

# Legislation for renewable energy communities and citizen energy communities in Austria: changes from the legislative draft to the finally enacted law

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## ABSTRACT

Based on the European guidelines—the Renewable Energy Directive (RED) and the Electricity Market Directive (EMD)—legislation to enable Renewable Energy Communities (RECs) and Citizen Energy Communities (CECs) is currently being developed in individual European countries. In July 2021, Austria, as one of the first countries in Europe, enacted legislation on both, RECs and CECs. A previous study of Fina and Fechner provided a detailed comparison of the legislative draft for energy communities in Austria, published in March 2021, to the European guidelines. Strengths and weaknesses of the Austrian transposition were highlighted and discussed. Now that the enacted version of the Austrian legislation has been published, important changes from the legislative draft to the final legislation have been identified. Building upon Fina and Fechner, this work aims at supplementing the previous study by examining and critically discussing these changes in order to present the Austrian legislation on energy communities as enacted to an international readership.

## 1. INTRODUCTION

The *Renewable Energy Directive*<sup>1</sup> and the *Electricity Market Directive*,<sup>2</sup> both parts of the *Clean Energy for All Europeans Package*<sup>3</sup> of 2019, provide, amongst others, provisions for Renewable Energy Communities (RECs) and Citizen Energy Communities (CECs). European Member States are required to transpose these guidelines into national law in order to legally enable the establishment of energy communities. National transpositions are at different stages of development in different countries. To date (October 2021), in many countries, legislation concerning RECs and CECs has not yet been proposed. Only some countries, such as

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- 1 EUR-Lex. Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources 2018.
- 2 EUR-Lex. Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU 2019.
- 3 European Commission, 'Clean Energy for All Europeans Package 2019' <[https://ec.europa.eu/energy/topics/energy-strategy/clean-energy-all-europeans\\_en](https://ec.europa.eu/energy/topics/energy-strategy/clean-energy-all-europeans_en)> accessed 3 November 2021.

Italy and Belgium, having parts of legislation for RECs and CECs already in place, and Austria having the whole legislation for RECs and CECs in place, stand out.

In Austria, efforts to transpose the European guidelines into national legislation began in 2020; the first draft was presented in September 2020. After expert feedback, a second draft was published in March 2021, which functioned as the basis of political discussion before final legislation was enacted in July 2021. Provisions for energy communities in Austria are laid down in the novel EAG<sup>4</sup>—*Erneuerbaren-Ausbau Gesetz* (in English: *Renewable Energies Expansion Act*)—and the EIWOG<sup>5</sup>—*Elektrizitätswirtschafts- und Organisationsgesetz* (in English: *Electricity Industry and Organization Act*). (The EAG does not only contain legislation for energy communities. Energy communities are rather a marginal topic, while the main part of the EAG focuses on fundamentally adapting the support structure for renewable electricity in order to achieve the goal of 100 per cent renewable electricity in Austria until 2030.)

A recent study<sup>6</sup> provides detailed insights into the transposition of the European guidelines into Austrian law based on the legislative draft of March 2021. During the final political coordination, some important details have been modified. Therefore, this work aims to identify, evaluate and discuss the changes made from the legislative draft to the final version. The contributions of this work are multiple: Since this study provides details of adaptations made from the legislative draft to the final law, insights into the legislative process (eg which details are adapted in which stage of the legislative process) in Austria are provided. Moreover, this article is important to complement the previous study<sup>7</sup> in the interest of providing a complete picture of the Austrian legislation on energy communities to an international readership. Doing so, legislators worldwide are provided with detailed information about strengths and weaknesses of the Austrian approach. This can support and facilitate the legislative process in other countries. And, finally, this study, in combination with the previously published article,<sup>8</sup> aims to actuate researchers from other countries to do the same and provide details on legislation for energy communities in the context of the CEP with the goal of building a scientific basis for energy community legislation in Europe. This example has already been followed by Palm.<sup>9</sup>

The remainder of this study is structured as follows. Section ‘Energy communities in the context of the CEP’ provides a selection of literature concerned with energy communities in the context of the CEP. Section 2 details the changes made from the legislative draft to the enacted legislation and examines the implications thereof. Section 3 provides further discussion and concludes.

### Energy communities in the context of the CEP

Since recent European Union (EU) energy policy seeks to promote renewable energy prosumers in each Member State, Inês and others<sup>10</sup> carry out a cross-country comparison of the regulatory frameworks to reveal the main barriers and possibilities that these have posed to collective renewable energy prosumers such as RECs and CECs. Roberts<sup>11</sup> discusses implications of the RED and EMD, both parts of the CEP, for the role

4 BMK, ‘EAG-Erneuerbaren-Ausbau-Gesetz. BMK Bundesministerium fuer Klimaschutz, Umwelt, Energie, Mobilitaet, Innovation und Technologie 2021’ <[https://www.parlament.gv.at/PAKT/VHG/XXVII/BNR/BNR\\_00348/index.shtml](https://www.parlament.gv.at/PAKT/VHG/XXVII/BNR/BNR_00348/index.shtml)> accessed 3 November 2021.

5 RIS, ‘Elektrizitätswirtschafts- und organisationsgesetz 2010. Rechtsinformationssystem des Bundes 2010’ <<https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20007045>> accessed 3 November 2021.

6 B Fina and H Fechner, ‘Transposition of European Guidelines for Energy Communities into Austrian Law: A Comparison and Discussion of Issues and Positive Aspects’ (2021) 14 *Energies* 3922.

7 *ibid.*

8 *ibid.*

9 J Palm, ‘The Transposition of Energy Communities into Swedish Regulations: Overview and Critique of Emerging Regulations’ (2021) 14 *Energies* 4982.

10 C Inês and others, ‘Regulatory Challenges and Opportunities for Collective Renewable Energy Prosumers in the EU’ (2020) 138 *Energy Policy* 111212.

11 J Roberts, ‘Power to the People? Implications of the Clean Energy Package for the Role of Community Ownership in Europe’s Energy Transition’ (2020) *Review of European, Comparative & International Environmental Law*. doi:10.1111/reel.12346.

of community ownership in Europe's energy transition. The legal status of energy communities under the framework of the CEP is elaborated on by Gerasina.<sup>12</sup> Going one step further, Sokolowski<sup>13</sup> discusses concrete ideas about how to regulate community energy in national legislation. Focusing specifically on the social component, Heldeweg and Saintier<sup>14</sup> propose a way to recognize RECs as legal entities to be embedded within a separate socio-legal institution to achieve a just new energy system.

Zulianello and others<sup>15</sup> highlight how energy communities have been introduced in the European legislation, before focusing in detail on the Italian context, describing the law that implemented a partial and anticipated transposition of the RED and point out open questions. Also focusing on the Italian situation, Candelise and Ruggieri<sup>16</sup> present novel and comprehensive evidence on recent developments in the Italian energy community sector.

Focusing specifically on the situation of Austria, the authors in Fina and Fechner<sup>17</sup> provide a comparison of the EU guidelines and the transposition into Austrian legislation (based on the legislative draft) and discuss potential issues as well as positive aspects. Similarly, the transposition of the RED and EMD into national legislation is underway in Sweden. The Swedish Energy Market Inspectorate has proposed a new law on energy communities, which has been sent for consultation. Therefore, Palm<sup>18</sup> analyses this proposal and the responses from the referral bodies commenting on the new energy community regulations. After legislation for energy communities will have actually been enacted in the different countries, it is the duty of scientific research to introduce and critically discuss the changes made from the legislative drafts to the final legislation. This step is now taken with this study for the Austrian case, presenting the changes from the legislative draft to the final legislation, including a discussion of such.

## 2. CHANGES MADE FROM THE LEGISLATIVE DRAFT TO THE FINAL VERSION

This section provides details concerning the changes made from the legislative draft of March 2021 to the enacted legislation (July 2021). While most of the legislative draft has remained unchanged, there are some provisions that have been tightened, modified or expanded in the final version of the Austrian energy community legislation. Section 'Provisions for RECs' examines changes concerning RECs, Section 'Provisions for CECs' examines changes concerning CECs and Section 'Provisions for both renewable and citizen energy communities' provides an overview of changes concerning both, RECs and CECs. It needs to be noted that every text passage of the Austrian legislation that is quoted in the course of this paper is a non-official translation into the English language, since the original legislative documents are only available in the German language.

### Provisions for RECs

This section aims at providing insights into the changes from the legislative draft to the final version of the legislation specifically concerning RECs. Section 'EAG section 79(2)' discusses the issue of financial gain, and Section 'EAG section 80(2)' introduces the market premium as an option to subsidize RECs.

12 O Gerasina, 'Energy Communities in the Centre of EU Energy Transition' (2020) Legal Status of Energy Community under the Clean Energy for all Europeans Package.

13 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.

14 MA Heldeweg and S Saintier, 'Renewable Energy Communities as 'Socio-legal Institutions': A Normative Frame for Energy Decentralization?' (2020) 119 *Renewable and Sustainable Energy Reviews* 109518.

15 M Zulianello, V Angelucci and D Moneta, 'Energy Community and Collective Self Consumption in Italy' (2020) 55th International Universities Power Engineering Conference (UPEC), IEEE, Torino - Italy).

16 C Candelise and G Ruggieri, 'Status and Evolution of the Community Energy Sector in Italy' (2020) 13 *Energies* 1888.

17 Fina and Fechner (n 6).

18 Palm (n 9).

*EAG section 79(2)*

‘The primary purpose of a REC is not financial gain, but to provide environmental, economic, or social community benefits to its members or to the areas in which it operates.’ This provision is present in both, the legislative draft and the finally enacted legislation. However, in the latter, it has been expanded as follows concerning the provision for financial gain: ‘This must be stated in the articles of association unless it is already apparent from the form of legal entity.’

This addition further emphasizes that RECs may not be established with the primary goal of generating a financial profit. The legislators’ intent in emphasizing that generating financial profits may not be the primary goal of RECs is to avoid that RECs develop towards becoming a pure business case for either established actors in the energy market environment, or novel stakeholders aiming to set foot in the field of energy communities. With the obligation to state in the articles of association of the underlying legal entity that financial gain is not the main purpose of the REC (if not already apparent from the form of legal entity), legislators want to ensure commitment to this provision. However, it is not illegal for a REC to make a profit for the benefit of the participants; RECs should be concepts that are able to break even, and also bring monetary benefits to the participants.

However, despite these good intentions, the legislators appear to show uncertainty about the practicability of excluding financial gain as a primary purpose for energy communities, as is indicated in Section ‘EAG section 91(3)’: There, legislators state that suggestions for improvement and the need for adaptation shall be evaluated specifically with regard to the practical applicability of the provisions for financial gains. If legislators were certain about their decision to prohibit the foundation of RECs (and also CECs) with the primary goal of generating revenues, this statement would be dispensable.

*EAG section 80(2)*

This provision provides another option for subsidizing RECs. It did not appear in the legislative draft. ‘Electricity generated but not consumed within a REC may be, up to a maximum of 50% of the total electricity generated within a REC, subsidised with a market premium. The market premium is calculated on the basis of the amount of electricity marketed by a REC and fed into the public grid. The market premium is not applicable to generation quantities consumed by or allocated to the members of the REC.’ (The subsidy scheme of a market premium is newly introduced in the EAG and has been designed to support renewable electricity and is now also used to benefit RECs. The market premium offsets the costs of electricity production from renewable sources and the average price on the electricity market. It thus replaces the fixed feed-in tariffs and follows the principle of direct marketing.<sup>19</sup>)

This new provision, which enables subsidizing generated electricity that is not consumed within the borders of RECs, is questionable. Energy communities are supposed to consume as much electricity as possible within their borders. This is even more important for RECs, the energy community concept that operates regionally (generation and consumption units within the medium voltage grid) or even locally (generation and consumption units within the low voltage grid). A provision that provides financial support for specifically those amounts of electricity that are not consumed within the REC reduces the incentive to maximize local or regional consumption. With the market premium’s applicability to unused amounts of renewable electricity in RECs, legislators might aim at motivating RECs to implement increased renewable electricity installation capacities in order to achieve the goal of 100 per cent renewable electricity until 2030 more easily. However, an implementation of larger renewable generation capacities without according strategy on how to use these additional amounts of electricity locally is expected to lead to significant burdening of the electricity grid.

19 Next Kraftwerke, ‘Marktpraemie und Marktpraemienmodell in Oesterreich: Wie funktioniert das?’ 2021 <<https://www.next-kraftwerke.at/wissen/marktpaemie>> accessed 3 November 2021.

### Provisions for CECs

This section examines legislative adaptations from the legislative draft to the finally enacted law specifically concerning CECs. Section ‘ElWOG section 16b(2)’ discusses the issue of financial gain, and Sections ‘ElWOG section 16b(4)’ and ‘ElWOG section 16b(5)’ introduce possibilities to subsidize CECs.

#### *ElWOG section 16 b(2)*

‘The primary purpose of a CEC is not financial gain, but to provide environmental, economic, or social community benefits to its members or to the areas in which it operates.’ This provision is contained in both the legislative draft and the enacted legislation. However, another provision concerning the issue of financial gain has been added to the final legislation, namely: ‘This must be stated in the articles of association unless it is already apparent from the form of legal entity.’

Similarly to RECs, CECs may also not be established for the primary purpose of generating a profit. Therefore, community founders are obliged to explicitly mention this point in the articles of association (unless already apparent). A detailed interpretation of this matter has already been provided in Section ‘EAG section 79(2)’.

#### *ElWOG section 16 b(4)*

This provision was added to the final legislation after amendments and states that ‘(generation) units of CECs may be subsidised’.

Since CECs are not intended to receive subsidies similar to those RECs are entitled to, it is important to explicitly state that CECs are entitled to a certain amount of financial support for their (generation) units. Compared to RECs, which are designated to receive financial support (such as a reduction of grid tariffs for electricity transfer within the community and exemptions from the electricity surcharge and the renewable energy surcharge), CECs are already insufficiently incentivized. From an entirely financial point of view, it could thus be expected that RECs might be adopted much more frequently than CECs. Besides, RECs do also have the advantage of not being constrained to the electricity sector, but also comprise the renewable heating sector (eg renewable gas). However, from the current point of view, three reasons to prefer the adoption of CECs over RECs can be identified: (i) if the proximity criterion for RECs cannot be fulfilled (REC participants and generation units need to be connected via the low voltage or the medium voltage grid), (ii) if other than renewable generation technologies are used and (iii) if a greater diversity of participants shall be achieved (eg in contrast to the provisions for RECs, energy suppliers are not excluded from participating in a CEC, as long as they do not have a control function).

#### *ElWOG section 16 b(5)*

This provision has been added to the final legislation and did not appear in the previous legislative drafts. ‘Renewable electricity generated but not consumed within a CEC may be, up to a maximum of 50% of the total electricity generated within the CEC, subsidised with a market premium. The market premium is calculated on the basis of the amount of electricity marketed by a CEC and fed into the public grid. The market premium is not applicable to generation quantities consumed by or allocated to the CEC’s members.’

Similarly to RECs, CECs are entitled to have a portion of their electricity subsidized with a market premium. However, the market premium is only applicable to electricity from renewable sources that is not used within the borders of the CEC. This issue has already been discussed in detail in Section ‘EAG section 80(2)’.

### Provisions for both renewable and citizen energy communities

This section aims at providing insights into changes from the legislative draft towards the finally enacted version of the legislation concerning both RECs and CECs. Section ‘EAG section 91(3)’ introduces the

adaptations of provisions regarding the evaluation process in the context of financial gains. Sections ‘EIWOG section 16d(2)’ and ‘EIWOG section 16d(4)’ elaborate on the grid operators’ and energy communities’ duty to provide the regulatory authority with necessary information. Information concerning the operation and control of the energy communities’ generation units is provided in Section ‘EIWOG section 16d(5)’, Section ‘EIWOG section 16d(6)’ introduces the possibilities of energy communities concerning the grid operator status, and Section ‘EIWOG section 111(8)’ provides information concerning the possibility of participating in more than one community.

*EAG section 91(3)*

‘The current status and development of RECs and CECs shall be evaluated, and unjustified obstacles or limitations to further development shall be identified. Furthermore, suggestions for improvement and the need for adaptation shall be evaluated.’ This provision has been further tightened. The enacted version of the novel legislation states that suggestions for improvement and the need for adaptation shall be evaluated ‘specifically with regard to the practical applicability of the provisions for financial gains’ (since the main purpose of RECs and CECs may not be financial gain).

This addition to the final legislation is of particular interest as it calls the fact that energy community founders are obliged to enshrine in the articles of association that financial gain is not its primary purpose (unless it is already apparent from the form of legal entity) in question. This could indicate that legislators doubt that the concepts of RECs and CECs will be widely adopted without the possibility of establishing communities for the primary purpose of gaining revenue. Therefore, if proven impractical, the provisions concerning financial gain will perhaps be amended in the future. However, since it is not illegal for RECs and CECs to generate revenues for the benefit of their participants under the premises explained in Sections ‘EAG section 79(2)’ and ‘EIWOG section 16b(2)’, it is not entirely clear why legislators specifically aim at evaluating their provisions concerning financial gain.

*EIWOG section 16d(2)*

It has already been stated in the draft legislation that: ‘Grid operators must be informed about the establishment of a REC/CEC as well as about the following elements and, if necessary, changes to these elements: generation and consumption facilities, metering point numbers, allocation of generated energy, allocation of non-consumed energy per 15 minutes, admission and withdrawal of participating network users, termination of the REC/CEC, and dismantling of generation facilities.’ The final legislation adds that grid operators are obliged to make this information available in its entirety to the regulator (E-Control) for the purpose of random or ad hoc verification of compliance with the statutory requirements for energy communities.

Since the concepts of RECs and CECs are new to Austria, it is important that the regulator (E-Control) has the power to verify energy communities’ compliance with the statutory requirements. In doing so, potential ‘grey areas’ in the legislation—that have not been noticed during the process of creating the novel legislation and occur naturally once practical implementation is actually conducted—can be identified and addressed.

*EIWOG section 16d(4)*

This provision is a new addition to the final legislation. ‘Energy communities are obliged to make the required data and information (beyond the information specified in Section ‘EIWOG section 16d(2)’) available to the regulator (E-Control) upon request for the purpose of random or ad hoc verification of compliance with the legal requirements. In the event of non-compliance, the regulator may order the restoration of the lawful state. Moreover, the regulator shall publish an annual report on energy communities founded in Austria, in particular on the number and regional distribution thereof.’

EIWOG section 16d(2) and EIWOG section 16d(4) officially designate the Austrian regulatory authority E-Control as the controlling body for energy communities. In order to allow E-Control to exercise its duties, grid operators and energy communities are obliged to cooperate by providing the necessary information and data. A certain amount of control exercised by a neutral party seems prudent, especially since RECs and CECs are novel concepts with no empirical data. Obliging the regulator to publish annual reports containing key data for energy community development ensures that the development of these novel concepts is properly monitored. Such information can provide valuable insights, not only on a national but also on an international level.

*EIWOG section 16d(5)*

This provision is a new addition to the final legislation, previously only contained in the annotations to the legislative draft. ‘Generation units are to be operated and controlled by the energy community. With regard to the operation and maintenance of its generation facilities, an energy community may use the services of a third party.’

This adaptation is of significant importance, since it was already recommended in Fina and Fechner<sup>20</sup> to transfer particularly useful provisions from the non-legally binding annotations to the legislation itself. Since privately owned generation units also need to be operated and controlled by energy communities, it is important to enshrine such a provision in law. Thus, by ensuring that participants do not have the option to refuse having their generation units operated and controlled by the energy community (or rather a third party contracted to operate the community), conflicts between the energy community operator and the participants can be avoided.

*EIWOG section 16d(6)*

‘The energy community is required to use the services of a licensed grid operator.’ This change from the legislative draft to the final legislation is the most incisive one. In the legislative draft, it was provided that energy communities should be entitled to own and operate distribution networks. This provision has been removed from the final legislation.

Originally, Austrian legislators intended to allow energy communities to own and operate distribution networks. It was expected that this option would remain a theoretical one in most cases but that it would also incentivize grid operators to collaborate with energy communities to avoid potential competition. However, despite limiting the range of action for energy communities by removing this option, this change in the final legislation may ultimately be beneficial since it reduces the complexity of the subject matter.

*EIWOG section 111(8)*

‘From 2024 onwards, consumption and generation units may participate in more than one energy community.’ In the draft version, it was stated that participation in more than one energy community would be allowed from 2022 onwards. Thus, this provision has been delayed by 2 years.

Allowing consumption and generation units to participate in more than one energy community further complicates an already complex situation, especially with regard to the prioritization of electricity allocation and billing/accounting. In Fina and Fechner,<sup>21</sup> it has been suggested to withdraw this option, or at least delay it until after initial roll-out of RECs and CECs. The 2-year delay allows affected stakeholders to undertake preparations and to develop a framework—such as a prioritization strategy—for consumption and generation units participating in more than one community.

20 Fina and Fechner (n 6).

21 *ibid* (n 6).

### 3. DISCUSSION AND CONCLUSIONS

Following the first draft in September 2020 and the revised draft in March 2021, the text of the now-enacted legislation for energy communities in Austria was published in July 2021. In Fina and Fechner,<sup>22</sup> the contents of the legislative draft of March 2021 are made available to an international readership, and policy makers of other countries are provided with information about the strengths and weaknesses of the Austrian legislation. During the parliamentary process, the draft of March 2021 underwent a number of changes. Therefore, this work aims to supplement the work of Fina and Fechner<sup>23</sup> by elaborating on the adaptations from the draft to the final version of July 2021 in order to present the completed Austrian framework for energy communities as enacted.

Some changes to the legislative draft can be considered positive, others also have downsides. On the one hand, it is gratifying that the legislator recognizes the importance of energy communities beyond financial gain by obliging founders to expressly state in the articles of association unless apparent from the form of legal entity that financial gain is not the primary purpose of the community. On the other hand, it is uncertain whether this is an actual improvement or whether it might hinder the establishment of energy communities including commercially oriented members or co-investors. A welcome improvement is the creation of a legal basis for the regulator E-Control to carry out its control function. On the downside, the legislation provides that renewable electricity that is not used within the energy communities and instead fed into the grid may be subsidized to a certain extent with a market premium. This is counterproductive since energy communities should be incentivized to use as much electricity as possible within their own borders. It seems that by taking this step, the Austrian legislator seeks to support RECs and CECs in breaking even. Finally, it is most unexpected that energy communities are not entitled to own and operate distribution grids anymore. In the draft versions of the legislation, energy communities were given this option.

Another positive change would have been to include the following passage from the annotations of the legislative draft in the final legislation in order to avoid creating a barrier to establishing RECs<sup>24</sup>: Since generation and consumption units of RECs need to be connected via the low voltage or the medium voltage grid in the concession area of one grid operator (EIWOG section 16c(2)) to satisfy the proximity criterion, retrospective changes to the grid structure may affect established RECs. In the annotations to the draft legislation, it is stated that retrospective technical changes of the distribution grid shall not affect established RECs. However, annotations are not legally binding, wherefore it would have been useful to include this passage in the final legislation.

Since the concepts of RECs and CECs are still very novel and, most European countries have yet to provide comprehensive legislation, it is expected that the laws concerning energy communities will be continuously adapted and improved. Therefore, it is necessary that legislators from different countries learn from one another—from the positive as well as negative aspects of each national legislation—in order to achieve the best possible energy community framework. Therefore, future work should elaborate on the national legislation of other countries to ensure accessibility to an international audience.

22 *ibid* (n 6).

23 *ibid* (n 6).

24 *ibid* (n 6).