

Legislative options and obstacles for energy communities in Belgium

- Summary of key issues identified & recommendations –

ROLECS project Task 2.3.1

Task partners

Blixt, ENGIE, Fieldfisher, METHA & VUB

Lead authors

Blixt, Fieldfisher, METHA & VUB,

Table of contents

1	INTRODUCTION.....	2
2	SUPPLY LICENCE AND SUPPLIER OBLIGATIONS	3
3	THE ROLE OF DSOS	4
4	MEMBERSHIP CONDITIONS	7
5	MANAGEMENT OF THE ENERGY COMMUNITY AND MANDATE FOR GROUP CONTRACTS ..	9
6	CONSUMER PROTECTION.....	11
7	LEGAL FORM.....	13
8	SCOPE OF PROXIMITY	15
9	DIRECT LINES	16
10	ENABLING LOCAL PARTICIPATION OF LARGER COMPANIES	17

Disclaimer

The information in this document is provided without guarantee or warranty, that the content fits for any particular purpose. The user thereof uses the information at its sole risk and liability.

The legal analysis and the recommendations in this document reflect only the authors' views and the Community is not liable for any use that may be made of the information contained therein. Grid operator Fluvius requested to expressly note that it does not share this document's legal analysis nor its recommendations.

1 Introduction

As part of three decades of an ongoing transformation process of the energy transition, the European Union (EU) agreed in 2015 to increase its efforts to build an energy union that provides European consumers with secure, sustainable, competitive and affordable energy. To achieve this goal, the European Commission introduced in 2018 the 'Clean Energy for all Europeans' package (CEP). Currently, this normative framework is composed by eight pieces of legislation addressing energy performance in buildings, renewable energy, energy efficiency, governance regulation, electricity market design and adoption processes by Member States (MS) in the EU. The regulation of energy communities (ECs) falls within the scope of the CEP. More specifically, the Renewable Energy Directive (REDII) and Internal Electricity Market Directive (IEMD) set a basis for implementation of rules related to Renewable Energy Communities (RECs) and Citizen Energy Communities (CECs).

The primary purpose of ECs, as defined in the two European directives, is to **“provide environmental, economic or social community benefits” to their members or shareholders or the local areas where they operate, rather than profit-making**. MS are tasked with providing **an enabling framework to promote and facilitate the development of energy communities**. Both art. 16 of the IEMD and art. 22 of the REDII require MS to ensure that these enabling frameworks **“are subject to fair, proportionate and transparent procedures.”** Both directives¹ also acknowledge that ECs serve multiple purposes, such as inclusive local citizen participation in the energy transition and augmented choice, added societal acceptance of renewable energy sources and increased local investment. While ECs can provide „economic, social and environmental benefits to the community that go beyond the mere benefits derived from the provision of energy services,”² REDII and IEMD recognise that energy communities may be at a disadvantage when it comes to their establishment and access to the market when compared with larger players. As ECs face a cost disadvantage, at least in their start-up phase, adapting the regulatory environment, and easing their economic and administrative burden, is a means to support their development. The premises for this paper are that the EU legal framework aims to enable and to facilitate RECs and CECs and that MS should echo these aims.

In the context of the ROLECS project and in line with its aim of gaining a deeper understanding of, and shaping the potential of Local Energy Communities, this paper highlights some of the key legal issues and uncertainties for the implementation of the European Frameworks for energy communities in Belgium, and in particular in Flanders.³ Specifically, it explores the larger questions that arise for the establishment and management of RECs and CECs, such as if there will be a supply licence requirement, and if energy communities can become DSOs or manage direct lines, and if so, will exemptions or a reduction of the obligations that come with such roles made available for energy communities. The summary further analyses some aspects of the governance model for energy communities, such as managing contracts, setting membership or termination fees, the legal form recommended for RECs and CECs, and possible community management and mandates. Finally, the paper highlights the importance of ensuring the rights of customers and touches upon the option for an additional legal framework to enable participation of larger companies.

¹ See e.g. Recital 70 and 71 of REDII and Recital 43 of the IEMD.

² IEMD recital 43.

³ This paper is a summary of a larger report, where each identified legal issue is further described and analysed. The full report will be made available later in 2020 as an output of the ROLECS project. Task 2.3.1 “will deliver suggestions for legislative modifications or organisational changes in the LEC scenario to support the implementation and operation of the diverse Local Energy Communities models subject of the research”

For each section of issues identified, the summary attempts to provide concrete recommendations for policy makers that could provide both clarity for energy community organisers and that would not introduce or maintain unnecessary hurdles for setting up and operating such a project, by this facilitating the viability of communities. It is recommended that any regulatory changes and new policies put in place should be subject to regular evaluation every 3-5 years, to ensure, without retroactive impacts, their continued relevance and desired impact and to assess any unintended consequences. The introduction of pilot regulations, where experimentation could be encouraged, might be a way to test regulations' effectiveness and impact over a period of time.

Finally, the recommendations presented in this paper are a result of a predominantly legal-regulatory analysis, and are to be considered in relation to research on technical and economic analysis of ECs.⁴

2 Supply licence and supplier obligations

Applying for a conventional supply license and fulfilling the obligations of a supplier would constitute a considerable financial and administrative burden for ECs as relatively small players (which is expected to be the case in the first deployment phases). In thinking how this burden could be avoided or reduced, it is important to distinguish between the delivery of electricity to the members of the EC and supply outside the community.

The Brussels legislator diversifies supply licenses into categories depending on type of electricity (green/grey) supplied, capacity and type of consumers, whereas the Walloon legal framework distinguishes based on capacity, geographical area and type of consumers. The Walloon legislator also provides a specific, limited, supply license procedure in case of own supply to its related companies via the public grid. No supply license is required for self-consumption (Art. 31, §2 Décret électricité) and, since May 2019, for collective self-consumption within RECs (Art. 2, 2^o quater Décret électricité). In contrast, the sale of electricity produced by a REC outside the community does require a supply license.

Art. 4.3.1 of the current Flemish Energiedecreet makes electricity supply via the distribution network or the local transport network for electricity to customers subject to a supply license accorded by VREG. No specific exemptions to this rule are yet determined. In contrast with the Brussels and Walloon Region regulations, the Flemish Region only provides one type of supply license, not further distinguishing between full, limited and/or site-specific supply licenses.

Consumption within the EC

There are two principal options for treating electricity produced and consumed by an EC. First, such consumption may be considered collective self-consumption (in the meaning of 'jointly acting renewables self-consumers' and 'jointly-acting active customers' acting within an EC) not constituting "supply" in the meaning of Article 2.12 of the IEMD ("the sale, including the resale, of electricity to customers"). In this case, it is clear that no supply license would be required. Second, if (part of the) consumption within an EC is not considered collective self-consumption and is considered to qualify as "supply", a reduction of

⁴ Issues related to tariff impact and calculations related to energy communities – incl. legal and regulatory – are addressed in a separate working group on Tariffs. These issues are therefore not dealt with in this paper.

the requirements for a supply license application, as is the case for RECs in the Walloon Region, could be considered.

In both cases, clarification may be needed on whether and to what extent the EC would need to fulfil the classical obligations related to energy supply vis-à-vis the EC members, such as concluding access contracts with grid operators and other relevant actors, guaranteeing basic contractual rights (see chapter on consumer protection), adhering to public service obligations (e.g. actions aimed at the protection of vulnerable consumers), and reporting obligations, including invoicing.

Supply by ECs outside the community

It seems clear that the sale by an EC to end consumers outside its own boundaries will make the EC a supplier vis-à-vis the relevant customers and as such will require a supply license. The question arising in this respect is whether, for the (limited) amounts of energy supplied by the ECs, the license requirements (and related supplier obligations) could be reduced so as to avoid a disproportionate burden on ECs. In case ECs would be exonerated from classical supplier obligations, it needs to be clarified how the relevant consumer rights can still be guaranteed/respected. The EC could also sell its surplus energy in the regular market, through an injection contract with an Access Responsible Party/supplier) and valorise this surplus at market conditions.

Recommendations

- The Flemish and Brussels Region legislators should either clarify that collective self-consumption within an EC does not qualify as “supply” (and does therefore not require a supply license) or determine that such supply does not require a conventional supply license.
- In either case, there is a need to determine to what extent and how the classical obligations related to energy supply should be fulfilled vis-à-vis the EC members.
- The Flemish and Brussels Region legislators could also consider the possibility of lightening the supply licensing procedure and related supplier obligations for ECs when they sell limited amounts of electricity to customers outside the community, depending on their capacity and/or amount.

3 The role of DSOs

ECs at times may face obstacles in setting (common) access points to grids, ensuring operation, maintenance, data management and balancing within the EC. Additionally, ECs may have to wait a long time before the public DSO adapts the grid to their needs. It might help address such limitations if ECs were able to act as DSOs. Allowing an EC to act as a DSO will not be possible for CECs that are not active within a “given area” (see also the “area”-limitation of a CDS).⁵ As discussed further, the geographical limitation exists for a REC.

At the same time, it may be burdensome for a REC or a CEC to fulfil all the obligations of a DSO. Establishing specific obligations and swift collaboration, apart from the existing ones, for the public DSO

⁵ See definition of DSO in article 2(29) IEMD.

to respond to the needs of ECs may also contribute to ensuring timely and appropriate common grid connections.

EU law provides an opening for member states to authorise ECs to become DSOs, but also provides for a number of obligations DSOs generally have to fulfil. The IEMD specifically permits Member States to authorise CECs to become DSOs, whereas the REDII does not explicitly provide for it, but implies it in its Article 22.4. However, neither of the Directives provides for preferential treatment of ECs acting as DSOs. Instead, the IEMD clarifies that CECs acting as DSOs have the same status and obligations as normal DSOs (Art. 16 and Recital 47). However, ECs could in principle be authorised to become ‘closed distribution system operators’ with a lighter burden. It is questionable whether the EU legal framework would be compatible with exempting ECs that become normal DSOs from any of the DSO obligations established in EU law.

While the Walloon Region decided not to grant RECs the right to become DSOs, the Flemish and Brussels Regions still need to decide whether they want to grant the right to become a DSO to ECs. If such a right is granted to ECs, it should be considered whether some of the conditions and obligations that regional law adds to the EU-defined general obligations for DSOs (e.g. some public service requirements) could be lifted for ECs acting as DSOs. It could also be investigated whether other EU-defined DSO obligations could be lifted for EC-DSOs, in a similar way that is possible for closed distribution systems.

While any such ‘DSO light’ status may be deemed to raise issues of discrimination, granting such a status to ECs may in effect be justified. First, a public DSO operates on a much larger scale than an EC-DSO that operates on a small, local scale. Second, the differentiated treatment seems reasonably justified as long as it serves a legitimate goal, is proportionate, is based on an objective criterion of differentiation, and is adequate to reach the legitimate goal. This goal is to facilitate the aggregation between injection and offtake of the members of the EC, failing the possibility to have a virtual connection point to the system.

In Flanders, systems of closed distribution not operated by the public DSO already exist. The operators of these grids are subject to fewer and/or lighter obligations than public DSOs. To prevent abuse, VREG is required to approve closed distribution systems that need to fulfil certain conditions. It can also supervise closed distribution systems. A similar “ex post” supervision could be worked out for EC-DSOs.

It should be noted that development of local DSOs could also lead to the emergence of parallel grids, something the legislator has always tried to avoid according to VREG,⁶ but has accepted for closed distribution systems, allowing in the same geographical area different grids to coexist. For new projects or real estate developments, whereby the investment in the extension of the grid is not yet made, the risk of parallel grids, leading to a suboptimal use of the existing distribution system, seems less likely than in the case of existing connections.

The Flemish and Brussels Regions also still need to decide which particular obligations for grid operators regarding ECs they will impose.

Art. 22, 4, (c) of the REDII states that Member States must provide an enabling framework to promote and facilitate the development of renewable energy communities. This enabling framework must ensure, *inter*

⁶ Parallel grids could jeopardize the efficient development and operation of the distribution grid.

alia, that the relevant DSO cooperates with an EC in order to facilitate energy transfers within an EC. It remains to be seen how this rather vague obligation will be implemented.

A strong cooperation duty of the DSO could be imposed as alternative to the EC's right to become a DSO (if this option is chosen), or in parallel to this right (for the ECs that choose not to become a DSO or are no longer a DSO).

In this respect, the Walloon Region obliged grid operators to cooperate with RECs in order to promote their development under transparent and non-discriminatory conditions. They shall implement, in accordance with regulated tariffs, the necessary technical, administrative and contractual arrangements, in particular with regard to electricity metering (Art. 42septies, § 1 Décret électricité). The details of this "duty to cooperate" of the DSOs and local transport grid operators remain to be determined, probably in an implementing decision of the Walloon government.

The Flemish and Brussels Regions might consider imposing a strong cooperation duty on DSOs towards ECs. For example, the DSO could be obliged to prioritise the free installation of digital meters in EC's, or under certain conditions and after control of VREG, be obliged to timely adapt the (virtual or physical) connection to the grid to the needs of an EC. Another choice may be that the legislator/regulator should allow the DSO to create a virtual connection point of the EC to the grid, facilitating the exchange of electricity between the EC members, at all times allowing this possibility only for EC's. Adequate judicial protection should be available in case of conflicts between the EC and the DSO. VREG should have a supervisory and mediatory function in this regard. The grid planning (investment plan of the DSO/TSO) is another important instrument in this respect, which should be transparent and open for consultation to the market parties.

Currently, with many ECs in the first stages of implementation, demand for ECs to become DSOs may be low. At this point in time, a cooperation between the public DSO and the ECs seems the way forward. Different needs and demands may, however, arise over time. Therefore, we suggest that the legislator allows a number of testbeds to acquire DSO status to gain relevant experience before making a final decision on DSO status for ECs in general.

In any event, consumer rights need to be protected, including the right to access to safe and reliable electricity networks, safe data management and to a minimum supply from a supplier of last resort. While some of the corresponding obligations necessarily lie with the DSO (as determined by EU law), every region in Belgium has its own provisions on the minimum supply of electricity. In Flanders, art. 6.1.1 to 6.1.3 Energiedecreet provides that the DSO has to act as the supplier of last resort in multiple scenarios (bankruptcy of the supplier, termination of the contract due to non-payment by the customer, relocation of the customer). As in all likelihood an EC-DSO would operate on a much smaller scale in addition to the public DSO in any given area, the EC could rely on the public DSO for all obligations related to the supply of last resort for participants in an EC.

Recommendations

- In the Brussels Capital Region, it is highly unlikely that the configuration of the distribution system justifies the creation of additional EC distribution systems. However, for new allotments, even in the Brussels Capital Region, an EC could become a DSO (light).
- In the Flemish region, the legislator should grant RECs and CECs with a well-defined geographical area the right to become DSOs, e.g. for new allotments. If this is considered a step too far, the legislator should allow a number of testbeds to acquire DSO status to gain relevant experience before making a final decision on DSO status for ECs in general.
- The Flemish legislator should waive DSO obligations beyond the minimum requirements arising from EU law for EC-DSOs (granting the latter a 'DSO light' status). It should investigate whether other EU-defined DSO obligations could also be lifted for EC-DSOs, as is possible for closed distribution systems.
- The public DSO operating along any EC(-DSOs) could best remain the supplier of last resort.
- Any ECs enjoying 'DSO light' status would still need to ensure that key consumer rights such as the right to safe and reliable electricity networks, to transparent information, and to safe data management are guaranteed.
- Furthermore, an EC-DSO needs to ensure simple access to individual data for comparing energy prices.
- The Flemish and Brussels legislators should establish a firm obligation of public DSOs to cooperate fully with RECs and CECs in order to ensure timely and expedient (virtual) grid connections (points) under transparent and non-discriminatory conditions.

4 Membership conditions

Ensuring membership stability and encouraging the continued participation of members of ECs is important for their viability. If participants of an EC can leave the community without any barriers (such as a sale of their shares and/or a notice period), an EC could become economically unviable. A regulation of the conditions of membership, including any minimum membership period, notice period or early termination fee, should be possible as part of the statutes and/or other internal rules of the EC. According to Art. 2.11 of the IEMD and Art. 2.16 of the REDII, CECs and RECS are legal entities effectively controlled by members or shareholders, implying the need for such internal rules/statutes. Such statutory rules would also cover how to become a member and how to leave the EC and could address the issue of membership volatility in several ways.

One specific problem arises where the EC is considered a supplier (see section on Supply) and the membership is defined by a customer-supplier relationship, i.e. the membership only entails that each member receives electricity from the EC as its supplier against a certain payment. In this case, Articles 4 and 12 of the EMD are applicable which guarantee the right of a customer to freely choose his supplier and provide that a (household) customer is entitled to switch supplier within a maximum of three weeks free of charge. This would seem to apply also to EC members since REDII Article 22.1 and IEMD Article 16.1(c) provide that REC and CEC participants maintain their rights and obligations as final customers. Furthermore, while Art. 12.3 IEMD allows termination fees for fixed-term and fixed-price contracts, Article

18 §2/3 of the Belgian federal “Elektriciteitswet” prohibits the supplier from charging any form of termination fee, and in Flanders, this is also reflected in Article 4.4.1 of the Energiedecreet.

If the EC is considered a supplier vis-à-vis its members, the Article 4.4.1 of the Flemish Energiedecreet (as well as Article 18 §2/3 Elektriciteitswet) will need to be amended to allow termination fees for fixed-term, fixed-price contracts of members wanting to leave an EC. If the EC is not considered a supplier (see section on Supply), the problem would not arise, and the EC would be free to determine any fee and or notice period for leaving the EC in its internal rules.

Even if the EC is considered the/a supplier of its members/participants, the internal rules can still be designed in ways that limit membership volatility. For example, the EC could determine a general membership fee that applies in addition to any fee for the supply of electricity. The broader membership of the EC could then be regulated separately from the supply of electricity and could include a notice period and/or a termination fee. The EC may also provide other services to its members/participants so that the EC could charge separately for the supply of electricity and these other services. Again, a notice period and/or termination fee could be applied with respect to these other services. ECs should therefore consider their membership rules carefully in order to ensure sufficient stability. Arrangements that allow participants to freely choose their energy supplier while continuing to participate in the EC seem to be preferable, in the case where ECs are considered suppliers when delivering electricity to their members. This would entail separating the energy costs from the service costs or general membership fees that are charged by the EC. In this case, it might be possible to give a discount to members that also purchase their electricity from the EC (as compared with other members – provided that this does not act as a disguised restriction on the free choice of supplier).

In case the EC requires participants to become shareholders, the buy-back of such shares can be regulated. Here, “lock-in issues” could arise (e.g. a participant-shareholder wants to sell its share, but no one wants to buy it). To address this issue, the EC could commit to buying back a share from a shareholder. Providing precontractual information to (potential) participants of a CEC/REC will be key.

Recommendations

- If the self-consumption within an EC or between members of the EC is considered “supply”, the federal Elektriciteitswet, and regional legislation should be adjusted to enable ECs to charge termination fees for members for fixed-price and fixed-term contracts in line with Article 12.3 IEMD.
- ECs can themselves (in their internal rules/statutes) provide for a notice period and/or a termination fee related to services other than supply and/or for the membership as such. Members that also purchase electricity from the EC could be granted a discount. The federal and regional legislators should acknowledge this possibility.
- In order to avoid a lock-in, the EC could commit to buying back a share from a shareholder that wants to leave if the latter has not found a buyer within a reasonable timespan.
- ECs need to ensure that participants have full information about the conditions of membership, including consequences of supplier switches, membership and/or termination fees, notice periods, rules on selling shares, etc. available. The legislator could clarify this.

5 Management of the energy community and mandate for group contracts

In this section, we discuss two practical issues related to the operation of ECs, namely (1) the appointment of an EC manager to facilitate and ensure the smooth management of ECs and (2) the possibility for EC members to provide a mandate to the EC to negotiate a joint contract with an external supplier for the residual consumption.

Energy Community Manager

The applicable EU Directives require member states to establish an enabling framework for ECs. Although not explicitly required, this may include providing for the function of an “energy community manager”. Outsourcing the management of an EC to such a third party could significantly facilitate fulfilling the multitude of tasks that running a REC or a CEC entails. We therefore strongly recommend that ECs be explicitly authorised, but not obliged, to outsource their day to day management (*dagelijks beheer*).

The approach implemented in the Walloon Region could serve as inspiration for the Flemish legislator. The Walloon legislator allows ECs to appoint a third party that can act as a manager of the EC. The legal status of this ‘manager of the energy community’ is such that it becomes the sole point of contact for the DSO and the Walloon regulator CWaPE for relevant matters (Article 42sexies Décret électricité). In this regard, the manager is authorised and responsible for the day to day management of the REC, with the assignment to defend the interest of the EC but without having impact on the effective control of the EC which resides with the members or shareholders.

In order to legally implement the statute of an “energy community manager”, the syndicus of a VME (‘Vereniging van Mede-eigenaars’) could serve as a good practice example. With its legal status enshrined in Belgian property law, the syndicus of a VME is a person who is appointed to manage a building with multiple apartments and shared parts. Similar to the syndicus of a VME, the EC manager could have different types of tasks related to the daily management of the EC, including those regarding (i) the functioning of the community, (ii) the members of the EC and (iii) relations with third parties such as requesting offers, placing orders, and paying invoices. The Manager should also ensure that the assets belonging to the EC are covered by a proper insurance.

The manager is accountable to the EC and should thus regularly report on its activities to the competent governing bodies of the EC and, more generally, give account of its activities to the EC and its members. The liability of the manager should be precisely defined, including arrangements for cases of force majeure.

Mandate for residual supply

A mandate is a contractual agreement between an entity / third party and a consumer giving proxy to the entity in order to have the supplier of the consumer chosen. Such a mandate for the EC, given by the EC members, might be useful to facilitate the search for a supplier⁷ for the members’, residual electricity, while also enhancing the added value of the EC for its members. For a smaller-sized EC, such a mandate could contribute to alleviating an administrative burden, as is required in REDII and IEMD. Concretely, the EC

⁷ Or several suppliers.

could, in name of the legal entity and potentially managed by an EC manager, collect mandates of all (or most) of its customers/members and ask for good market prices from interested suppliers (a system similar to group purchases), thereby reducing administrative complexity.

Since the applicable EU law has established the right of free suppliers' choice as absolute, in particular for household consumers,⁸ any mandate must be construed so that it in no way constrains this free supplier's choice by the end consumer. A mandate should therefore be revocable, at all times and within a reasonable timeframe, to enable the (household) consumer to change supplier. In accordance with EU law and practice (see Article 12.1 IEMD), switching suppliers should be possible within three weeks, and, at the latest in 2026, within 24 hours on working days.

Currently there is no mandate possibility for EC entities to exercise the right of free suppliers' choice of its off-takers explicitly acknowledged in (Brussels and Flemish) regulation. We recommend that this be introduced. Inspiration and wording for such regulation and model mandate could be found in the presently established mandate possibilities for (i) i.a. RECs, private networks and closed professional networks in the Walloon Region, (ii) contact with a DSO in the regional Technical Regulations, and (iii) regional railway traction networks in the Brussels and federal regulations.

Recommendations

Energy community manager

- The Flemish and Brussels legislators should explicitly allow the outsourcing of the management of a REC and a CEC to a third party.
- To this end, they should provide for the legal status of an energy community manager. This could be inspired by the syndicus of a VME.
- The manager's role should entail responsibility for the daily management of the EC and to defend its interests, without having impact on the effective control, which resides with the members or shareholders.
- The legislators should determine minimum professional qualifications required to become 'energy community manager' in order to promote proper management of ECs.

Mandate

- It is recommended that the Flemish and Brussels legislators expressly acknowledge the mandate possibility for ECs to exercise the right of free suppliers' choice of its off-takers. This should include clarification that such a mandate: (1) cannot infringe the free supplier's choice and (1) is revocable at all times (within 3 weeks).
- They could also consider providing a model mandate agreement.

⁸ E.g. see Recital (11) of the IEMD.

6 Consumer protection

Art. 16.1(c) IEMD and Art. 22.1 REDII determine that EC participants maintain their rights as household customers. Article 10 of the Electricity Market Directive lists all the basic contractual rights that suppliers have to guarantee when contracting with final customers, including their rights to information, to transparent invoicing, ability to compare energy prices and to dispute settlement. Additionally, consumers have a right to a supplier of last resort (see section on DSOs for universal service), and vulnerable households need to be protected. In the Flemish Region, these rights are implemented in article 3.2.18 Energiebesluit.

If ECs acted as suppliers, they would in principle have to guarantee these rights vis-à-vis EC participants and/or other “outside” customers.

- In relation to the EC participants (‘inside the EC’), this could constitute a considerable administrative and financial burden, which should be limited as much as possible to facilitate ECs and taking into account that the directives mention the activity of ‘sharing’ rather than ‘supplying’. Keeping this in mind, it should be reviewed how consumer rights can be translated into the regional frameworks for ECs, in a way that is both useful and legally possible and with respect of the basic rights of consumers.
- Energy communities having an excess of energy that they want to sell to more than 1 ‘outside’ customer should have to be considered as a supplier, having the same rights and obligations as regular suppliers.

Dispute settlement: In Belgian law, as a general rule, the regions are competent for energy matters. Consumer protection, however, falls under federal legislation. As a result, out-of-court dispute settlement in energy matters is provided through the federal energy ombudsman. In Flanders, article 3.1.2, 7° Energiebesluit moreover contains an obligation for suppliers to provide a fair and simple internal complaints system. On the one hand, the energy supplier has to provide a system of internal filing of complaints. On the other hand, a system of out-of-court dispute settlement in the form of an energy ombudsman or a consumer protection organisation also has to be provided. To keep costs in check, ECs could prioritise mediation as the means for internal dispute settlement, while the existing energy ombudsman could be employed for external disputes.

Right to price comparison: The federal “Consumentenakkoord” obliges every supplier to allow customers to compare their prices with other energy suppliers’ prices in such a way that all relevant elements of the price are included. ECs are only obliged to guarantee this price comparison if they sign this document. In order to guarantee the equal treatment of final customers within an EC, they should however do so, as far as possible. Good practice guidelines on price comparison could preferably be drafted by the regulator, taking into account experiences and insights from pioneer ECs.

In Flanders, article 3.1.3, °4 b) Energiedecreet in this respect determines an objective comparison between prices and conditions of energy suppliers as one of the tasks of the Flemish regulator VREG. Additionally, art. 14 IEMD provides that Member States should provide at least one comparison tool that includes the whole market. If not possible, the tool should then provide a clear explanation for this. It is unclear from the European text if this implies that ECs should be included in the same way as regular suppliers. In this regard, it stands to reason that VREG should, as far as possible, also include ECs in this comparison, so

as to increase awareness of the existence and potential of ECs. VREG could, amongst other options, make a disclaimer in the comparison tool that energy communities are not part of the comparison, as they are not comparable to regular suppliers, include EC's in the tool, but in a limited way, or provide a separate tool for EC's.

Transparent Invoicing: Article 10 of the IEMD on basic contractual rights lists all the rights final customers are entitled to from their supplier regarding their contract. These rights include information on „services provided, the service quality levels offered, as well as the time for the initial connection,“ maintenance offered, conditions of duration, renewal and termination of contract, compensation and refund arrangements. Article 10 also covers customers' rights to transparent information on prices and tariffs, payment options, general terms and conditions as well as alternative measures to disconnection for consumers facing disconnection. This level of information may be challenging for energy communities to provide in a way comparable with other suppliers as they do not function exactly in the same way as a professional supplier.

Vulnerable customers: European regulations demand that member states ensure that vulnerable customers can participate in a CEC or REC, without being discriminated against. The inclusion of vulnerable customers can create additional costs for ECs. These costs are caused by two factors: the cost of the application of social tariffs, and the cost created by the increased likelihood of non-payment of members to the EC.

In Belgium, the regular definition of a protected client, is stated in the federal law. Customers that fall within the definition of protected client are entitled to a social maximum tariff that is the same in the whole Belgian territory. The application of this social maximum tariff creates an additional cost for ECs. A mechanism to compensate for the difference between the social maximum tariff and the regular energy prices already exists today for regular suppliers. Art. 8 of the Royal Decree of 22 December 2003 provides the legal basis for this mechanism with a fund called the 'Fonds ten gunste van residentiële beschermde klanten.' In order to facilitate ECs, this mechanism (or a similar type of a compensation fund) should also apply to ECs that include protected clients.

The inclusion of vulnerable customers in ECs may increase the likelihood of non-payment that will fall on the EC and its members, potentially raising the costs of membership. In order to compensate for this risk, ECs should be able to receive some form of reimbursement for including vulnerable customers.

This possible reimbursement should be a general practice for the energy supply activities, but in case only applied to ECs, it would not constitute a discrimination towards other market parties because the difference in treatment is motivated by the specific nature of ECs. Namely, EC are market parties that do not have a primary purpose of profit-making, they do not contain participants with a main economic activity in the energy sector, they require 'open' participation, they require a certain social cohesion and trust between the participants, and they operate on a much smaller scale than regular market parties. Although a general practice of reimbursement in case of non-payments seems the best way forward, a specific treatment of energy communities seems also possible, in particular while they are in early stages of development. Once ECs become mainstream, discrimination against other market parties that face the same issue of non-payment will become an issue. A possible way for the legislator to decide upon these reimbursements, is to link them to the scale and stage of the operation. This way, only small scale and early-stage development ECs will be eligible for the reimbursement. Possible criteria to define the scale are, for

example, the amount of participants in an EC combined with the percentage of vulnerable customers participating in the EC.

Another option to limit the risks associated with non-payment would be for the legislator to provide an obligation for ECs to insure themselves against non-payment of vulnerable customers.

A customer has the right to a supplier of last resort as stipulated in article 27 of the IEMD on universal service. As stated in the above section on DSO status, in case the EC acts as a DSO, it may be obliged to provide this service. However, in case of DSO connected customer, this responsibility would better fit with the public grid DSO as the EC members (or the EC as a whole) will remain connected to the public distribution grid.

Recommendations

- The regional legislator should clearly provide that the supplier of the residual energy remains responsible for the invoicing and information provision for the amount of energy residually supplied. The energy community, as a legal entity, should have the responsibility for the invoicing and information provision to its members (covering the shared energy and possibly other services). The EC should be able to transfer this responsibility to another party.
- The regional legislator should expressly acknowledge the possibility that ECs can transfer the responsibility for invoicing and information provision to the residual supplier of the EC in those cases where an EC has a mandate for making a contract with a single energy provider for the residual energy supply of its members
- In relation to self-consumed energy within the ECs, a simplified invoicing obligation should be possible and recommended.
- Regarding dispute settlement, the regional legislator could provide for mediation as the standard means for disputes within the EC and extend the existing system for suppliers (e.g. via energieombudsman, geschillendienst) for external conflicts.
- The regional legislator should take additional measures to facilitate the including of vulnerable customers in ECs
 - ECs should be included in the mechanism of art. 8 of Royal Decree of 22 December 2003, in order to receive a compensation for the difference in price between the social maximum tariff and the regular energy price.
 - ECs should in the early stages of development receive some form of reimbursement, for including and covering vulnerable customers in case of non-payment.

7 Legal form

The IEMD and REDII respectively provide that CECs and RECs are legal entities but leave it to the Member States to decide which legal form CECs and RECs could or should have. The Directives also state that

the primary purpose of both RECs and CECs is “to provide environmental, economic and social community benefits” rather than to generate profits.⁹

Allowing only one specific legal form to be used to create a CEC or a REC might unduly limit the development and growth of ECs. In contrast, the EU Directives aim to provide an enabling framework and promote the development of RECs and CECs. However, it could be useful if the legislator set out certain best-practice guidelines for how to use certain legal forms (including examples, as appropriate). This could enable new CECs and RECs to learn from available experience, while leaving room for experimentation and innovation.

In order to protect the members of an EC, their liability should be limited. As a result, it should be required for an EC to choose a legal form (with limited liability) for its legal entity.

The Walloon legislator decided to allow ECs to have the freedom to regulate themselves in the way they want, but to impose minimum conditions by law. The choice of legal form for the EC is left to the discretion of the founders.

In Belgium, two legal forms are particularly suitable for fulfilling the aforementioned conditions set out under Art. 2.11 IEMD and Art. 2.16 REDII, namely the cooperative company or Coöperatieve Vennootschap (CV) and the non-profit association or Vereniging Zonder Winstoogmerk (VZW). Both the CV and the VZW can arrange in their statutes that the general assembly is governed through the principle of one member, one vote.

Effective control is not clearly defined in IEMD and REDII. This gives leeway for the Member States to give an interpretation to this concept. A straightforward way to define this concept in a regional framework would be to interpret ‘effective control’ as ‘majority shareholdership’ or ‘majority of the votes in the general assembly’. According to this interpretation, natural persons, local authorities and SME’s should always have ‘majority shareholdership’ or ‘majority of the votes in the general assembly’ in a CEC.

The primary purpose of the CV is to “*meet the needs of its shareholders or third interested parties and/or to develop their economic and social activities*”. Disadvantages of a CV include that some individuals may not be eligible to participate due to their professional situation, since a CV is a for profit company and in some professions, employees are only allowed participation in not-for-profit organisations.

The VZW is a legal form that requires a primary purpose that is not aimed at making profit (‘belangeloos doel’). Hence, the VZW is not allowed to directly or indirectly distribute profits to its members and may only spend any profit for its primary purpose. Other disadvantages of a VZW include that in case of liquidation the assets of the VZW must be transferred to another VZW and cannot be shared between its members.

While the CV and the VZW seem particularly suitable legal forms for ECs, we consider that it is not necessary for the legislator to determine a standard legal form or forms for an EC.

⁹ REDII, art. 2.16; IEMD, art. 2.11.

Recommendations

- The legislator should leave the choice of legal form to the EC to allow for experimentation. It should provide guidelines on how to best employ the most common or suitable options (especially CV and VZW).
- The legislator should set out in law general requirements that every entity aspiring to be an EC has to meet. This should in particular include the primary purpose as determined in the applicable EU Directives: to provide environmental, economic and social community benefits rather than to generate profits.
- The legislator should provide a definition of 'effective control'. This definition should preferably be 'majority shareholdership' and/or 'majority of the votes in the general assembly'.

Recommendation for EC creators

- Actors interested in setting up an EC may wish to consider a VZW or a CV as particularly suitable legal forms.

8 Scope of proximity

REDII requires that RECs are “effectively controlled by shareholders or members that are located in the proximity of the renewable energy projects that are owned and developed by that legal entity” (Art. 2.16(a)). The inclusion of the proximity criterion in REDII implies a geographical scope that is smaller than the whole jurisdiction of a Member State. Therefore, proximity in REDII seems to refer to an area that is smaller than a whole region.

The Walloon legislator has already established some criteria. It has opted for a hybrid version of geographical and technical criteria. According to Art. 2, 2^o *quinquies* of the Walloon ‘Décret électricité’, the local perimeter is defined as the perimeter of which the off-take or injection points are downstream of one or more public substations for transformation of electricity under medium and/or low voltage electricity substations. It further requires that the connection points be located “in a geographical area in which the technically, socially, ecologically and economically optimal part of the grid is mobilized to promote the local collective self-consumption¹⁰ of renewable electricity.” This is a very broad criterion, allowing widely varying interpretations.

Proximity has not been defined in Brussels or Flanders yet. Defining pre-determined sub-criteria of proximity via a network based approach, and/or maximum allowed distance approach (France) and/or administrative restrictions (Greece, Germany), e.g. the border of a municipality and adjacent municipalities, would provide for greater clarity and transparency. It would prevent delays and uncertainty of the REC having to wait for a governmental decision on its maximum perimeter that entails a risk of discriminatory decisions (and subsequent judicial proceedings).

¹⁰ Please note that the Walloon legislator has chosen to equate collective self-consumption activity with REC activities, which is not considered as such in REDII, to the contrary (cf. distinction in art. 21 REDII on (jointly active) renewables self-consumers vs. art. 22 REDII on RECs).

One specific aspect related to the proximity requirement of the REDII concerns its potentially limiting reference to “renewable energy projects that are **owned and developed**” by the REC (own emphasis). Similarly, Art. 22.2(b) of the REDII refers to “production units **owned by** that renewable energy community”.¹¹ In reality, however, RECs frequently lease or rent relevant renewable energy assets and a narrow interpretation of ownership may unduly limit the scope of REC membership. VREG therefore suggests in its Consultation to allow taking into account the renewable energy assets rented or leased by a REC when determining the proximity of the REC assets.

Recommendations for policy maker

- When defining the proximity criteria for Flanders and Brussels, the legislators should take into account that, according to REDII, RECs are to provide environmental, economic and social community benefits locally. The legislator should in any event define the scope of "proximity" as smaller than the entire Region.
- The two legislators should consider defining proximity:
 - By defining general and clear rules applicable for all cases and/or
 - Based on a set of pre-determined criteria applicable to different categories of RECs (e.g. based on energy source: allowing larger area for wind than PV).
- Legislators should expressly decide that rented or leased renewable energy assets of a REC are taken into account when determining the proximity of the REC.

9 Direct lines

According to the IEMD, a direct line is “either an electricity line linking an isolated generation site with an isolated customer or an electricity line linking a producer and an electricity supply undertaking to supply directly their own premises, subsidiaries and customers” (Art. 2.41). Since local production and consumption is an essential aspect of ECs, direct lines are a valuable asset for strengthening the viability of ECs. This could be the case when the production installation is not situated within the geographically confined area of the EC, when the EC could supply surplus electricity to an offtaker outside the EC but in the immediate vicinity of the EC or to an offtake within the boundaries of the EC but not being a member of the EC.

Furthermore, direct lines are highly relevant in the absence of reduced grid tariffs for energy transfers within an EC (for instance with regard to the transfer of electricity that is locally produced and consumed). If reduced grid tariffs apply to ECs, the demand for direct lines by ECs will be less high.

The problem is that a direct line is considered as an exception to the general rule that a consumer should be connected to and supplied through the public distribution grid operated by a DSO. As a result, it is challenging to receive permission for a direct line from the EC to supply another customer outside the EC or to connect production facilities of the EC to deliver energy to its members/participants (including the case where a production facility of a REC formally falls outside the boundaries of the REC given the

¹¹ Compare with art. 21.5 of REDII, clearly allowing third party ownership for renewable self-consumers.

proximity requirement – see section on proximity). Whereas direct lines should not become a mainstream solution, there seems to be room for improvement and simplification of the restrictive rules worth exploring.

In the Flemish Region, direct lines are treated differently depending on whether or not they are located “on the proper site”. Direct lines on the proper site only have to be notified to VREG. If not on the proper site, direct lines must be approved by VREG before they are installed and/or operated (as the case may be). Direct lines not on the proper site will also have to pay a yearly tax. In practice, direct lines “on the proper site” as currently defined will be rare for ECs, since the REC/CEC will rarely have property rights or other rights (erfpacht, opstal, concessie) on all the cadastral parcels on which the direct line is located and these rights will often be divided among the REC/CEC participants. Options for lightening the financial and administrative burden of direct lines of ECs could be considered, while still taking into account the safety of the installations and the grid.

In the Brussels Capital Region, every direct line must obtain a permit from the Minister, without consideration of the site. The Minister can only grant a permit after the access to the local transmission grid or the distribution grid has been rejected.

In Wallonia, a direct line must be approved by the regulator CWaPE. Direct lines not on the proper site are only allowed if the applicant has been refused access to the network, it does not have an offer to connect to the public network on reasonable technical and economic conditions, or the direct line is connected to an authorized private network or professional closed network.

Recommendation

- The legislators and the regulators should consider that the demand for direct lines by ECs will be higher in the absence of reduced grid tariffs for energy transfers within an EC. In order to enable the viability of ECs, reduced grid tariffs and/or a more flexible system for direct lines seems necessary.
- The Flemish Region could adapt the procedure on direct lines allowing ECs to connect the EC to production facilities or neighbouring offtakes without additional burdens.
- The Brussels Region should abandon the requirement that approval of a direct line is only possible if access to the grid has been rejected. It should instead provide for quasi-automatic approval of direct lines (with only a notification requirement) to the members of an EC and production facilities owned and developed by it.

10 Enabling local participation of larger companies

The EU provisions on RECs and CECs seem to limit the participation of companies in ECs. The IEMD requires CECs to be “effectively controlled by members or shareholders that are natural persons, local authorities, including municipalities, or small enterprises”, whereas the REDII requires the shareholders or members of RECs to be “natural persons, SMEs or local authorities, including municipalities”. As a result, inclusion of companies other than small enterprises in CECs or SMEs in RECs is severely constrained. This creates a situation in which constellations of companies cannot participate in or set up a system of collective self-consumption (or energy sharing) in the same way as would be possible within a CEC or a REC.

While the European directives seem to put the role of the citizen central, participation by larger companies can at times constitute an important asset and can facilitate the fuller exploitation of the potential of certain (industrial) sites.¹² Local ECs could thereby take advantage of companies' sharing energy assets within the scope of the community and of their experience and financial capacity to test and roll out new technologies. In turn, companies beyond SMEs could be incentivised to invest in renewable energy and optimize RES potential, flexibility, and grid infrastructure. This may result in cost reductions for final customers. Large players will also have a larger impact on the energy mix due to their higher levels of energy consumption compared with most SME's and residential customers. Besides energy transfer aspects, EC's can provide other services to their members such as collective purchasing, efficiency measures (e.g. insulation and roof) and facilitate social cohesion, exchange of (innovative) ideas on energy related activities such as water management and others.

As cooperation with relevant companies without them becoming members or majority shareholders is not easily arranged for, one possible way forward may be to provide for an additional legal framework for local participation of larger companies, beyond RECs and CECs, in national/regional law. The purpose of introducing such framework is to provide possibilities for larger companies to participate in local energy sharing and to promote renewable energy production.

In order to be compatible with EU law, such framework would still need to be limited strictly to local participation of larger companies, and should not defeat the purpose of CECs and RECs, namely, to promote energy communities for their benefits or the benefit of the relevant local area rather than for financial profit. A carefully designed additional legal framework could facilitate the growth of such ECs, increase their impact and address practical issues related to the involvement of larger companies arising under existing conditions.

In this regard, the additional legal framework for local participation of larger companies would still include the actors already covered by CEC's and REC's, but would further broaden the scope of full participation to include companies of all sizes, granting them also decision making powers. The primary target group of this additional legal framework for local participation of larger companies would be the (new) industrial sites in Flanders (and Brussels) that often contain a multitude of companies, of different sizes, and that under the new regulatory framework of CEC's and REC's would face difficulties to self-consume their renewable energy and participate in other energy services together with other companies within their proximity.

The legislator should, however, guarantee that RECs and CECs still remain a viable option and that the additional legal framework for local participation of larger companies does not infringe on, or indirectly limit, the rights given to RECs and CECs. In order to ensure this, the legislator might first engage in an impact analysis to analyse if a possible additional legal framework for local participation of larger companies would undermine the goals of the EMD II and RED II, and in the meanwhile continue to work with test beds (in a sand box environment if needed).

At a minimum, it should be ensured a project that is set up under the additional legal framework for local participation of larger companies serves a similar primary purpose (providing environmental, economic or social community benefits for its shareholders or members or for the local areas where it operates, rather

¹² Certain pilot sites within the ROLECS-project have also echoed this sentiment.

than financial profits) and applies to a limited geographical area (“local” energy community). Further criteria may be considered.

Recommendation

- The Flemish and Brussels Region legislators should consider providing an additional legal framework to allow companies to more forms of local participation and energy exchange as well, in addition to CECs and RECs to enable participation by larger companies.
- In order to ensure that this additional legal framework for local participation of larger companies complements RECs and CECs on a level playing field, the legislators should establish specific requirements for these energy projects, at a minimum including that:
 - Their primary purpose is to provide environmental, economic or social community benefits for its shareholders or members or for the local areas where it operates, rather than financial profits;
 - Their scope is local, i.e. limited to a specific geographical area.
 - A supply license is required when supplying outside the EC.
 - A minimum percentage of an EC’s overall investments should go to renewable energy.
- Another option would be to provide more possibilities in the legal framework for companies in regard to self-consumption