon Energy Transition in Europe* (Palgrave Macmillan 2021) 23–48; MM Sokolowski, 'Renewable and Citizen Energy Communities in the European Union: How (Not) to Regulate Community Energy in National Laws and Policies' (2020) 38 *Journal of Energy & Natural Resources Law* 289; and J Lowitzsch, 'Investing in a Renewable Future—Renewable Energy Communities, Consumer (Co-)Ownership and Energy Sharing in the Clean Energy Package' (2019) 9 *Renewable Energy Law and Policy Review* 14, 24.

<sup>12</sup> J Lowitzsch and F Hauke, 'Renewable Energy Cooperatives' in J Lowitzsch (ed), *Energy Transition, Financing Consumer Co-Ownership in Renewables* (Palgrave Macmillan 2019) 139, 150.

<sup>13</sup> Roberts (n 11) 28.

<sup>14</sup> OO Cherednychenko, 'Islands and the Ocean: Three Models of the Relationship between EU Market Regulation and National Private Law' (2021) 84 *Modern Law Review* 1294.

<sup>15</sup> *ibid* 1307ff.

<sup>16</sup> *ibid* 1315ff.

<sup>17</sup> *ibid* 1321ff.

The IEMD and RED II fit into this scheme to a great extent. There is a clear separation of the Directives and the national private law on legal persons or other forms of collaboration. The Directives do not require any changes to the rules on, for instance, cooperatives and will in all probability not affect the interpretation thereof because these rules apply to a wide variety of initiatives. However, this separation does not mean that they will not influence the use of national private law by energy communities. Certain legal persons or rules may no longer be adequate for energy communities because they would deprive the energy communities of the desired status under the Directives. In this sense, the Directives limit the practical scope for manoeuvring that would otherwise be available to energy communities under national private law.

Note that separation does not lead to a less effective implementation of EU law. The Directives will in all probability entail that energy communities will have to apply for a permit in a procedure with an *ex-ante* inquiry into whether they qualify as a citizen or renewable energy community. Private law rights and remedies are thus not needed for its implementation.

Whether the national transposition of the Directives will reduce or expand the impact of the Directives, remains to be seen. The Directives leave a lot of scope for national specification and are minimum harmonization directives,<sup>18</sup> which means that the national legislatures can impose further-reaching requirements for the status of the energy community in line with the protective goal(s) of the Directives. What is problematic in this case is that the protective goals of the Directives do not all point in the same direction. The RED II is aimed at promoting the generation of renewable energy,<sup>19</sup> which would suggest that the requirements for the status should rather be relaxed by national law or the privileges under the Directive should be extended to other energy communities. The IEMD is aimed at levelling the playing field for citizen initiatives in the energy sector, which would suggest the same.<sup>20</sup> On the other hand, both Directives also seek to prevent abuse of the privileged status of energy community by commercial players,<sup>21</sup> which would suggest that stricter requirements rather than more lenient requirements would be permissible. The scope for diverging national regimes is thus potentially very wide. A differentiated interpretation of the Directives that allows for an expansion of the protection where abuse is not likely, and permits a narrower protective scope where abuse is likely, appears to be a suitable, albeit vague, formula to solve this issue.

## HOW THE DIRECTIVES MAY CREATE UNDESIRABLE INCENTIVES OR EXCLUDE ENERGY COMMUNITIES

The argument of this contribution is that the rules on energy communities in the IEMD and RED II may create undesirable incentives for energy communities to change their internal governance and organization or exclude energy communities that should benefit from the Directives' benefits. The core of this argument is that the Directives may fail to confer benefits upon certain groups of citizens who jointly generate renewable energy even though they feature at least the spirit of citizen and/or renewable energy communities.

Methodologically, this argument has an empirical and a doctrinal component, which this section sets out first ('The methodological basis of the argument' section). The rest of this section is structured along the characteristics of energy communities as determined by the Directives. This section deals with the permissible purposes of citizen and renewable energy communities ('Purpose of the community' section), subsequently with membership restrictions ('Openness (I): the exclusion of powerful legal persons' section) and the requirements of openness ('Openness (II): no arbitrary or discriminatory entry requirements' section) and voluntariness ('Voluntary participation: right to exit' section), and it finally addresses the effective control of the community through autonomous and democratic decision making ('Effective control (I): autonomous and democratic decision-making' section) and the exclusion of powerful ('Effective control (II):

<sup>18</sup> Roberts (n 11) 42 and 45, fn 43.

<sup>19</sup> Recitals 26, 50, and 70 Directive (EU) 2018/2001.

<sup>20</sup> Recital 43 Directive (EU) 2019/944.

<sup>21</sup> Roberts (n 11) 34.

exclusion of certain enterprises' section) or distant groups from control ('Effective control (III): proximity' section). The Directives also require that citizen and renewable energy communities have legal form and pursue certain energy-related activities.<sup>22</sup> As all of the empirically examined energy communities have a legal form and generate renewable energy, these requirements fall outside the scope of this contribution.

### The methodological basis of the argument

The empirical component geographically focuses on Germany and consists of interviews, a desk review of statutes of energy cooperatives, and the responses to a questionnaire by energy communities. Interviews have been conducted with five cooperatives generating renewable energy, to explore their activities and internal governance. They are citizen-led initiatives and have, for the most part, members from a certain area, but are open to members from other areas. They have solar panels on roofs of other people and/or wind turbines on the land of other people, to feed this energy into the grid and/or sell it to the inhabitants of the buildings on which the solar panels are situated. It can hardly be called into question that at least *prima facie*, they are the type of communities that should benefit from the Directives.

A desk review has been undertaken of the statutes of 570 energy cooperatives in Germany, to gather information on their internal governance. The German Association of Cooperatives (*Deutscher Genossenschafts- und Raiffeisenverband e.V.*) reports 877 energy cooperatives,<sup>23</sup> between 70 and 75 per cent of which produce energy.<sup>24</sup> A sample of 570 statutes of energy cooperatives that produce renewable energy is therefore representative of this population. Note that while energy communities can assume other legal forms in Germany and these legal forms may give rise to other legal challenges than cooperatives, 877 energy cooperatives form the majority of the 1750 citizen-led energy initiatives in Germany and are therefore a suitable object of research. Statutes of cooperatives in Germany are generally freely available through 'handelregister.de'. The search terms 'Energie', 'Bürgerenergie', 'Bürgerenergiegenossenschaft', 'Bürgerwind', 'Bürgerwindpark', 'Energiegenossenschaft', 'Solargenossenschaft', and 'Bürgersolar' were used to find the statutes of energy cooperatives that may reasonably fall into the category of cooperatives in which citizens jointly produce renewable energy. The search has not produced the statutes of all energy cooperatives in Germany because the names of the energy cooperatives are more varied than can be covered by standard search terms. It has been checked whether Google produced any indication that the energy cooperative in question still existed and, on the cooperative's website, if applicable, whether it produced renewable energy and embodied civic engagement. Using the descriptive statistics tools and correlation analysis tools of SPSS 28, the statutes have been analysed in light of the EU Directives with respect to the following characteristics: purpose of the cooperative, membership requirements, requirements for an exit through the cancellation or transfer of shares, voting rights in the general assembly, the appointment or dismissal of the management board, decision-making powers of the different bodies, and the disbursement of profits. In addition, the cooperative's year of foundation and the statute's age were noted.

Statutes reflect the black-letter law of the cooperative, but not necessarily their application in practice. To alleviate this weakness, the last empirical component is a questionnaire. One hundred twenty-seven potential energy communities from Germany that produce renewable energy have filled in the questionnaire. Ninety-four of the respondents are cooperatives, 23 combine a cooperative with a limited partnership with a private limited liability company (*GmbH & Co KG*) and one respondent combines a cooperative with a civil law partnership (*GbR*). Nine respondents have a different legal form or combinations thereof. There are 1750 citizen initiatives in the energy sector,<sup>25</sup> 877 of which are cooperatives. As 70–75 per cent of those cooperatives produce energy,

<sup>22</sup> art 2, No 11 Directive (EU) 2019/944; and art 2, No 16 Directive (EU) 2018/2001.

<sup>23</sup> Bundesgeschäftsstelle Energiegenossenschaften <<https://www.dgrv.de/bundesgeschäftsstelle-energiegenossenschaften/#:~:text=Die%20877%20Energiegenossenschaften%20stehen%20mit,die%20breite%20Akzeptanz%20der%20Energiewende>> accessed 14 February 2024.

<sup>24</sup> Yildiz and others (n 9) 62.

<sup>25</sup> Caramizaru and Uihlein (n 9) 5.

the number of responding cooperatives (118) represents around 18 per cent of the total population of energy-producing cooperatives. The questionnaire contains questions on the characteristics of the respondents such as the source of renewable energy used, the year of foundation, the generation capacity, the number of members, legal form, and paid positions, the aspects mentioned in the paragraph on statutes, and the affiliations and residence of the members and the managers of the respondents. The descriptive statistics and correlation analysis tools of SPSS 28 served to analyse the responses.

The doctrinal component is a discussion of the legal requirements under the Directives for recognition as citizen and/or renewable energy community, based on a textual analysis of the Directives and a review of the existing legal literature. Where useful, information on the German rules on cooperatives embeds the discussion in the national private-law context. Drawing on this doctrinal analysis, this section applies the requirements to the examined energy communities, to show where the Directives may have an exclusionary effect or at least create undesirable incentives for those communities to change their internal governance. Note that for the sake of simplicity, the analysis, for the most part, deals with energy communities as a single citizen-led entity that operates renewable energy installations. In practice, citizen-led entities, such as an energy cooperative, also collaborate with private enterprises or public bodies and jointly operate the renewable energy installations with them through a larger legal entity, such as a limited partnership with a private limited-liability company. The requirements discussed in this contribution equally apply to this type of construct.

### Purpose of the community

Under the Directives, both citizen and renewable energy communities must not define their primary purpose as financial profits. Rather, their primary purpose must be to provide environmental, economic, or social community benefits for their members or for the local areas where they operate.<sup>26</sup> This rule primarily excludes commercial enterprises that aim at generating profits for their shareholders. Profits still remain permissible, but generally have to be re-invested.<sup>27</sup> This interpretation of the rule stands in contrast to proposals in the literature that the primary purpose of energy communities is or, rather, should not only be to provide economic benefits but also environmental and social benefits.<sup>28</sup>

An analysis of the statutes of 570 German energy cooperatives shows that except for 21 cooperatives, all cooperatives postulate economic, environmental, or social benefits as their goal. However, in over 60 per cent of the cases, the statute also incorporates financial goals (Table 1).

Twenty-one cooperatives with only a financial or no relevant goal at all will struggle to find recognition as citizen or renewable energy communities. They should revise their statute by including a relevant goal, provided their activities and the intentions of their members actually reflect this goal.

That said, under most statutes, financial benefits co-exist with economic, environmental, and/or social benefits. The extent to which the permissible purposes under the Directives will have an exclusionary impact on these cooperatives, will depend on this rule's interpretation and what documentation will be considered in the inquiry of whether the energy community provides environmental, economic, or social community benefits. A potential problem would be the disbursement of a dividend. All of the energy communities in which interviews have been conducted actually disburse a part of their annual net profit to the members.<sup>29</sup> Of the energy communities that filled in the questionnaire around 72 per cent disburse a dividend. As the day-to-day manager of an energy cooperative explains the internal considerations on this point:

In the general assembly there are every now and then debates about how much should be disbursed. The members of the Board of Directors and the Supervisory Board hold different

<sup>26</sup> art 2, No 11 Directive (EU) 2019/944; and art 2, No 16 Directive (EU) 2018/2001.

<sup>27</sup> Roberts (n 11) 30.

<sup>28</sup> See, for instance, R Trevisan, E Ghiani and F Pilo, 'Renewable Energy Communities in Positive Energy Districts: A Governance and Realisation Framework in Compliance with the Italian Regulation' (2023) 6 Smart Cities 563, 567.

<sup>29</sup> Full transcripts on file with author.

**Table 1.** Goals of energy cooperatives under their statutes (own design).

Goal (none, one, or more)	Included in statute	Percentage included
Lower energy prices for members and/or others	13	2.3
Local economic development and/or energy security	54	9.5
Renewable energy, emission reduction, and/or climate protection	521	91.4
Alleviating poverty, strengthening social cohesion, supporting social institutions	9	1.6
Information and education	328	57.5
Sale of energy and/or other financial motives	360	63.2
None of those purposes or only financial motives	21	3.7

opinions on disbursements. Some say that when we make a substantial profit, more money should be disbursed to the members. Others say that the members do not need it and we should spend the money on developing the cooperative further. Each time we need to revisit this delicate balance. On average, in the past few years, we disbursed around 3% of the nominal value of the shares to the members. This is not a fixed percentage, but depends on the economic situation.

The median of the initiatives that filled in the questionnaire indicated that they disbursed around 30 per cent of their net annual profit to their members.<sup>30</sup> Such disbursements should not be a reason to exclude such energy communities from the status of either citizen or renewable energy community. The Directives would otherwise exclude energy communities that cannot or do not wish to engage in energy sharing and whose business model is to generate electricity and feed it into the grid. Members of such energy communities will only receive benefits through disbursements.<sup>31</sup> The Directives may also otherwise exclude particularly larger energy communities with members from different areas, in which a return on investment plays a more prominent role than in smaller energy communities.<sup>32</sup> Another reason to tolerate such disbursements is that energy communities generally face lower returns on investment due to their smaller size and higher transaction costs.<sup>33</sup> This fact indicates that the primary motive of most members is not to make a high return on their investment.<sup>34</sup> Banning disbursements may also pose a substantial obstacle to financing larger projects. As the president of the Board of Directors of an energy cooperative elaborates:<sup>35</sup>

We can only disburse something if there is a profit. On average, we roughly disburse a dividend of 2% of the nominal value every other year. That is not what most members strive for. 95% of the members want to contribute to local projects, through their money and their membership. However, there is a number of members that want to invest. I cannot exclude them because I need them when raising large sums. The average member invests between 4,000 and 5,000 EUR, not much more. In this way, however, I will not be able to build a solar park. That would not work.

The most common primary purpose of energy communities appears to be generating energy from renewable sources. Such energy communities should fall under the definition because they provide economic benefits to the members, through lower energy prices if the energy is shared within the community, or at least environmental benefits to the local area through a reduction of

<sup>30</sup> Detailed results on file with author.

<sup>31</sup> cf L Diestelmeier, 'The Role of Energy Communities in Facilitating Sustainable Energy Democracy' in R Fleming, K Huhta and L Reins (eds), *Sustainable Energy Democracy and the Law* (Brill/Nijhoff 2021) 124, 140–141.

<sup>32</sup> T Bauwens, 'Analyzing the Determinants of the Size of Investments by Community Renewable Energy Members: Findings and Policy Implications from Flanders' (2019) 129 *Energy Policy* 841, 849ff.

<sup>33</sup> Lowitzsch and Hauke (n 12) 150.

<sup>34</sup> cf R Fernandez, 'Community Renewable Energy Projects: The Future of the Sustainable Energy Transition?' (2021) 56 *International Spectator* 87, 91; B Prasad Koirala and others, 'Trust, Awareness, and Independence: Insights from a Socio-psychological Factor Analysis of Citizen Knowledge and Participation in Community Energy Systems' (2018) 38 *Energy Research & Social Science* 33, 38.

<sup>35</sup> Full transcript on file with author.



emissions if the community feeds the energy into the grid only. In some energy communities, the profit motive may still dominate though, even within cooperatives.<sup>36</sup> The depth of the inquiry then plays a major role. If the inquiry is confined to the statute or the articles of association, this profit motive, if any, is not likely to stand alone or to dominate, as shown by the analysis of the statutes. A profit motive would thus have to surface during a deeper inquiry into the motives of the majority of members, but this does not seem workable. The inquiry will thus have to be confined to the statute or the articles of association.

### Openness (I): the exclusion of powerful legal persons

To qualify as a citizen and/or renewable energy community under the Directives, energy communities must be open.<sup>37</sup> Openness means that nobody should be excluded from joining the energy community on arbitrary or discriminatory grounds.<sup>38</sup> Only an open energy community can promote the inclusive governance and broad-based legitimacy of the energy transition.<sup>39</sup> However, far-reaching openness may conflict with the goal of promoting bottom-up initiatives in the energy sector. When powerful companies or authorities join an energy community, they may, intentionally or inadvertently, dominate the decision making in the energy community, thereby eroding its legitimacy as a citizen-led organization.<sup>40</sup> While the IEMD does not view this as a reason to ban energy companies, large- and medium-sized enterprises, and/or non-local authorities from citizen energy communities, but only from decision-making powers,<sup>41</sup> the RED II precludes energy companies, large enterprises and non-local authorities from becoming members in renewable energy communities.<sup>42</sup>

The analysis of 570 statutes of German energy cooperatives shows that there is no common practice of excluding non-local authorities, large enterprises, or energy companies. While 260 statutes (45.6 per cent) subject the admission of non-local people, enterprises, and authorities to at least the approval by one or more bodies of the cooperative, only 11 statutes (1.9 per cent) preclude the membership of companies in general. German energy cooperatives do view energy companies with more suspicion. Thirty-six statutes (6.3 per cent) exclude energy companies from membership, three (0.5 per cent) require the approval by the Board of Directors and the Supervisory Board, and 254 statutes (44.6 per cent) mandate that members that compete with the cooperative may be expelled.

The practice may deviate from the black letter of the statutes, and the bodies of an energy community may still decide to exclude certain groups from membership. The filled-in questionnaires reveal a higher but still low rate of exclusion in practice. Only 8 out of 127 respondents (6.3 per cent) exclude large enterprises from membership. Twelve respondents (9.4 per cent) exclude energy companies. It comes as no surprise that influential players actually become members of energy communities. Eleven out of 119 respondents (9.2 per cent) report major lenders of the community as members, and 14 respondents (11.8 per cent) report large enterprises as members. However, these numbers are fairly small when compared to the 85 out of 118 respondents (72 per cent) who report having medium-sized enterprises among their members.

By making the status of ‘renewable energy community’ contingent upon the exclusion of energy companies, large enterprises, and non-local authorities, the RED II creates an incentive to end or never to seek collaboration with such entities. This would prevent fruitful collaborations, like the joint venture with an energy supplier for the windfarm of one of the interviewed energy

<sup>36</sup> L Holstenkamp, ‘Community Energy in Germany: From Technology Pioneers to Professionalisation under Uncertainty’ in FHJM Coenen and T Hoppe (eds), *Renewable Energy Communities and the Low Carbon Energy Transition in Europe* (Palgrave Macmillan 2021) 119, 126.

<sup>37</sup> art 2, No 11 and art 16(1)(a) Directive (EU) 2019/944; and art 2, No 16 Directive (EU) 2018/2001.

<sup>38</sup> Roberts (n 11) 32; and Roberts (n 3) 237.

<sup>39</sup> Yildiz and others (n 9) 68.

<sup>40</sup> See, for instance, N Magnami and G Osti, ‘Does Civil Society Matter?’ (2016) 13 *Energy Research & Social Science* 148, 151; G Seyfang, JJ Park and A Smith, ‘A Thousand Flowers Blooming? An Examination of Community Energy in the UK’ (2013) 61 *Energy Policy* 977, 986; E Bomberg and N McEwen, ‘Mobilizing Community Energy’ (2012) 51 *Energy Policy* 435, 442; G Walker and others, ‘Trust and Community: Exploring the Meanings, Contexts and Dynamics of Community Renewable Energy’ (2010) 38 *Energy Policy* 2655, 2655, 2657.

<sup>41</sup> Recital 44 and art 2, No. 11 Directive (EU) 2019/944.

<sup>42</sup> art 2, No 16(b) and art 22(1) Directive (EU) 2018/2001. cf Roberts (n 11) 33–34.

cooperatives.<sup>43</sup> Moreover, as the president of the Board of Directors of another energy cooperative says in an interview, the membership of a large enterprise was terminated due to the exclusion of such enterprises from the definition of renewable energy communities:<sup>44</sup>

Director (D): ( ... ) When deciding on the admission of a member, we check, as far as possible, whether they could potentially do harm to the cooperative.

Author: Could you tell us what you mean by potential harm?

D: Specifically, large companies would currently do harm to us because we could not qualify as an energy community. We would not be able to develop solar farms anymore. That was a reason why we bid farewell to a large company that had been with us from the beginning. It was a mutual decision. They immediately agreed when I gave this reason [regarding the legal status of energy community; author]. ( ... )

As the cooperative may still qualify as a citizen energy community and participate in the electricity market with a member that is a large enterprise, the concerns of the Director do not appear completely warranted.<sup>45</sup> However, this interview does illustrate the potential of the RED II to jeopardize fruitful collaborations or to exclude unduly energy communities that cannot or do not wish to conform to this specific requirement but otherwise constitute bottom-up, democratic organizations that contribute to a decentralized energy transition.<sup>46</sup> In addition, access barriers for energy companies, large enterprises, and/or non-local authorities that play a prominent role in the life of community members may actually reduce the legitimacy of the community.<sup>47</sup>

In addition to its exclusionary effects, the discouraging of collaborations with energy companies, large enterprises and non-local authorities may inhibit an expansion of the activities of energy communities and/or the development of larger-scale projects because these groups can provide crucial knowledge and skills to energy communities,<sup>48</sup> which often rely upon volunteers to a large extent.<sup>49</sup> This finding from the literature is corroborated by a statistical analysis of the filled-in questionnaires that show a significant positive correlation between the membership of major lenders and the professionalization of the energy community through paid directors.<sup>50</sup> To benefit from this support, energy communities may want to circumvent the exclusion of energy companies, large enterprises, and non-local authorities under the RED II. Instead of making these entities formal members, energy communities could admit employees or other representatives of energy companies, large enterprises, or non-local authorities to the energy community.

### Openness (II): no arbitrary or discriminatory entry requirements

Apart from the exclusion of energy companies, large enterprises, and non-local authorities under the RED II, neither Directive imposes restrictions as for the characteristics of the members. However, openness does not entail that citizen and/or renewable energy communities have to admit anyone who wishes to join the community. They may apply non-arbitrary and non-discriminatory criteria for admission.<sup>51</sup>

<sup>43</sup> Full transcript on file with author.

<sup>44</sup> Full transcript on file with author.

<sup>45</sup> The statement of the Director cannot relate to a German transposition of the Directives because Germany has yet to transpose them.

<sup>46</sup> J Lowitzsch, 'Consumer Stock Ownership Plans (CSOPs)—The Prototype Business Model for Renewable Energy Communities' (2020) 13 *Energies* 118, 7.

<sup>47</sup> cf Yildiz and others (n 9) 68.

<sup>48</sup> E Creamer and others, 'Community Energy: Entanglements of Community, State, and Private Sector' (2018) 12 *Geography Compass* 1, 6. cf MJ Burke, 'Energy Commons and Alternatives to Enclosures of Sunshine and Wind' in AM Feldpausch-Parker and others (eds), *Routledge Handbook of Energy Democracy* (Routledge 2021) 200, 205–06.

<sup>49</sup> JL MacArthur and MD Tarhan, 'Institutionalizing Energy Democracy' in AM Feldpausch-Parker and others (eds), *Routledge Handbook of Energy Democracy* (Routledge 2021) 172, 180; and Lenhart and others (n 1) 43.

<sup>50</sup> Spearman correlation coefficient 0.253,  $p = 0.99$ .

<sup>51</sup> Roberts (n 11) 32; Roberts (n 3) 237; and Recital 71 Directive (EU) 2018/2001.

A specific example of such a criterion is the main residence or the place of the registered office of the applicant. This criterion is fairly common. Out of 570 examined statutes of German energy cooperatives, 121 statutes (21.2 per cent) generally ban non-local entities from membership. Often, the Board of Directors may still admit non-local entities in case there is a special interest of the cooperative in the membership. Another 139 statutes (24.4 per cent) subject the admission to the approval by one or more bodies of the cooperative. The filled-in questionnaires suggest that in practice, around 40 per cent (51 out of 127) of energy communities keep their membership exclusively local. Arguably, such an access barrier is justified when the activities of the energy community are confined to a certain area and the criterion for admission relates to the same area. As the Directives mean to promote local participation,<sup>52</sup> as particularly evidenced by the requirement of proximity under the RED II, the Directives do not require but do allow energy communities to exclude people from membership who have no sufficiently strong connection with their area.<sup>53</sup> In contrast, should the energy community conduct activities in a certain place, but not admit persons from that place as members, this access barrier would jeopardize local participation and a further inquiry into the justifiability would be required.

The price of a share in the energy community, which may lead to the disbursement of a dividend, and processing fees are another common access barrier. A person's socio-economic status and, therefore, their ability to pay for the share and the fees are widely recognized as an exclusionary or at least deterring factor.<sup>54</sup> The analysis of 570 statutes of German energy cooperatives shows that the median of the minimum investment in the cooperatives amounts to 500 EUR, with 93 energy cooperatives asking 1000 EUR and 43 cooperatives asking more than 1000 EUR. Also, this amount generally has to be paid up-front in its entirety. Only 33 out of 570 statutes (5.8 per cent) allow for a payment in instalments. Some energy communities acknowledge that the amount poses a problematic obstacle. For instance, the day-to-day manager of an energy cooperative that sets 1000 EUR as the minimum amount says:<sup>55</sup>

In terms of class, most members belong to the upper middle class, also because the financial hurdle to join the cooperative of 1000 EUR is relatively high. We are discussing about lowering the price of a share in the cooperative to allow for broader participation.

In energy communities with their own heat network, a high amount will be motivated by the need to connect the new member's household to the network. In other energy communities, reasons for a higher amount may be better founded investment decisions and lower administrative burdens. As the president of the Board of Directors of an energy cooperative explains:<sup>56</sup>

At the beginning a share cost 1000 EUR. That is relatively high. Why did we set such a high price? ( ... ) I thought that the person who invests should consider that giving this money to us is not an easy decision to make, but a serious investment. It may get lost. Fifty EUR was too little to start this process. The second reason was that I needed fewer members to implement the project. When there are a lot of members, I need to rent a huge hall. With a price of 1000 EUR I have one member, while I have 20 if the price is set at 50 EUR. ( ... ) Masses do not secure the funding for the projects. However, this view has changed. We have seen our target groups change as we started to sell electricity and offer car sharing services. Families and single persons want to join us. To them, 1000 EUR is just too much. For this reason, we set the price of a share at 250 EUR. ( ... )

It is questionable whether such high prices of a share comply with the Directives. While both Directives aim to alleviate energy poverty and acknowledge the role of energy communities in this

<sup>52</sup> Recital 70, Directive (EU) 2018/2001; and Recitals 43 and 44, Directive (EU) 2019/944.

<sup>53</sup> Sokolowski (n 11) 298.

<sup>54</sup> See, for instance, Diestelmeier (n 31) 130; and MacArthur and Tarhan (n 49) 181.

<sup>55</sup> Full transcript on file with author.

<sup>56</sup> Full transcript on file with author.

endeavour,<sup>57</sup> the RED II even compels Member States to ensure ‘[ ... ] the participation in the renewable energy communities is accessible to all consumers, including those in low-income or vulnerable households; [ ... ]’.<sup>58</sup> This provision bans exorbitant financial barriers in energy communities that seek the status of renewable energy community.<sup>59</sup> However, it is difficult to predict what amounts the Court of Justice or the Member States will regard as accessible. While waiting for clarification, it may be worthwhile for legislatures and energy communities to consider legal and funding arrangements that do not require up-front investments from members, but instead feature shares that are paid up by the profits generated by projects financed through loans instead of membership contributions.<sup>60</sup>

### Voluntary participation: right to exit

Both Directives require that participation in the energy communities be voluntary.<sup>61</sup> Primarily, this means that while incentives to join, such as tax deductions, are permissible, nobody can be forced to become a member.<sup>62</sup> While both Directives expressly safeguard the right to switch the supplier of energy,<sup>63</sup> they do not overtly address the right to exit as a member.<sup>64</sup> However, voluntary participation always implies the right to non-participation, which means that energy communities must give their members an option to leave.<sup>65</sup>

In practice, the exit from an energy community can take different forms. For instance, Section 76(1) of the German Cooperative Act (*Genossenschaftsgesetz*) permits the transfer of shares in the cooperative. Section 76(2) allows for restrictions on this right. Under the 570 examined statutes, 569 statutes subject the exit through a transfer to the approval by the Board of Directors. One statute bans transfers altogether. In any case, a member may always exit by cancelling their shares. To safeguard the liquidity of the cooperative, which has to pay back the nominal value of the shares, the cancellation never has an immediate effect under German law. Section 68(2) of the Cooperative Act sets a minimum notice period of three months, which can be extended to 60 months. In practice, the median is 24 months, with 112 statutes prescribing the maximum of 60 months (Table 2).

The right to cancel shares appears to be decisive to the right to exit under the Directives, because the right to cancel is the last resort where there is no person willing to buy the shares. In order not to exclude too many energy communities, the right to exit can at least not have a mandatory immediate effect. Given that the energy community will have to pay back the nominal value of the shares to the exiting member, the notice period is generally a reasonable restriction on the right to exit. However, a period of more than a year *prima facie* appears to be excessive and should prompt a further inquiry into its justifiability. Longer notice periods may be particularly

**Table 2.** Notice periods for cancellations under examined statutes of German energy cooperatives (own design).

Months	Number	Percentage
≤ 12	157	27.5
13–24	254	44.6
> 24	159	27.9

<sup>57</sup> Recitals 43 and 59–60 Directive (EU) 2019/944; Recital 67 Directive (EU) 2018/2001.

<sup>58</sup> art 22(4)(f) Directive (EU) 2018/2001. cf L Diestelmeier, ‘Citizen Energy Communities as a Vehicle for a Just Energy Transition in the EU—Challenges for the Transposition’ (2021) 1 Oil, Gas & Energy Law Intelligence 1, 10.

<sup>59</sup> Roberts (n 11) 32; and Sokolowski (n 11) 298–99.

<sup>60</sup> Lowitzsch (n 46) 8ff.

<sup>61</sup> art 2, No. 11 and art 16(1)(a) Directive (EU) 2019/944; and art 2, No 16 Directive (EU) 2018/2001.

<sup>62</sup> Sokolowski (n 11) 298.

<sup>63</sup> Recital 45 and art 16(1)(b) Directive (EU) 2019/944; and Recital 72 Directive (EU) 2018/2001. This does not include the right to be connected to another heating or electricity network: Roberts (n 11) 32–33.

<sup>64</sup> Roberts (n 3) 237.

<sup>65</sup> Sokolowski (n 11) 299; I Hoffmann, ‘Erneuerbare- und Bürgerenergiegemeinschaften im EU-Winterpaket—Who is Who?’ (2021) 10 EnWZ 299, 303.

justified when the energy community implements their first projects or if the member holds a substantial number of shares and an exit could threaten the viability of the energy community.<sup>66</sup> In the context of local heating grids, longer notice periods or even more far-reaching restrictions on the right to exit appear justified. More than others, local heat communities with their own grids depend on the number of consumers for their economic viability, and exits may create a vicious cycle of rising costs per consumer and the loss of even more consumers.<sup>67</sup>

### Effective control (I): autonomous and democratic decision making

Citizen energy communities must be effectively controlled '[ ... ] by members or shareholders that are natural persons, local authorities, including municipalities, or small enterprises; [ ... ]'.<sup>68</sup> Non-local authorities and medium-sized as well as larger enterprises<sup>69</sup> are thus excluded from effectively controlling a citizen energy community. Renewable energy communities must be autonomous and effectively controlled by shareholders or members located in the proximity of the community's renewable energy projects.<sup>70</sup> As energy companies, large enterprises, and non-local authorities cannot be members of renewable energy communities, they cannot have effective control over them either.

Autonomy and effective control are not the same, but related concepts. Effective control means that decision-making powers are held by the members who are not non-local authorities and enterprises of a certain size.<sup>71</sup> The IEMD further defines 'control' as decisive influence on an undertaking through, for instance, decisive influence on the composition and decisions of its organs.<sup>72</sup> The autonomy of renewable energy communities under the RED II is the absence of dominance by individual members, investors, or other collaborators and entails that communities can take decisions independently from those entities.<sup>73</sup> Unlike effective control, autonomy thus bans energy communities that depend on the benevolence of one powerful member or collaborator but are formally governed by members. Arguably, even though the IEMD does not mention autonomy in characterizing citizen energy communities, the requirement of autonomy also applies to citizen energy communities because the IEMD describes citizen energy communities as initiatives of citizens and local actors flowing from cooperation.<sup>74</sup> All this is to avoid abuse of energy communities as a vehicle for corporate interests and to ensure that as many people as possible can participate in decision making.<sup>75</sup>

### *Effective control*

Whether or not the requirements under the Directives will have an overly exclusionary effect, depends on the required type or degree of autonomy and control by members. Many energy communities have a layered governance structure.<sup>76</sup> For instance, German cooperatives have a Board of Directors (*Vorstand*).<sup>77</sup> The analysis of 570 statutes of German energy cooperatives shows that it is the Supervisory Board (*Aufsichtsrat*) who appoint the Board in 465 out of 570 cases (81.6 per cent), with the right to dismiss the Board immediately under 446 statutes (78.2 per cent). The General Assembly (*Generalversammlung*), consisting of all members, only appoints the Board of Directors under 102 statutes (17.9 per cent) and may, sometimes along with the Supervisory Board, immediately dismiss the Board under 133 statutes (23 per cent). Although the Board of Directors is mostly only indirectly accountable to the General Assembly, the Board nearly always take all decisions on new renewable energy installations such as the acquisition and the financing

<sup>66</sup> cf Roberts (n 11) 34–35.

<sup>67</sup> cf J Webb and D Hawkey, 'On (Not) Assembling a Market for Sustainable Energy: Heat Network Infrastructure and British Cities' (2017) 10 *Journal of Cultural Economy* 8.

<sup>68</sup> art 2, No 11 Directive (EU) 2019/944.

<sup>69</sup> cf art 2, No 7 Directive (EU) 2019/944.

<sup>70</sup> art 2, No 16 Directive (EU) 2018/2001.

<sup>71</sup> Recital 44 Directive (EU) 2019/944.

<sup>72</sup> art 2, No 56 Directive (EU) 2019/944.

<sup>73</sup> Recital 71 Directive (EU) 2018/2001; MM Sokolowski, 'Models of Energy Communities in Japan (Enekomi): Regulatory Solutions from the European Union (Rescoms and Citencoms)' (2021) 30 *European Energy and Environmental Law Review* 149, 154; and Roberts (n 11) 37–38.

<sup>74</sup> Recitals 43–44 Directive (EU) 2019/944.

<sup>75</sup> cf MacArthur and Tarhan (n 49) 181; and Burke (n 48) 202–03.

<sup>76</sup> cf Lenhart and others (n 1) 36; and MacArthur and Tarhan (n 49) 178–80.

<sup>77</sup> ss 9(1), 26(1), and 29(1) German Cooperative Act.

thereof. That said, 374 statutes (65.6 per cent) require the approval of such projects by the Supervisory Board elected by the General Assembly.<sup>78</sup> Only under eight statutes (1.4 per cent) does the General Assembly take or participate in these decisions.

Against this background, it comes as no surprise that the interviewees describe the General Assembly in cooperatives as rather passive.<sup>79</sup> As the day-to-day manager of an energy cooperative explains:

The General Assembly, the supreme organ of the cooperative, takes the fundamental decisions on the purpose and goals of the cooperative. ( ... ) These decisions can only be very basic because the General Assembly is convened once a year. ( ... ) The Board of Directors is the organ that takes decisions on new projects, business fields, investments, services, the further development of the community and on the question on what we want to spend our energy. As manager, I work on behalf of the Board and do the day-to-day business, by now fairly independently to relieve the Board of some of its workload.

This poses the question of whether effective control only refers to the ownership of the energy community and more or less indirect supervision of managerial decisions or also to making managerial decisions.<sup>80</sup> *Lowitzsch* adopts a formal approach to effective control that is confined to ownership and votes in an assembly of members. Citizens, local authorities, and enterprises of a certain size must hold 51 per cent of votes in that assembly, and not on a management board, in order to have effective control.<sup>81</sup> The principle of one-member-one-vote, the starting point in cooperatives, is not required for effective control but helps those groups obtain the necessary majority. This approach seems to resemble the most closely the practice in the interviewed cooperatives and, more generally, larger and more professionalized energy communities. An analysis of the filled-in questionnaires shows significant positive correlations between the quantity of renewable energy generated, the number of members and professionalization through paid positions.<sup>82</sup> The formal approach would thus have little exclusionary effect.

On the other hand, under this approach, the Directives would omit to encourage direct democratic decision making and management.<sup>83</sup> It is easy to see that this approach would allow for energy communities to go down the path of public limited-liability companies in which ‘control’ in the sense of the authority to manage is separated from ‘ownership’.<sup>84</sup> This is particularly alarming where the influence of the members on the appointment of the Board is reduced even further than it already often is because the power to appoint the Board of Directors resides with the Supervisory Board. Under 14 of the 570 statutes (2.5 per cent), representatives of a regional cooperative bank or municipal energy supplier (so-called *Stadtwerke*) must form part of the Board, with decisive influence on decision making.<sup>85</sup> Not only do the members of these cooperatives have very little influence on decision making, the Directives also exclude such entities from effective control, discussed in more detail in the ‘Effective control (II): exclusion of certain enterprises’ section. In five more cases (0.9 per cent), such entities or other external enterprises have a right to propose a candidate for the Board of Directors.

In such cases, a formal approach is arguably inappropriate because members are even deprived of indirect control over the composition of the managing body, such as a cooperative’s Board of

<sup>78</sup> s 36(1) German Cooperative Act.

<sup>79</sup> Statutes and full transcripts on file with author.

<sup>80</sup> A Walker, ‘What are the Barriers and Incentives for Community-owned Means of Energy Production and Use?’ (2008) 36 *Energy Policy* 4401, 4402.

<sup>81</sup> *Lowitzsch* (n 46) 6. In *Lowitzsch* (n 11) 24, *Lowitzsch* even argues that their share can be lower if the ownership of the rest is dispersed.

<sup>82</sup> Spearman correlation coefficient between quantity of energy generated and a paid day-to-day manager: 0.316 ( $p = 0.99$ ); Spearman correlation coefficient between quantity of energy generated and number of members: 0.386 ( $p = 0.99$ ); Spearman correlation coefficient between number of members and paid Board of Directors: 0.183 ( $p = 0.95$ ).

<sup>83</sup> MacArthur and Tarhan (n 49) 178, 180–81.

<sup>84</sup> A Cahn and DC Donald, *Comparative Company Law: Text and Cases on the Laws Governing Corporations in Germany, the UK and the USA* (Cambridge University Press 2018) 349–52; and BR Cheffins, *Corporate Ownership and Control: British Business Transformed* (Oxford University Press 2008) ss 1.1 and 2.1.

<sup>85</sup> cf Burke (n 48) 204.

Directors, and essentially demoted to passive investors. Effective control must go beyond having the majority of votes in an assembly of members who decide on the disbursement of dividends,<sup>86</sup> as the Directives seek to ensure the democratic character and supervision of the energy community and stipulate that financial gain is no legitimate primary purpose of energy communities. Effective control requires influence, albeit indirect, on the actions of the energy community, for example through the election of a Supervisory Board or the Board of Directors. This interpretation would also follow the definition of ‘dominating influence’ by ‘controlling undertakings’ under the EU Works Council Directive, which includes the right to appoint more than half of the management body.<sup>87</sup> Energy communities in which the members and their elected representatives, such as a Supervisory Board, are excluded from appointing a majority on the managing body, must be excluded from the protective scope of the Directives. In Germany, this applies to the few energy cooperatives and many limited partnerships with a private limited-liability company, commonly used in the wind sector,<sup>88</sup> in which the members cannot, directly or indirectly, appoint a majority of Directors.

*Roberts* attaches more weight to the influence of the members, proposing that effective control require a decisive voice in managing the energy community.<sup>89</sup> This approach is consistent with the local and democratic character of the ideal renewable or citizen energy community and, in that respect, most desirable.<sup>90</sup> However, such an interpretation would be unprecedented in EU legislation on legal persons, difficult to administer and, worse, have undesirable effects. As indicated above, it would not only exclude most German energy cooperatives but also discourage growth and professionalization.

### Autonomy

Unlike effective control, autonomy does not stress the insulation from a potentially harmful category of entities, but from individual members or stakeholders. Again, it is important whether this requirement refers to ownership and rough supervision or actual decision making. In practice, the development of energy communities is often dependent on a few active individuals or entities who bring particular commitment, expertise, and support.<sup>91</sup> As the Managing Director of an energy cooperative remarks:

Since the 1980s the cooperative has been growing steadily. Of course, we have often faced challenges. It flourished mainly because of one person. It is often one person that makes the difference. A person who has a certain vision. This person has led the cooperative where it is today.

Such individuals are very likely to be a driving force behind many activities and have a disproportionate influence on the decision making in the energy community. On the one hand, this jeopardizes autonomous decision making. On the other hand, holding back these active individuals and entities would destroy fruitful collaborations and may prevent successful energy communities in the future. For this reason, a more formal approach based on ownership of the energy community appears the least disruptive and exclusionary. *Lowitzsch* proposes that no individual member should hold more than 33 per cent of all votes.<sup>92</sup> If this threshold takes into account that a single corporate entity may have control over more than one member, and the assembly of

<sup>86</sup> S Becker, ‘The State or the Citizens for Energy Democracy?’ in AM Feldpausch-Parker and others (eds), *Routledge Handbook of Energy Democracy* (Routledge 2021) 158; and MacArthur and Tarhan (n 49) 178ff.

<sup>87</sup> art 3(2)(c) Directive 2009/38/EC.

<sup>88</sup> Fernandez (n 34) 96; and RJ Hewitt and others, ‘Social Innovation in Community Energy in Europe: A Review of the Evidence’ (2019) 7 *Frontiers in Energy Research* 14.

<sup>89</sup> Roberts (n 11) 34–35. He does note that the eventual definition and application of effective control will depend on the traditions in the respective Member State.

<sup>90</sup> Recital 43, Directive (EU) 2019/944; and Recital 71, Directive (EU) 2018/2001. cf Burke (n 48) 206.

<sup>91</sup> ME Bresselioglu and others, ‘Individuals, Collectives, and Energy Transition: Analysing the Motivators and Barriers of European Decarbonisation’ (2020) 66 *Energy Research & Social Science* 101493, 7; and P Maleki-Dizaji and others, ‘Overcoming Barriers to the Community Acceptance of Wind Energy: Lessons Learnt from a Comparative Analysis of Best Practice Cases across Europe’ (2020) 12 *Sustainability* 3562; Walker (n 80) 4401; and Becker (n 86) 167.

<sup>92</sup> Lowitzsch (n 46) 6.

**Table 3.** Limits to the maximum number of shares acquired by a member (own design).

Rule	Number	Percentage
One share per member	14	2.5
Extra shares subject to approval by Board of Directors or another body	292	51.2
Number of extra shares is theoretically unlimited, subject to availability	50	8.8
Acquisition of extra shares is subject to a ceiling	214	37.5

members follows the one-person-one-vote principle and has direct or indirect power over the composition of the managing body, this formal approach will ensure formal community control over the activities. Note that cooperatives with their one-person-one-vote principle will find it easier to comply with this threshold than legal forms where investments determine voting shares. Under this approach, the actual composition of the managing body is less problematic, unless entities excluded from effective control under the Directives dominate it. If the majority of Board members are affiliated with a small enterprise, this does not question the community's autonomy because the members of the Supervisory Board can vote the Board out. In contrast, constructs, where a municipality or a commercial enterprise takes all major decisions and citizens are primarily investors with a right to a dividend, as is the case with many wind projects in Germany,<sup>93</sup> could not be considered autonomous.

*Roberts* further stresses that autonomous decision-making is also free of economic or financial pressure.<sup>94</sup> For instance, the member of a cooperative who only has one vote in the assembly of members of, for instance, a cooperative, but holds a great number of shares may jeopardize the autonomy of the cooperative by threatening to withdraw their investment. While section 7a(1) of the German Cooperative Act establishes 'one-member-one-share' as a starting point, most cooperatives allow the acquisition of more shares by the same member. As the analysis of 570 statutes of German energy cooperatives shows, most cooperatives seek to contain the described danger by subjecting the acquisition of extra shares to an approval by the Board of Directors or a ceiling. Only a minority imposes no limits (Table 3).

*Roberts* suggests that limits on withdrawals of investments, which may contain the danger just signalled, or external sources of funding may be adequate means to ensure autonomy. An important insight from the suggested means is that different requirements under the Directives may limit each other. A limit to withdrawals is a limit to the right to exit through the requirement of effective control, which limit appears well-founded and reasonable.<sup>95</sup> The limit to external sources of funding, in contrast, may clash with the reality of energy communities. According to the filled-in questionnaire, the average respondent obtains 31.3 per cent of its funding from institutional lenders such as banks, and only 50 out of 127 respondents go without such loans. In comparison, subordinated loans from members play a smaller role, accounting for 14.4 per cent of project financing on average. Limits on bank loans could inhibit growth and particularly exclude energy communities in the biomass and wind sectors. A statistical analysis of the filled-in questionnaires produces a significant positive correlation between the use of bank loans and the generation of energy from biomass or wind and between the use of bank loans and the amount of energy generated.<sup>96</sup>

Finally, the formal approach to autonomy and effective control, which boils down to ownership and rough supervision by the members, more generally reflects the need for professionalization in many energy communities. The more complex the operations of an energy community become,

<sup>93</sup> Fernandez (n 34) 96.

<sup>94</sup> Roberts (n 11) 37–38.

<sup>95</sup> See 'Voluntary participation: right to exit' section.

<sup>96</sup> Spearman correlation coefficient between the use of bank loans and energy generated from biomass: 0.31 ( $p = 0.99$ ); Spearman correlation coefficient between the use of bank loans and energy generated from wind: 0.206 ( $p = 0.95$ ); Spearman correlation coefficient between the use of bank loans and quantity of energy generated: 0.28 ( $p = 0.99$ ). Interestingly, there is a significant negative correlation between the use of bank loans and the generation of energy from solar power with spearman correlation coefficient of  $-0.482$  ( $p = 0.99$ ).



the less well-founded the decisions of lay members will become and the more of a need there will be for salaried professionals from outside or active members with specific expertise.<sup>97</sup> As pointed out previously, the empirical research produces a correlation that confirms such a link. A formal approach thus facilitates the growth of energy communities and an expansion of their activities, while at the same time, eroding the direct control and influence of members.<sup>98</sup>

### Effective control (II): exclusion of certain enterprises

To prevent abuse and promote broad-based participation, the IEMD excludes non-local authorities, medium-sized and large enterprises, as well as persons for which the energy sector constitutes a primary area of economic activity, from effective control.<sup>99</sup> The RED II bans non-local authorities, energy companies, large enterprises, and any person outside the proximity of the community's renewable energy installations from effective control.<sup>100</sup> As the president of the Board of Directors of an energy cooperative explains, the danger of undue influence is present:<sup>101</sup>

A few members would like to exert undue influence. But we will not let them. The most severe example: two energy retailers had become members. When we wanted to sell energy ourselves, one manager put massive pressure on me, 15 minutes before the meeting. I presided over the meeting as if nothing had happened, and we took the decision that we would have taken anyway. Afterwards, I talked to the managers of the retailers and told them: 'This far, no further.'

The 'Effective control (I): autonomous and democratic decision making' section has already pointed to 19 German energy cooperatives in which local cooperative banks and/or municipal energy suppliers have a decisive influence on the appointment of the Board of Directors. Under the Directives, such entities must not have effective control over the community. Therefore, these energy cooperatives will fall outside the protective scope of the Directives. If one adopts the formal approach focusing on the shares held by members,<sup>102</sup> most other energy communities will pass muster. In the median energy community that has responded to the questionnaire, medium-sized enterprises hold 2 per cent of the voting rights in the General Assembly of a cooperative or another assembly of members. There is no respondent that reports a higher voting share of such enterprises, as a group, of more than a third of all votes. Large enterprises, which never hold more than 15 per cent of the voting rights in a single community, and major lenders have no detectable voting rights in most of the respondent communities. The exception is three respondents who report that a municipal energy supplier holds all of the voting rights. Generally, entities excluded from effective control, on their own or together, thus do not accumulate 51 per cent of the voting rights.

However, the exclusive focus on voting rights in an assembly of members appears out of line with the definition of 'control' under the IEMD.<sup>103</sup> Under the IEMD, 'control' means decisive influence on an undertaking through, for instance, decisive influence on the composition and decisions of its organs. As the Board of Directors takes the decisions on major investments, its actual composition should be considered, potentially leading to a different conclusion. The affiliations of the Directors with the entities in question would then suffice to establish their effective control over these decisions. To specify these factors, a decision needs to be made on what type of affiliation would count towards effective control and what would not. It may be required that for the

<sup>97</sup> K Ahlemeyer and others, 'Success Factors of Citizen Energy Cooperatives in North Western Germany: A Conceptual and Empirical Review' (2022) 12 *Energy, Sustainability & Society* 3, 10; M Krug and others, 'Mainstreaming Community Energy: Is the Renewable Energy Directive a Driver for Renewable Energy Communities in Germany and Italy?' (2022) 14 *Sustainability* 7181, 1, 7; Lowitzsch (n 11) 17–18; and Prasad Koiraal and others (n 34) 34, 38.

<sup>98</sup> cf MacArthur and Tarhan (n 49) 180–81.

<sup>99</sup> Recital 44 and art 2, No 11 Directive (EU) 2019/944.

<sup>100</sup> art 2, No 16 Directive (EU) 2018/2001.

<sup>101</sup> Full transcript on file with author.

<sup>102</sup> See 'Effective control (I): autonomous and democratic decision making' section.

<sup>103</sup> art 2, No 56 Directive (EU) 2019/944.

**Table 4.** Affiliation of major lenders, medium-sized and/or large enterprises to seats on the Board of Directors (own design).

Type of entity	25–49%	≥ 50%
Major lenders	1 respondent	6
Large enterprises	3	7
Medium-sized enterprises	26	18
Groups combined	25	31

Director to add to the control by the entity, the entity nominate or even appoint the Director, as is the case with ‘dominant influence’ under the Works Council Directive.<sup>104</sup> As concluded in the ‘Effective control (I): autonomous and democratic decision making’ section, such arrangement precludes effective control by the members. A stricter interpretation would only require a legal affiliation through, for example, a contract of employment with, or shares in, the entity. Three rows of Table 4 show the share of the directors of 121 respondent energy communities who have legal affiliations to major lenders, medium-sized or large enterprises, which are excluded from effective control under the Directives. The last row shows the share of directors with legal affiliations to any of those three types of entities.

Table 4 shows that under a requirement of effective control that also takes into account the composition of the Board of Directors and their actual affiliations, 31 out of 121 energy communities (25.6 per cent) would be excluded from the protective scope of at least one of the Directives. Twenty-five more energy communities (20.7 per cent) would be in a danger zone.

Even if this stricter interpretation of effective control is followed, it could still be debated whether affiliations of groups of entities to half or more of the Directors would be sufficient proof of effective control. Within each type of entity, there may be several entities whose interests may be incompatible with each other. While their combined numbers may be sufficient to exercise effective control, they may not agree on what decisions to take. However, the wording of the Directives shows that this consideration is irrelevant. The text requires effective control by natural persons, local authorities, and enterprises of a certain size, and not the absence of effective control by other entities. It is clear that where these other entities have legal affiliations with 50 per cent or more of the Directors, natural persons, local authorities, and enterprises of a certain size do not have effective control.

The downside of such a more restrictive interpretation is that, as has been noted in the ‘Openness (I): the exclusion of powerful legal persons’ section, valuable collaborations with existing members may have to be terminated or, failing which, the energy community may be excluded from the benefits offered by the Directives. Other collaborations may never get off the ground. For instance, municipalities, whose support is often indispensable to the success of an energy community,<sup>105</sup> may have municipal energy utilities and/or retailers that cannot become members or nominate directors, despite their expertise.<sup>106</sup> Medium-sized enterprises may also provide skills and knowledge and may open up financing opportunities.<sup>107</sup> In fact, the filled-in questionnaires produce a significant positive correlation between professionalization through paid positions and the influence of major lenders and medium-sized enterprises on the Board.<sup>108</sup>

Another drawback of an inquiry into all the legal affiliations of Directors is its costs because information on legal affiliations is often not publicly available and the composition of the Board as

<sup>104</sup> art 3(2)(c) Directive 2009/38/EC.

<sup>105</sup> B Schmid and others, ‘Energy Cooperatives and Municipalities in Local Energy Governance Arrangements in Switzerland and Germany’ (2020) 29 *Journal of Environment and Development* 123, 126, 133, 138; A Savaresi, ‘The Rise of Community Energy from Grassroots to Mainstream: The Role of Law and Policy’ (2019) 31 *Journal of Environmental Law* 487, 499, 505; Lowitzsch and Hauke (n 12) 151; and Creamer and others (n 48) 6–8.

<sup>106</sup> Hoffmann (n 65) 302.

<sup>107</sup> Lowitzsch (n 11) 25.

<sup>108</sup> Spearman correlation coefficient between a paid day-to-day manager and affiliations of board members with medium-sized enterprises: 0.191 ( $p = 0.95$ ); Spearman correlation coefficient between a paid Board of Directors and affiliations of board members with major lenders: 0.223 ( $p = 0.95$ ).

well as the affiliations may regularly change. The historical interpretation of ‘effective control’ in the Directives also militates against this approach. In the original proposal of the RED II by the European Commission, renewable energy communities had to reserve 51 per cent of the seats of the managing body for local authorities, citizens, and small or medium-sized enterprises.<sup>109</sup> As this requirement has been scrapped from the final text of the RED II, the Directives do not appear to dictate boundaries for the affiliations of the members of the managing body. For these reasons, it is submitted that a more lenient interpretation of effective control, focusing on voting rights in the General Assembly or another representation of members and the nomination of Directors by entities excluded from effective control, is not only desirable but also legally correct.

### Effective control (III): proximity

Under the RED II, an energy community will only be a renewable energy community if it is effectively controlled by members in the vicinity of their renewable energy installations.<sup>110</sup> While the Member States have considerable leeway in defining this criterion in more detail,<sup>111</sup> it does indicate that members and shareholders must have their residence or their seat in the *physical* vicinity of the renewable energy installation.<sup>112</sup> This potentially excludes energy communities that are not place-based, but interest-based, that are more virtual than physical.<sup>113</sup> *Bauwens* and others conclude that the choice for proximity as a requirement reflects a larger shift towards a place-based notion of community.<sup>114</sup>

On the one hand, proximity fosters local acceptance of, and local control over, the energy community and prevents hostile take-overs.<sup>115</sup> This may make sense for local heating networks that fall under the RED II, but not under the IEMD, which exclusively governs the electricity market. On the other hand, energy communities that produce or seek to produce electricity at a larger scale may struggle to grow and meet this requirement. One problem is that the criterion of proximity limits the number of available sites for new projects because the sites have to be in the proximity of the residences or seats of members.<sup>116</sup> Another problem is that this requirement, just as the previously discussed exclusion of certain entities from effective control, discourages fruitful collaboration.<sup>117</sup> A statistical analysis of the filled-in questionnaires shows that non-local members positively correlate with growth and professionalization,<sup>118</sup> leaving it open whether these members lead to growth and professionalization or are attracted by already existing growth and a professional organization. As the president of the Board of Directors of an energy cooperative explains though, investments from outside the community’s home area can facilitate up-scaling and larger projects<sup>119</sup>:

Through the overarching association of cooperatives we reach potential members who want to invest in cooperatives all over the Federal Republic. We receive around 50 to 60 enquiries per year from people who want to invest and get to know our cooperative. ( ... ) When, in the

<sup>109</sup> art 22(1)(d) COM(2016) 767 final, 2016/0382(COD).

<sup>110</sup> art 2, No 16 Directive (EU) 2018/2001.

<sup>111</sup> Hoffmann (n 65) 303.

<sup>112</sup> ME Bireselioglu and others, ‘Legal Provisions and Market Conditions for Energy Communities in Austria, Germany, Greece, Italy, Spain, and Turkey: A Comparative Assessment’ (2021) 13 Sustainability 11212, 7, 9; V Brummer, ‘Community Energy—Benefits and Barriers: A Comparative Literature Review of Community Energy in the UK, Germany and the USA, the Benefits it Provides for Society and the Barriers it Faces’ (2018) 94 Renewable and Sustainable Energy Reviews 187, 189; Yildiz and others (n 9) 59, 66, 69; and J Hicks and N Ison, ‘An Exploration of the Boundaries of ‘Community’ in Community Renewable Energy Projects: Navigating between Motivations and Context’ (2018) 113 Energy Policy 523, 524, 527.

<sup>113</sup> S Moroni and L Tricarico, ‘Distributed Energy Production in a Polycentric Scenario: Policy Reforms and Community Management’ (2018) 61 Journal of Environmental Planning and Management 1973, 1976; and Lenhart and others (n 1) 46.

<sup>114</sup> T Bauwens and others, ‘Conceptualizing Community in Energy Systems: A Systematic Review of 183 Definitions’ (2022) 156 Renewable and Sustainable Energy Reviews 111999.

<sup>115</sup> Roberts (n 11) 35. cf Burke (n 48) 206.

<sup>116</sup> CE Hoicka and others, ‘Implementing a Just Renewable Energy Transition: Policy Advice for Transposing the New European Rules for Renewable Energy Communities’ (2021) 156 Energy Policy 112435, para 3.2.

<sup>117</sup> Lowitzsch (n 11) 25.

<sup>118</sup> Spearman correlation coefficient between renewable energy capacity and voting rights of members from outside the administrative district: 0.231 ( $p = 0.95$ ); Spearman correlation coefficient paid day-to-day manager and voting rights of members from outside the administrative district: 0.209 ( $p = 0.95$ ).

<sup>119</sup> Full transcript on file with author.

course of the next years, we want to carry out two to three large projects, I think we will automatically receive membership requests from everywhere, due to the advertisements regarding planning procedures for a wind or solar farm, deliberations, and media articles. ( ... )

The filled-in questionnaires show that the influence of people who do not live in the same German administrative district (*Landkreis* or *kreisfreie Stadt*) in which the renewable energy installations are located, varies substantially. The administrative district has been chosen as a frame of reference because it is easy to understand for respondents and a radius of 50 km, roughly reflecting the average size of an administrative district in a rural or semi-urban area, was earlier used in German legislation.<sup>120</sup> In the median energy community, people from outside the administrative district hold 5 per cent of the voting rights. In almost 96 per cent of the energy communities, they do not hold more than 30 per cent of the voting rights. However, in five out of 119 energy communities (4.2 per cent), people from outside the administrative district hold 50 per cent or more of the voting rights. It would be these energy communities who would be hit by too strict an interpretation of the requirement of proximity. Even if not relevant in light of the argument made in the previous sub-section, an analysis of the composition of the Board of Directors reveals a similar picture. While 104 of the respondents (86 per cent) have no Directors from outside that district, seven energy communities have Boards with half or more of their Directors from outside that district.

To reduce the exclusionary effect, *Roberts* suggests that the criterion of proximity should be construed and applied in line with the magnitude of the activities of the community.<sup>121</sup> A community with more and/or larger projects in different areas could then also confer effective control upon members from different areas. It is submitted that this interpretation should be followed. Moreover, it seems that the exclusionary effect is likely to be limited anyway. The analysis of the filled-in questionnaires produces a significant positive correlation between feeding electricity into the public grid and the number of members from outside the administrative district.<sup>122</sup> As citizen energy communities in the electricity sector are not subject to the requirement of proximity, the RED II cannot exclude them from the rights under the IEMD, provided that the Member States transpose the rules on citizen energy communities properly.

## CONCLUSION

The Internal Electricity Market Directive and the Renewable Energy Directive offer new exciting opportunities for citizen and renewable energy communities. While newly founded energy communities can design their internal governance in light of the Directives from the outset, already existing communities face a choice between forgoing useful opportunities and a potentially painful transition to adapt their internal governance to the new status of citizen and/or renewable energy community. Through the requirements on the internal governance of energy communities, the Directives risk a lasting division between privileged citizen and renewable energy communities and those that did not want or were not able to adapt to the Directives.

This transition should be made as easy as possible to ensure the viability of existing energy communities. The requirements for the community's internal governance under the Directives should be interpreted and transposed so as to accommodate existing practices, without jeopardizing the goal of each of those requirements. The primary purpose of energy communities must be to generate economic, environmental, or social benefits and must not be financial gain. Energy communities that have not done so yet should at least include the goal to generate renewable energy in their statutes. Despite the prohibition of a primary financial goal, they may continue to disburse moderate dividends. While the total ban of energy companies, large enterprises, and non-

<sup>120</sup> cf s 3, No 15 Renewable Energy Act (*Erneuerbare-Energien-Gesetz—EEG 2023*).

<sup>121</sup> *Roberts* (n 11) 35.

<sup>122</sup> Spearman correlation coefficient between feeding electricity into the public grid and voting rights of members from outside the administrative district: 0.261 ( $p = 0.99$ ).

local authorities from renewable energy communities is unfortunate, energy communities may want to try subtler forms of collaboration with these entities. Despite the openness requirement, energy communities may continue to exclude non-local entities. To be truly open and inclusive of economically vulnerable people, however, many should lower the prices of their shares and/or their processing fees or allow a payment in instalments. In order to meet the requirement of voluntariness, the right to exit the community should generally not be subject to a notice period of more than one year.

Effective control by members requires more than being a passive investor, but less than active involvement in the management of the energy community. It is sufficient that a majority of votes from entities that are not excluded from effective control in an assembly of members can appoint the majority of managers of the community or elect representatives, such as a Supervisory Board, who will then appoint the managing body. Autonomy merely requires that a single entity does not hold dominant influence over the assembly of members. This interpretation recognizes the indirect or representative democracy that characterizes most of the examined energy communities. It excludes energy communities in which the members cannot directly or indirectly determine the composition of the majority of the managing body. It is true that this approach will even accommodate energy communities that like some cooperatives in Germany,<sup>123</sup> have the required governance structure but consist of members that are so uninterested in management that the community only functions as a legal vehicle for investments. However, it seems too cumbersome to find and apply legal criteria to distinguish these investment vehicles from large and professionalized, yet member-driven energy communities that merit the protection of the Directives. Finally, to accommodate growth and professionalization, the requirement of proximity should take into account the size and sprawl of the communities.

This contribution has uncovered the potential exclusionary effect of the IEMD and RED II on existing energy communities in Germany and proposed interpretations that accommodate their existing practices or make the transition towards the status of citizen or renewable energy community easier. These insights should inform the interpretation of the Directives and the transposition of the Directives in Germany and beyond. Future research should confront the legal-doctrinal debate with empirical data on energy communities in other countries, to complement the list of obstacles started in this contribution. Future research should also apply the empirical insights from each country to national transpositions.

<sup>123</sup> Holstenkamp (n 36) 126.

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