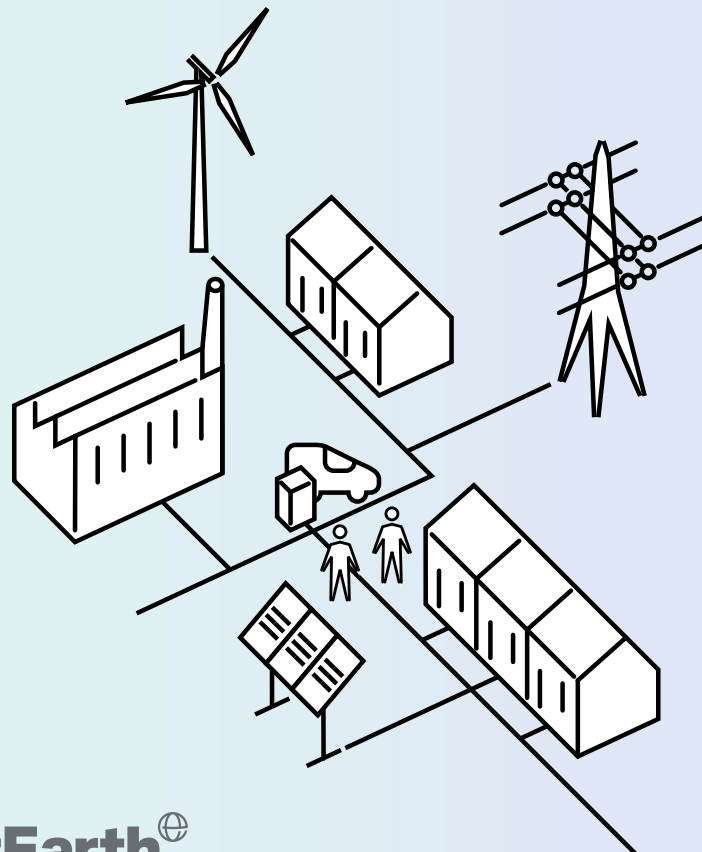
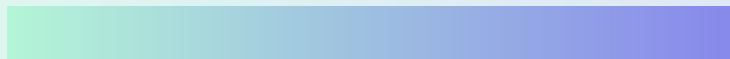


Enforcing the rights of energy communities

Overview of judicial and non-judicial mechanisms at EU and national levels



ClientEarth[®]

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Acronyms

CEC: Citizen Energy Community

CEP: Clean Energy Package for All Europeans

CJEU: Court of Justice of the European Union

EU: European Union

EP: European Parliament

IEMD: 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 (Internal Electricity Market Directive)

MS: Member states of the European Union

PETI: Committee on Petitions

REC: Renewable Energy Community

REDII: 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 (recast) (Recast Renewable Energy Directive)

TEU: Treaty on the European Union

TFEU: Treaty on the Functioning of the European Union

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Summary

In 2019, the European Union (EU) adopted the Clean Energy for all Europeans package (CEP) which for the first time established specific provisions for Renewable Energy Communities (RECs) and Citizen Energy Communities (CECs). The two concepts have been respectively introduced by the Renewable Energy Directive (RED II) and the Internal Electricity Market Directive (IEMD).

Although the deadlines for transposing the directives have passed, there remains a lot of gaps with the transposition – let alone the implementation – of the RECs and CECs provisions in a large majority of MS. This document analyses several remedies against these practices.

Not all those remedies are accessible to citizens and other private undertakings, yet energy communities¹ affected by the failure of a MS to (fully) transpose or implement a directive can undertake diverse types of action.²

At EU level, energy communities can initiate action against their MS using two main channels:

1. The infringement procedure

Energy communities can file a **complaint before the European Commission** against a MS suspected to be in breach of EU law (Section 1.1.1). Citizen's complaints are a useful instrument to provide information to the Commission about a suspected breach of EU law, and put pressure on a MS. They do not have formal legal effects, but if used strategically, they can lead to a MS changing its legislation.

If a MS persist in their breach, the Commission can decide to start an **infringement action** against the MS, which can end up in front of the Court of Justice of the European Union (CJEU) (Section 1.1.2). Complaints to the Commission can thus result in EU level court action, however this is not in the control of the complainant. If successful, complaints to the Commission are potentially the most efficient action that can be undertaken at EU level in order to force a MS to transpose or implement EU law. However, these procedures are very resource intensive and can be relatively slow, should the complaint lead to an infringement action in front of the CJEU.

2. Petitions in front of the European Parliament (EP)

Energy communities have, as any citizen, a right to petition the EP on EU-related matters concerning them. This alternative tends to be less efficient than infringement procedures in holding MS accountable with respect to their obligations towards EU law. However, it could be considered as an alternative should complaints not work out, and/or as part of a larger advocacy campaign.

Advantages of complaints to the Commission and petitions to the EP is that they are **accessible and inexpensive** procedures. They **do not require the mandatory intervention of a lawyer** – although they will need to be solidly justified in law to convince the institutions. Used strategically, they are very interesting **political levers** to put pressure on a Member State.

Downsides include that those procedures can be fairly **time and resource intensive** for complainants. Energy communities using them may also **lose the control of their requests and argumentation**, as it is for the EU institutions to decide on the follow-up to be given to the complaint.

1 In this Guidance document, we use 'energy communities' as a generic term. For the purpose of legal and other type of procedures, requirements can differ as to the nature of the applicant: energy communities can be either directly represented as a legal entity (which can be of multiple forms under national law, see the Electricity Market Directive Recital 44), or be represented by their individual members.

2 A table summarising the advantages, drawbacks, time and resources in relation to each type of action described is provided in Section 3 of Part I.

At national level, there are several remedies open to citizens or energy communities in case of transposition or implementation issues. National courts and institutions are primarily responsible to ensure the application of EU law: **the national level is thus the privileged level for action** and should always be considered before (or at least in combination with) EU-level action. Depending on the jurisdictions and the political context, actions at national may have a **more direct impact** than actions at EU level.

Energy communities can seek remedies through:

- **Non-judicial mechanisms** (Section 2.1) in front of administrative or other official bodies. This includes **complaints to ombudspersons or to national regulators**.
- **Judicial action** (Section 2.2), i.e., action in front of a court of justice. National courts have the **responsibility to ensure the proper application of EU law**. In doing so, they are bound by a few key principles, ensuring that the rights EU law confers to individuals are uniformly upheld across all MS:
 - › the **doctrine of direct effect** (2.2.1.1) – a first analysis of the direct effect of the energy community provisions in REDII and IEMD is also provided in Annex;
 - › the **obligation to interpret national law in conformity with EU law** (2.2.1.2); and
 - › **state’s liability for breach of EU law** (2.2.1.3).

Energy communities can use these principles to enforce their rights under the REDII and the IEMD in front of national courts.

Further, in the context of a national challenge against an act or decision suspected to breach the REDII or the IEMD, an affected energy community could make use of the **preliminary reference procedure** to obtain more clarity on the interpretation of the provisions contained in the directives. This procedure is subject to specific requirements (Section 2.2.1.4).

This guidance document offers a non-exhaustive overview of the procedures available for energy communities to push for the enforcement of EU law concerning them. Ultimately, the legal and advocacy strategies deployed will very much depend on the political contexts at both EU and national level, and it will be for on-the-ground stakeholders and national legal experts to choose which mechanism is more adequate to achieve their objective.

Introduction

In a context of soaring energy prices and uncertain energy supply in Europe, the participation and empowerment of citizens in energy projects is needed. The Renewable Energy Directive (RED II) and the Internal Electricity Market Directive (IEMD) introduced Renewable Energy Communities (RECs) and Citizen Energy Communities (CECs) which aim to involve citizens, local municipalities and small and medium-sized enterprises (SMEs) in the energy transition. The EU legislation provide rights and responsibilities for them to collectively engage in various energy activities such as the production, sharing and supply of renewable electricity, but also the storage and development of energy efficiency services³. RECs and CECs can contribute to improving local acceptance of renewable energy projects and increasing the share of renewables in the energy mix while improving energy savings for households and SMEs. In the longer term, energy communities can lead to more sustainable consumption behaviours, lower supply tariffs, as well as changes in supply and demand patterns for the benefit of citizens.

Because they may lack expertise and/or financial capacity, energy communities need a favourable and supportive regulatory framework, including technical assistance and financial support, to start their projects. The objective of the REDII and the IEMD is to create a level playing field for them on energy markets. The directives prescribe strict definitions and detailed enabling frameworks for energy communities which must be transposed by MS into their national frameworks within certain deadlines⁴ that have already expired⁵. However, so far, only a few Member States (MS) have correctly transposed the directives. While some MS have not yet transposed the relevant provisions for energy communities at all, others only integrated them into their national legislation either partially⁶ or incorrectly.⁷

This guidance document is intended to serve as a general information and practical guide for citizens, cooperatives, national associations, and relevant legal entities forming energy communities, on the different mechanisms to address transposition and implementation issues in relation to the EU provisions on energy communities. It lists a series of legal and non-legal interventions that can be initiated within the EU and selected national legal frameworks to push MS to comply with their obligations and to challenge national transposing laws that are not in line with the EU directives. Without recommending a specific procedure, it is the purpose of this guide to support energy communities and other stakeholders in elaborating their strategies by providing some practical tips and ideas of possible legal arguments that could be used throughout those procedures. Therefore, no action should be taken on the basis of this document alone, which does not contain legal advice.

Part I focuses on actions that can be taken in front of EU institutions (Section 1) and national courts and authorities (Section 2). By way of example, it provides information on possible legal avenues in selected Member States (Hungary, France, and Belgium) that could be used by aggrieved energy communities. Part II gives an overview of the possible transposition problems of the EU law provisions on energy community into national legislation and the legal grounds that could be invoked in a complaint or case alleging a breach of EU law on energy communities by a MS.

³ Article 2(11) of the IEMD and Article 22 para. 2 of the REDII..

⁴ When an EU directive comes into force, EU Member States (MS) have to first transpose it fully and correctly in their national law by the prescribed date, before notifying the transposing measures to the Commission, and then ensure that the provisions are properly implemented. Failure to do so may constitute a breach of its EU Treaties obligations.

⁵ Member States had to transpose the REDII and the IEMD into their national legislation by 30th June 2021 and 31st December 2020, respectively.

⁶ In Bulgaria and Poland for instance, only little progress has been made at the time of writing this report, and Spain progressed with the transposition of the definition of RECs only (no definition of CECs has been adopted). For more details see: COME RES, Comparative assessment of enabling frameworks for RECs and support scheme designs, 31 August 2022, version 04; REScoop's transposition tracker. See also REScoop, "Community Energy - are European Member states taking it seriously?", in Revolve, 12 January 2022.

⁷ Improper transposition is for instance the case in Hungary, where RECs are framed as a sub-category of CECs, meaning that they can only operate in electricity, excluding heating and cooling. See: REScoop's transposition tracker.

PART I
Ensuring the
proper transposition
and implementation
of EU directives

1. EU-level mechanisms

1.1. Infringement procedure

1.1.1. Complaint to the European Commission

Before deciding to submit a complaint to the Commission, it is important to keep in mind that it is a **resource-intensive process**. Despite its seemingly easy access, only very well-argued complaints have a chance to succeed.

Complaints can be submitted to the European Commission in case it is suspected that a MS has breached EU law.

Box 1: Requirements for submitting a complain to the European Commission

Subject matter: under Article 258 Treaty on the Functioning of the European Union (TFEU), the complaint must be about a MS's "[failure] to fulfil an obligation under the Treaties". This includes failure to transpose or poor transposition of a directive; failure to implement or breach of EU law; measure, absence of a measure or practice in a MS that is contrary to EU law.⁸

Applicants: any EU citizen, natural or legal person residing in the EU, or business legally established in a MS can submit a complaint to the Commission. There is no need for applicants to show a formal interest or that they are directly or principally concerned by the issue.

Defendant: the contested behaviour has to be imputable to a national authority, broadly understood, be it national, regional or local.

Exhaustion of national remedies: While having exhausted national remedies is not a strict requirement, it might, in practice, be considered as an important part of the process by the Commission. It is therefore important to consider national remedies first, and in the alternative, be able to justify why no steps have been taken at national level (i.e., it is not legally possible, inefficient, etc.)

Note that the primary purpose of an infringement procedure is to ensure that the MS give effect to EU law, **not to provide individual redress**. The procedure **cannot lead to annulment of national measures or financial compensation** for the damage caused by the measures. National courts are competent for that. The aim of the procedure is to push a MS to **voluntarily remedy** the breach of EU law by adopting or amending its national legislation to bring it in compliance with EU law. If the MS resists, the Commission can refer the case to the Court of Justice of the European Union (CJEU) (see point 1.1.2. on infringement actions below).

⁸ State aid and competition law measures are excluded from the material scope of complaints. There are specific complaints procedures for these matters.

Box 2: Commission's answers to complaints

Under the **complaint procedure**, the Commission will:

- Confirm receipt of the complaint within 15 days;
- Assess the complaint within 12 months. This can last longer if the matter is especially complicated;
- Inform you about the decision. The decision can, for instance, be as follows:
 - The Commission decides to open a formal **infringement procedure** which depending on the response of the MS, may lead to an action before the CJEU (see section 1.1.2). From that point on, the complainant is no longer involved, but the Commission will inform them and keep them updated about the progression of the case.
 - Referral to an out-of-court mechanism if the Commission believes it is likely to be more efficient.
 - The Commission assesses that it is not a breach of EU law and closes the case.

There is **no obligation for the Commission to act upon a complaint**, and it is not possible to appeal against that decision.⁹ However, you could seize the European Ombudsman if you are unhappy with the way your complaint has been handled.

Note that **in practice**:

- the Commission generally takes on a non-confrontational approach and will **first try to solve the issue directly with the MS before launching an infringement action**: this is a fairly exceptional step.
- it is important to follow the formal procedure strictly, but equally important to **be in close touch with relevant Commission units before and throughout the complaint procedure**. Commission staff can provide you with information about the relevance and chance of success of the complaint, current priorities and backlog, as well as ask for further evidence and information.

⁹ Luszcz, Viktor, *European Court Procedure: A Practical Guide*, Oxford: Hart Publishing, 2020, p.34; Lenaerts, Koen, Ignace Maselis and Kathleen Gutman, *EU Procedural Law*, Oxford: Oxford University Press, 2014, p.182.

Box 3: How to submit a complaint to the European Commission ?

We recommend you draft your complaint with the help of an experienced lawyer. The precise and accurate identification of breaches of EU law is fundamental for the complaint to raise the interest of the Commission.

It is mandatory to use the **standard complaint form**, which can be filled online or submitted via e-mail or post to the Secretary General.¹⁰

Tip: Fill in the form offline and email it to SecGen and to the Desk officer in the relevant DG(s). List any key evidence that you can submit to the Commission under Question 5 but do not submit anything yet.

The form contains **six main content questions:**

1. National measures breaching EU law
Tip: State shortly the measures and how they counteract EU law. Focus on how the *national* or regional transposing measures (or absence thereof) operate and not on the EU legislation.
2. EU law breached
Tip: List all provisions of EU law concerned. Refer to CJEU case law showing why EU law is to be interpreted in a way that makes the national measures illegal. Really insist on the breaches and do *not* include matters which are not breaches of EU law.
3. Problem description (max 7000 characters)
Tip: Start with a paragraph summarising what the complaint is about. Present the facts chronologically, explaining why these facts show the legal violation described in (1) and (2). Justify the complaint by mentioning why you were not able to resolve this issue nationally and why an *EU intervention is crucial*.
4. EU funding related to the subject of the complaint (yes, then specify/ no / don't know tickbox)
5. Fundamental rights (yes and specify / no / don't know)
Tip: Describe the *EU Charter* provision(s) breached and relevant CJEU fundamental rights case law. There is no need to repeat how other EU provisions are involved, as this is described above.
6. Previous action(s) to solve the problem (several questions)
Tip: List any administrative or legal actions at national level and their outcome. Actions should be completed: if pending, show why they will not resolve the issue. As mentioned, *having exhausted national remedies is not a strict requirement*, but is likely to be considered by the Commission while examining the complaint. It is therefore important to look first at what can be done at national level or be able to justify why national avenues were not taken.

Beyond formal requirements, it is good to keep in mind that **the Commission has priority criteria when considering launching an infringement procedure**. It can be useful to frame the complaint in a way that encompasses those elements. Priorities of the Commission include:¹¹

- **Non-transposition;** incorrect or incomplete transposition is also relevant. The complaint can be about specific provisions, so in the case of energy communities, could focus on Article 16 IEMD and/or Article 22 REDII and not the whole directives.
- **Infringements undermining foundations of the rule of law;** this element is probably less relevant in the case of energy communities, although fundamental rights in relation to a clean environment and access to energy could be invoked.

¹⁰ See for accessing the form of the complaint: [How to make a complaint at EU level | European Commission \(europa.eu\)](https://ec.europa.eu/commission/eu-law-portal/submit-complaint).

¹¹ Note that of course, priorities can change over time. This is why it is crucial to be in touch with the Commission before launching the complaint to check its relevance with regards to their agenda. See for further details on how the Commission handles complaints: [Communication on the handling of relations with the complainant in respect of the application of Union law, C/2016/8600.](https://ec.europa.eu/commission/eu-law-portal/submit-complaint)

- **Systemic issues (general practice rather than individual cases);** in our experience, a systematic violation of the same EU provisions may be more effective in drawing the attention of the Commission, for example by showing patterns of non-compliance or improper transposition of a directive observed by different regions in one MS or in several MS. For this purpose, it may be interesting to file a complaint with national partners in other MS.
- **Impact of the violation on important EU policy objectives;** for energy communities, relevant EU objectives include those set under the Green Deal, REPowerEU¹², the CEP and of course the directives themselves.
- **Added-value of an EU infringement action compared to other procedures;** this is particularly relevant when actions at national level have failed or are difficult/impossible to access for citizens. As mentioned it is thus recommended to first seek redress at national level and in any case, to demonstrate why acting at national level proved ineffective to remedy the alleged breach of EU law.
- **Existence of a cross-border dimension:** creating energy communities will mostly have an impact at local level, but cross-border issues could arise if, for instance, the uneven development of energy communities across MS creates imbalances in the EU energy system and jeopardises the climate ambitions of the entire Union.

Finally, this is our understanding that at the present time, **the Commission is under pressure to reduce the number of infringement cases**, and the current trend is to close existing files while carefully considering opening new ones.

Box 4: Do's and don'ts: Some practical tips

Do:

- Identify the best **political angle**...and be ready to change it! What arguments will the Commission / MS be responsive to? What will trigger public / political reactions?
- **Speak early to the relevant desk officer/technical unit in the Commission** to check whether the complaint is of interest (check political priorities, whether the issue was previously raised, if there are any similar ongoing procedures...).
- Submit information on any new developments proactively.

Don't:

- Raise many different issues in one complaint.
- Bring in unsubstantiated allegations, speculations, generalisations, attacks against decision-makers involved.
- Provide too much background and context.
- Focus solely on jurisprudence of the national courts.

¹² Communication from the Commission, REPowerEU Plan, COM(2022) 230 final;{SWD(2022) 230 final}

Box 5: Advantages and drawbacks of complaints to the Commission	
Advantages	Drawbacks
<ul style="list-style-type: none"> • Relatively accessible mechanism with little formal requirements. • Low costs and no need to involve a lawyer, in theory. However, the procedure can be long and in practice require the intervention of a legal expert to develop persuasive arguments. • Matter likely to be solved (though without much transparency), through the dialogue established between the MS and the Commission. 	<ul style="list-style-type: none"> • Time-consuming: the complaint needs to be convincing, well-structured and demonstrate a clear breach of EU law by a MS authority. It will also require investing time in speaking to the Commission and gather evidence. • Uncertainty about the outcome: the follow-up given to the complaint (and its admission) is at the discretion of the Commission. • May be a long procedure: the complaint process takes around 1 year, not including the time for preparing the complaint, and the proceedings before the CJEU if relevant. Note that this is still on average faster than a case in front of a national court. • No possibility to appeal the Commission's decision.

Conclusions

There is a **strong political dimension** in submitting complaints to the Commission, and the success of the endeavour will highly depend on whether it fits within the Commission's priorities. **Being in touch with Commission staff** in the relevant DG is paramount prior to and during the complaint procedure in order to maximise the chances for the complaint to succeed.

On the other hand, infringement complaints remain **powerful tools**. Even if not conclusive, **advocacy work** prior to the submission of the complaint can be used to **bring an issue to the attention of the Commission and the general public**.

1.1.2. Action for infringement of EU law by a Member State

The main legal avenue to address a violation in a directive's transposition or implementation by a MS is the action for infringement, described in Articles 258 and 260 TFEU. The Commission can decide to act on its own initiative, upon a complaint introduced by citizens (see 1.1.1), at request of the European Parliament (see 1.20) or other EU bodies. Infringement actions **cannot be directly initiated by citizens**. However, since they are a possible outcome of the non-judicial actions described above, we provide an overview of this procedure for information purposes.

Three main phases can be distinguished under an infringement action: (1) the informal phase; (2) the pre-litigation phase; and (3) the judicial proceedings as such. Only the EU Commission or another MS (although this rarely happens) are entitled to bring such an action in front of the CJEU, with the objective of preserving the general interest of the Union. Very often, **the matter will be solved either during the informal or the pre-litigation phase**, and the case will eventually not reach court.

(1) **Informal phase**. The **procedure** usually starts with an informal phase in which the MS will have the opportunity to defend itself and remedy the infringement.¹³ This phase is a crucial one: it opens a dialogue between the MS and the Commission, and a **channel to pressure the MS to address the matter**. Often, the back and forth between the MS and Commission will lead to a **resolution of the issue**

¹³ Lenaerts, Maselis & Gutman, *op.cit.*, p.186.

before the official procedure is launched. Note that in cases where the infringement procedure is launched upon a citizen's complaint, the informal phase can coincide with the dialogue that will take place in the context of the investigation following the complaint.

(2) **Pre-litigation phase.** If the matter remains unsolved, the Commission will send a **Letter of Formal Notice** to the MS, marking the **start of the formal procedure** and setting out the scope of the infringement. If the Commission is not satisfied with the MS's response, it will send a **Reasoned Opinion** with a time limit to remedy the infringement. These letters and reasoned opinions are confidential and cannot be obtained upon request by individuals.

(3) **Legal proceedings.** Should the pre-litigation phase not result in solving the issue, the matter may be **brought in front of the CJEU.**¹⁴ If the Court finds that a MS is in breach of its obligations, it will request that measures be taken to comply with the judgment,¹⁵ typically, the timely and correct transposition of the relevant EU directive. Should the MS not comply with the judgment, the Commission can refer the case to the CJEU (again) after giving the MS the opportunity to give observations. In that case, the Commission shall also request financial sanctions to be paid by the MS (lump sum or penalty payment).¹⁶

Note that while private **third parties are not allowed to submit observations** during the infringement procedure, NGOs or citizens can try to influence the process through the complaint mechanism (see above), and by continuing the dialogue with the Commission throughout the proceedings. In any case, the Commission will keep you informed as the case progresses.

Box 6: Advantages and drawbacks of infringement actions	
Advantages	Drawbacks
<ul style="list-style-type: none"> • Strong impact: the informal and pre-notification phase are influential and generally force MS to remedy their breaches. Final judgements are binding and authoritative. In some cases, the Commission can even request fines. • Establishes authoritative legal interpretation on the subject matter in EU and national law. 	<ul style="list-style-type: none"> • Lack of control for ordinary citizens: the prerogative is on the Commission (or other MS) to initiate the proceedings. • Likely to be very long: on average, direct actions in front of the CJEU take 19 months,¹⁸ to which you would need to add the pre-litigation and informal phases that can take several years. That does not take into account the complaint procedure described above, which can last for up to a year.

Conclusion

The infringement action **cannot be initiated by ordinary citizens.** It is also a long and heavy administrative and judicial procedure. However, given the **importance of the informal discussions** between the Commission and the MS prior to the formal procedure, **triggering this dialogue through a well-argued complaint** to the Commission can be useful in adding pressure on a MS even if it does not lead to a formal action.

¹⁴ Article 258 para. 2 TFEU.

¹⁵ Article 260(1) TFEU.

¹⁶ Article 260(2) TFEU.

¹⁷ CJEU Annual Report 2020: Judicial activity, p. 220. Available at https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-04/ra_jud_2020_en.pdf

1.2. Petition before the European Parliament

Article 227 TFEU and Article 44 EU Charter of Fundamental Rights confer to the right to petition the European Parliament (EP).

Box 7: Requirement for petitions to the European Parliament

- Applicants can be **any citizen of the Union and any natural or legal person residing or having its registered office in a MS**.
- The petition should cover **any subject which comes within the European Union's fields of activity and which affects the petitioner directly**.¹⁸ These criteria are interpreted broadly and include the non- or incorrect transposition of a directive or the violation of rights following its improper implementation (e.g., incomplete transposition of the enabling framework for RECs provided by Articles 2(16) and 22 REDII).¹⁹
- Besides those formal requirements, it is important for the petition to be admissible that it is **written in a clear and legible manner** and is **comprehensive**.

The Secretariat of the Committee on Petitions receives the petition and prepares a summary, including recommendations, for the Committee on Petitions (PETI), a dedicated committee consisting of EP members.²⁰ The latter will then review its admissibility.

Box 8: European Parliament's answers to petitions

If the petition is deemed admissible, PETI will decide on the **action to be taken**, such as:

- Asking the Commission to open an investigation;²¹
- Referring the matter for information or further action to another EP Committee or another EU institution or body;
- Asking for information to national authorities to clarify the matter raised;
- Requesting an EP report/ resolution on the matter or conduct a fact-finding mission in the MS concerned (this situation is very exceptional).²² If the petition is deemed **inadmissible**, the petitioner will be notified and might be advised on alternatives. It is not possible to appeal the decision taken by PETI, but they can re-open the case should additional information justify so.

On average, a petition takes **less than a year to be treated** once declared admissible.²³

18 The petition "may take the form of a complaint, a request or an observation concerning problems related to the application of EU law or an appeal to the European Parliament to adopt a position on a specific matter". See: <https://www.europarl.europa.eu/at-your-service/en/be-heard/petitions>.

19 See our list of possible arguments to raise in relation to transposition of the REDII and/or the IEMD in Part II.

20 The members of the PETI Committee are listed here: <https://www.europarl.europa.eu/committees/en/peti/home/members>

21 See Section 1.1.2 of this guidance document.

22 For detailed information on the procedure, see: <https://www.europarl.europa.eu/petitions/en/faq/det?questionor=12§ionor=2>.

23 See European Parliament (PETI), *Report on the activities of the Committee on Petitions 2015*. Available at: https://www.europarl.europa.eu/doceo/document/A-8-2016-0366_EN.html.

Box 9: Some lessons learned regarding petitions to the EP

- Experience shows that **petitioning the European Parliament is fairly inefficient when it comes to putting a MS on the spot for failure to respect its obligations under EU law.** This is partly due to the roles played by the different institutions: it is mainly the Commission's role to be "the guardian of the Treaties."
- In practice most admissible petitions are sent to the Commission for its opinion. Therefore, there **should be a good reason for going through PETI instead of directly complaining to the Commission.** If reaching the Commission is the main objective, going through the Parliament is likely to be counterproductive and not necessarily well-perceived by Commission staff. In that respect, it is **not necessarily a good strategy to run complaint and petition procedures in parallel** in both institutions.
- On the other hand, **petitioning the EP can give visibility to an issue.** An outcome that turns out to be particularly helpful is when the PETI committee gives the petition to other committees to get their opinion, in addition to getting the Commission's view, because that ensures it gets wider coverage. Such a request should be included in the petition itself. Besides, it is now possible to go onto the PETI committee's page and express "support" for petitions, so it is worth considering having a communications strategy about that.
- When submitting a petition to the EP, it is necessary to ensure the **support of one or several MEPs,** who can help in making the issue visible – and maybe get it to be discussed in another committee.

Box 10: How to submit a petition to the European Parliament?

Petitions can be submitted online via the Petitions Web Portal, or by post. The petition must be written in an official EU language and state the nationality and address of each petitioner.

Box 11: Advantages and drawbacks of petitions to the EP

Advantages	Drawbacks
<ul style="list-style-type: none"> • Very accessible mechanism with little formal requirements. • Low costs and no need to involve a lawyer (although developing strong legal arguments increases the chances of having an impact). • It can help increase the visibility of an issue if the petition is supported by MEP(s) and/or discussed in other EP Committees. 	<ul style="list-style-type: none"> • Uncertainty about the outcome: the follow-up action is at the discretion of PETI. • Fairly inefficient process if the objective is to force a MS to change its legislation or comply with EU law (though it could support a broader advocacy campaign).

Conclusion

Petitions to the EU Parliament are a **less efficient and straightforward way to put pressure on a MS than infringement complaints to the Commission.** They are a second-choice option should the latter not be workable for a specific reason.

However, petitions are an interesting **political lever** to draw the attention of the EU Parliament on a specific infringement. They can be an **interesting extra element in larger advocacy campaigns.** Careful consideration should be given to decide whether petitioning the Parliament has added value.

2. National mechanisms

National courts and institutions are primarily responsible to ensure the application of EU law: **the national level is thus the privileged level for action**, to be considered in first instance. Depending on the jurisdictions, actions at national may have a more direct impact than actions at EU level. In some cases they can also be faster (although the opposite is also true). We operate a distinction between judicial actions, i.e., actions in front of a court (Section 2.2), and non-judicial actions which involve administrative or other official bodies (Section 2.1).

2.1. Non judicial actions

2.1.1. Complaint to national ombudspersons

Ombudspersons are independent administrative authorities that can be seized by individuals whose rights have been violated by a state institution or body. Rules and procedures, as well as their powers and competencies, vary according to national law, but ombudspersons' roles are usually focused on **handling and mediating complaints between citizens and their administration, access to information, and fundamental rights and anti-discrimination**.²⁴ Complaints to ombudspersons tend to be more focused on redressing individual harms than for instance petitions to a parliament.²⁵

For energy communities, complaints to ombudsmen will likely be more relevant to address individual harms or human rights violations resulting from the wrong implementation of the directives – unless the lack of transposition affects them directly. There also exist specific complaint mechanisms related to consumer rights which could be relevant in the case of energy communities (see box below).

Decisions made by ombudspersons are not binding, although they can influence public authorities, and be a lever to raise public and political interest on an issue.²⁶

National and regional ombudspersons in EU Member states coordinate under the European Network of Ombudsmen. All MS but Italy either have national or regional ombudspersons or petition committees. Their contact details can be found online.²⁷

Example from Hungary

In Hungary, the Commissioner for Fundamental Rights can receive complaints from individuals. He is assisted by a Deputy Commissioner for the Rights of future Generations, who specifically deals with environmental issues. The Commissioner for Fundamental Rights is one of the few actors who can request for a constitutional review of legal acts and governmental decrees (either prior to or after their adoption), a procedure which is inaccessible to ordinary citizens. The Commissioner could thus – via his Deputy – use this power upon request of citizens or citizen energy associations.

²⁴ For a list of typical mandates granted to ombudsmen see OECD & European Ombudsman, *The Role of Ombudsman Institutions in Open Government*, OECD Working Paper on Public Governance No. 29, 2018, p.4. Available at: <https://www.oecd.org/gov/the-role-of-ombudsman-institutions-in-open-government.pdf>. See also <https://www.ombudsman.europa.eu/en/european-network-of-ombudsmen/about/en>.

²⁵ Tiago Tibúrcio, "The role of ombudsmen and petitions committees in detecting breaches of EU law", European Parliament Briefing requested by the PETI committee, November 2018, p.2. Available at https://www.europarl.europa.eu/cmsdata/226408/Briefing_The_role_of_ombudsmen_and_petitions_committees_in_detecting_breaches_of_EU_law.pdf.

²⁶ See <https://www.ombudsman.europa.eu/en/european-network-of-ombudsmen/about/en>

²⁷ See <https://www.ombudsman.europa.eu/en/european-network-of-ombudsmen/members/all-members>

Box 12: Consumer ombudspersons

Issues related to **unfair commercial practices** affecting the rights of energy communities as consumers, or of individuals as members of energy communities, could arise as the directives are being implemented. For instance large energy market players could abuse the concept of energy communities for economic or greenwashing purposes and deceive consumers.

In such cases, **national complaint mechanisms dealing with consumer rights** could be seized. In Europe, there is a Network of Consumer Centres entitled to handle such complaint, with branches in every MS.⁹

2.1.2. Complaint to the national regulatory authority

Under **Article 60 IEMD**, about decisions and complaints, foresees in Paragraph 2 that:

"[a]ny party having a complaint against a transmission or distribution system operator in relation to that operator's obligations under this Directive may refer the complaint to the regulatory authority which, acting as dispute settlement authority, shall issue a decision within two months of receipt of the complaint."

Paragraph 3 of the same article foresees that any affected party can also submit complaints to the national authority to review decisions on tariffs and methodologies.

While those articles are restricted to **obligations of DSOs, TSOs and the regulatory authority** itself, it **could be triggered by energy communities whose rights have been violated** or restricted by one of those actors. Note that the directive should be transposed for this clause to be effective and the responsibility of those actors to be engaged – unless those provisions are considered to have direct effect (see 2.2.1.2).

Also note that there is no similar provision under the REDII, which means that, in theory, this avenue is only available in relation to obligations and acts that fall under the scope the IEMD – i.e., concerning CECs. However, the **exact scope of the complaint mechanism is to be defined under the national transposing laws**, and is expected to vary across MS.

Finally, and more generally, it is worth checking national laws and whether a national regulatory authority has the competence to examine complaints related to the proper enforcement of energy laws. If this is the case, it would allow for energy communities to submit complaints based on those laws, including the IEMD and REDII.

²⁸ For more information, see: https://ec.europa.eu/info/live-work-travel-eu/consumer-rights-and-complaints/resolve-your-consumer-complaint/european-consumer-centres-network-ecc-net_en.

2.2. Judicial actions

2.2.1. Enforcement of EU directives in front of national courts

European Union law has primacy over national legislations.²⁹ Accordingly, national courts are required to exclude the application of any national law that is contrary to EU law.³⁰ Except for disputes expressly assigned to the CJEU by the Treaties (such as the infringement actions mentioned above), **the responsibility to ensure the proper application of EU law falls upon national courts.**

Key principles govern the way EU law is to be implemented by national courts and authorities, ensuring that the rights it confers to individuals are uniformly upheld across all MS. The most relevant ones for this guide are the **doctrine of direct effect** (2.4.1.1); the **obligation to interpret national law in conformity with EU law** (2.2.1.2.); and **state's liability for breach of EU law** (2.2.1.3). Energy communities can use these principles to enforce their rights under the REDII and the IEMD in front of national courts.

In case of doubt on the interpretation of EU law or its validity, a procedure for judicial cooperation exists between national courts and the CJEU: the **preliminary reference procedure** (2.2.1.4). This mechanism enables (or obliges) a national court to ask the CJEU how to interpret relevant provisions of EU law. This could be triggered in the context of a national challenge by energy communities against an act or decision of a national authority allegedly breaching the REDII or IEMD, and for which more clarity on the provisions of REDII and IEMD is needed to solve the issue.

2.2.1.1. The doctrine of direct effect

EU directives only directly bind MS. Businesses and individuals should thus normally simply apply national legislation that transposes or implements a directive. In addition, MS cannot be found at fault for not applying an EU directive until it has been transposed or before its transposition date expired.

However, when individual rights conferred under a directive have been violated, but the directive has not been transposed by the due date, or has been transposed incorrectly, aggrieved natural or legal persons can invoke the **direct effect of directives**. The CJEU developed this doctrine to ensure citizens protection under EU law even if a MS has not fulfilled its transposing obligations.³¹ Under this theory, **the provisions of a directive conferring individual rights can be directly enforced against the state in national courts in the absence of implementing measures** adopted within the prescribed period.

²⁹ See Judgment of 15 July 1964, *Flaminio Costa v E.N.E.L*, Case 6-64, ECLI:EU:C:1982:7.

³⁰ See Judgment of 9 March 1978, *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, Case 106/77, para 24.

³¹ Judgment of the Court of 5 February 1963, *van Gend & Loos v Netherlands Inland Revenue Administration*, Case 26-62, ECLI:EU:C:1978:49.

Box 13: Criteria for direct effect

The **criteria** for a directive to have direct effect have been established throughout the jurisprudence, and can be summarised as follows:³²

1. The provisions are **clear and sufficiently precise**.³³
2. The provisions are **unconditional**, i.e., they “require no further implementation (involving a margin of discretion) by Union or national authorities in order to achieve the effect sought in an effective manner”.³⁴ No further implementation means **no further rules in substance**; if the further implementation relates only to procedural requirements, then the provision is unconditional.³⁵
3. The remedy is sought by an **individual against a MS institution**, i.e., the direct effect is *vertical*. “Member State” should be interpreted in broad terms and include authorities at all levels.³⁶ That includes entities that have been given responsibilities to provide public-interest services.³⁷
4. The **transposition period has expired** and, if there are transposition measures, the transition period for their application has passed.³⁸ Direct effect can also be invoked in case of a failure to adopt measures correctly *implementing* a directive (i.e., the existence of a transposing act might be insufficient).³⁹

Box 14: Do energy community provisions under REDII and IEMD have a direct effect?

To know whether the provisions on energy communities in REDII and IEMD could be solely relied upon in front of national courts by aggrieved energy communities even if not (correctly) transposed in national law, one must **analyse each provision considering the criteria**, but also taking into account the **specific context in which the dispute arises**.

We provide a first indicative analysis of all the relevant provisions in Annex. As the exercise to determine that a provision meets the criteria summarised above is quite complex, further in-depth assessment, which goes beyond the scope of the present guidance, needs to be done to determine the direct effect or the relevant EU legislation on energy communities. This practically means that the initial assessment provided in the annex might change following this assessment.

³² Judgment of the Court of 5 February 1963, *van Gend & Loos v Netherlands Inland Revenue Administration*, Case 26-62, ECLI:EU:C:1978:49.

³³ See Judgment of 15 July 1964, *Becker*, Case 8/81, ECLI:EU:C:1964:66, para. 25; Judgment of 26 February 1986, *Marshall* (“*Marshall I*”), Case 152/84, ECLI:EU:C:1986:84, para. 46; Judgment of 22 June 1989, *Fratelli Costanzo*, Case 103/88, ECLI:EU:C:1989:256, para. 29.

³⁴ See Judgment of 19 November 1991, *Francovich v Italy*, Case C-6/90, ECLI:EU:C:1991:428, para. 12: in the *Francovich* case, the CJEU applied a useful test, distinguishing three elements that must be clear and precise: (1) the identity of the person entitled with certain rights, the (2) the content of the entitlement, and (3) the identity of the entity liable (which must be a Member state in the case of directives).

³⁵ Lenaerts, Koen and Piet Van Nuffel, *European Union Law*, 3rd edition, Sweet & Maxwell, p. 810.

³⁶ Lenaerts & Van Nuffel, *op.cit.* p.902.

³⁷ See; Judgment of 14 September 2000, *Collino and Chiappero*, Case C-343/98, ECLI:EU:C:2000:441, para 23; Judgment of 5 February 2004, *Rieser Internationale Transporte*, Case C-157/02, ECLI:EU:C:2004:76, para 24; Judgment of 19 April 2007, *Farrell*, Case C-356/05, ECLI:EU:C:2007:229, para 40. Judgment of the Court of 12 July 1990, *Foster*, C-188/89, ECLI:EU:C:1990:313, para. 20. In that case, the CJEU ruled, that British Gas Plc, a statutory corporation responsible for developing and maintaining a system of gas supply in Great Britain and whose members were appointed by the Secretary of state, was responsible to ensure rights to individuals under provisions of a directive considered to have direct effect. In Judgment of 12 December 2013, *Portgás*, Case C 425/12, ECLI:EU:C:2013:829, the ECJ held that Portgás, a private entity tasked with the operation of the gas distribution network in northern Portugal, could be held responsible (in this case by the Member state authorities themselves) for the non-implementation of provisions with a direct effect. This might be relevant for energy communities seeking to obtain rights under the IEMD and REDII that derive from public service obligations imposed upon DSOs, TSOs and other entities such as gas and energy market regulators.

³⁸ See Judgment of 5 April 1979 *Ratti*, Case 148/78, ECLI:EU:C:1979:110, paras. 33-44; Judgment of 4 December 1997, *Kampelmann and Others*, Joined cases C-253/96 to C-158/96, ECLI:EU:C:1997:585, paras. 42-45.

³⁹ Judgment of 11 July 2002, *Marks & Spencer*, Case C-62/00, ECLI:EU:C:2002:435, para. 27.

2.2.1.2. Obligation to interpret national law in conformity with EU law

Even when the provisions of a directive do not have a direct effect, a MS is still required to ensure the effectiveness of EU law when transposing it, and **“to adopt measures which are sufficiently effective to achieve the objective of the directive.”**⁴⁰

This obligation derives from the application of the **principle of sincere cooperation**, enshrined in Article 4(3) TEU. Similarly, **“when it applies domestic law, and in particular legislative provisions specifically adopted for the purpose of implementing the requirements of a directive, the national court is bound to interpret national law, so far as possible, in the light of the wording and the purpose of the directive concerned [...]”**. The requirement to interpret national law in light of relevant EU law applies to all state institutions.⁴¹

Box 15: Interpreting national law in conformity with REDII and IEMD

Member States must correctly capture the intention of the directives to promote citizen energy when it comes to defining RECs and CECs (Articles 2(16) REDII and Article 2(11) IEMD, respectively). A salient issue is, for instance, for MS to ensure that the effective control of energy communities is held by citizens, local authorities or small enterprises to avoid capture by commercial and corporate interests. Several MS have failed to properly transpose the directives' requirements in that respect.⁴²

Other core elements that are key in reaching the objectives of the directives include proximity of the REC with the source of energy production, or their focus on providing environmental, economic or social community benefits rather than financial profit.⁴³

2.2.1.3. State liability for breach of EU law

If a citizen or business suffers **damages because of a MS' failure to implement or transpose a directive**, the MS may be liable for the damage suffered.

Box 16: Criteria for state liability

The CJEU established three criteria for the state to be liable in such cases:⁴⁴

- The directive must **confer rights to individuals**;
- The **content of the right must be identifiable in the directive**;
- There must be a **causal link between the damage and the State liability**.

State liability rules to safeguard the rights that individuals derive from EU law must be enshrined in the internal legal order of each MS and applied by national courts. They must be accessible, and similar to liability rules applicable for comparable domestic claims.⁴⁵

40 Judgment of 10 April 1984, *Von Colson v Land Nordrhein-Westfalen*, Case 14/83, ECLI:EU:C:1984:153, paras 18, 26 and 28.

41 See e.g. Judgment of 5 October 2004, *Pfeiffer and others*, Joined cases C-397/01 to C-403/01, ECLI:EU:C:2004:584, para. 113.

42 For a comprehensive analysis of the transposition on definition in different MS see Rescoop.eu's transposition tracker: <https://www.rescoop.eu/policy#transposition-tracker>.

43 A more complete overview of legal arguments that can be raised is provided in Part II.

44 See *Francovich*, *op.cit.* para 40.

45 *Ibid.*, paras 42 -43:

However, only a **serious breach to EU law** can engage MS liability.⁴⁶ When the MS has a reduced or even no discretion in designing implementing measures, the mere breach of the provisions of the directive can be considered a sufficiently serious breach.⁴⁷ **Failure to transpose a directive in time also constitutes a serious breach** and will give rise to a right of reparation for individuals suffering injury, provided the other conditions for state liability are met.⁴⁸

Box 17: Can energy communities aggrieved by a MS' breach of EU law claim damages?

Should RECs/CECs wish to make use of the principle of state liability for breach of EU law to claim damages, they would need to prove that the incorrect transposition/implementation of REDII or IEMD qualifies as a serious breach and directly affects its individual members. In practice, this avenue might therefore be limited to challenge the Member state's failure to transpose or implement the directives. Further, the scale of damages is hard to predict, and the compensations may considerably vary from MS to another.

2.2.1.4. Request for preliminary ruling on interpretation of EU law

The most effective way to obtain a **harmonised interpretation of a provision of EU law across all MS** is a reference for preliminary ruling to the CJEU.

During judicial proceedings at national level involving the application of a particular provision of EU law, a court can (or must),⁴⁹ on its own initiative or upon request of the claimants, **submit questions to the CJEU to help them interpret the relevant provision of EU law**. This cooperation process is known as the **preliminary reference procedure on interpretation of EU law**, foreseen under Article 267 TFEU. Preliminary rulings can be about "(a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union".⁵⁰ For the purpose of this guide, only **clarifying the interpretation of REDII and IEMD** is of relevance; we do not recommend challenging the *validity* of the provisions on energy communities.

Depending on the circumstances, preliminary reference can be a **slow process**: the case must first go through the entire national processes, and sometimes be referred to higher courts to finally be submitted to the CJEU – when the judges decide to do so, which is never a certainty. Once the question is asked to the EU judges, the case usually takes about 16 months to be handled.⁵¹ Note that an **expedited procedure** exists at the CJEU (four months on average), under which the Court can handle some questions more urgently. In that case, the urgency and risks associated with the normal procedure must be explained by the referring Court.⁵²

46 See Judgment of 5 March 1996, *Brasserie du Pêcheur and Factortame*, Joined cases C-46/93 and C-48/93, ECLI:EU:C:1996:79, para 55: "[...] as regards both Community liability under Article 215 and Member state liability for breaches of Community law, the decisive test for finding that a breach of Community law is sufficiently serious is whether the Member state or the Community institution concerned manifestly and gravely disregarded the limits on its discretion."

47 Judgment of 8 October 1996, *Dillenkofer and others v Bundesrepublik Deutschland* Joined cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94, ECLI:EU:C:1996:375 para. 25.

48 See *Dillenkofer*, op.cit., para. 29.

49 Courts in first instance can refer a question to the CJEU, whereas courts of last instance are obliged to do so when the matter does raise an issue of interpretation. This can create (extra political) barriers for claimants in national cases to access EU Courts.

50 The official Recommendations to national courts and tribunals highlight that "[t]his procedure is considered useful when, in a case before a national court, a question of interpretation which is new and of general interest for the uniform application of EU law is raised, or where the existing case-law does not appear to give the necessary guidance to deal with a new legal situation." in *Recommendations to national courts and tribunals, in relation to the initiation of preliminary ruling proceedings*, OJ C 439, 25.11.2016 [emphasis ours].

51 CJEU, *Annual Report 2020: Judicial activity*, p. 220. Available at https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-04/ra_jud_2020_en.pdf

52 Articles 105-107 of the Rules of Procedure of the Court of Justice, OJ L 265, 29.9.2012, pp. 1-42, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32012Q0929%2801%29>.

Any court can send questions to the CJEU, although courts of last instance are compelled to do so if necessary to solve the case.

Box 18: How should a preliminary question on interpretation of EU law be framed?

There are some **requirements and limitations** when it comes to what the preliminary question can entail:⁵³

- The interpretation required is **on EU law**, not on the national law. That covers the Treaties and acts of the institutions, bodies, offices, or agencies of the Union (including directives).
- A **case is pending before the national court making the reference**, and the interpretation of the CJEU is **necessary for the court to give its judgement**, i.e., the answer to the question will affect the outcome of the case.
- The CJEU **cannot directly rule on the compatibility of national rules with EU law or check that they are correct**. “[I]t may nevertheless provide the national court with an interpretation of European Union law on all such points so as to enable that court to determine the issue of compatibility for the purposes of the case before it”.⁵⁴ In practice, when such a question arises (which frequently happens), the CJEU will reformulate it to be able to answer within the limits of what it is allowed to do.
- The CJEU **will not rule on a specific case**, but tends to respond in general terms, that the national courts will then have to apply to the case at hand.

Once the CJEU has given its interpretation, all courts and tribunals dealing with the case at stake will have to abide by it. The ruling will also be **binding for all national authorities** (*erga omnes* effect) and **for all national courts, including those of other MS**.⁵⁵

Box 19: How could the preliminary procedure be used by aggrieved energy communities?

In case of a non- or incorrect transposition of a directive or its lack of implementation, preliminary reference to the CJEU could be helpful to, indirectly, **highlight a MS's failure to comply with EU law through obtaining an interpretation of the energy community provisions that contradict the national text**.

The provisions on energy communities in the REDII and the IEMD are new, and therefore unlikely to have been clarified in existing jurisprudence. On the other hand, they are fairly clear. If used to highlight a MS's failure to comply, a preliminary question will have to be framed in such a way that it requests clarification on how to EU directives should be interpreted in the national context.

The framing of the question will depend on the dispute at stake, and on the political context. It could be quite simple, such as something related to the adequacy of the national definitions of energy communities, or something more complex, e.g. related to the energy market's structure and how it affects the enabling framework. It is for the national lawyers dealing with the case to formulate the question in a way that will trigger the national judges.

⁵³ For more details see Lenaerts, Maselis & Gutman, *op.cit.* pp.235 ff and Luszcz, *op.cit.* pp. 71 ff.

⁵⁴ Judgment of 8 September 2011, *Paint Graphos and Others*, Joined Cases C-78/08 to C-80/08, ECLI:EU:C:2011:550, para. 34.

⁵⁵ Luszcz, *op.cit.* pp. 101-102.

2.2.2. Examples of judicial actions under national law

National judges have the power to **verify that national law is in conformity with EU law** and to **annul or stop applying administrative or legislative acts that are not**. The legal avenues open to citizens or legal persons to bring up such challenges differ from one jurisdiction to another, and can e.g., cover actions for annulment in front of administrative or, more rarely, constitutional courts, targeting the national law or regulation transposing the directive, when that is possible under national law. The option to sue state institutions to obtain compensations for damages can be taken by individuals or legal persons whose rights have been violated by MS breaching EU law, under certain circumstances.

It is not the purpose of this guidance document to provide an exhaustive review of all national judicial actions that can be undertaken, nor to explain all national regimes (that greatly vary) or to advise on the best avenues. By way of illustration, we will focus on the conditions laid down in some national jurisdictions, namely Hungary, France and Belgium.

Box 20: Check the transposition status in different MS

To verify whether a national law has been (correctly) transposed, a useful resource to consult is Eur-lex, the online platform gathering all official EU documents. All national laws notified to the Commission under the IEMD can be consulted [here](#),⁵⁶ while the list of national laws transposing REDII are available [here](#).⁵⁷ Note that different provisions can be transposed in different legislative acts, and the list does not identify which acts transpose the provisions on energy communities. Eur-lex also does not include draft legislation.

2.2.2.1. Hungary

The draft Hungarian law transposing REDII and IEMD is flawed in two major respects:

- both directives will be transposed through amendments of the Electricity Act and governmental decrees implementing the Electricity Act. This means that the definition of RECs applies only in the field electricity, leading to an incomplete transposition of the REDII provisions; under Hungarian law, RECs thus cannot be active in, for instance, the heat and transport sectors as allowed by REDII.
- RECs are defined a sub-category of CECs, which could lead to limit the scope of their activities as the two categories do not fully overlap.⁵⁸

It must be noted that it comes in a context in which the production and distribution of energy in Hungary is traditionally entrusted with state-owned companies, and the concept of energy communities was basically unknown before the directives.

Citizens and enterprises cannot challenge the legality of a draft or newly adopted piece of legislation. Before the adoption of the act, a constitutional review of bills can be requested to the constitutional Court, but only by a restricted set of actors, such as members of parliament, the public prosecutor, or the Commissioner for Fundamental Rights (ombudsman). If this is not initiated, the President will sign Acts of the Parliament and they will enter into force. Ex post review is possible, but again, only a limited number of actors (amongst which neither individuals nor enterprises) can initiate such a review. Advocacy at national level to influence the inception of an action by a member of parliament or the Ombudsmen, for instance, could be considered.

Additionally, constitutional complaints against a legal act suspected to violate EU law are only possible if it causes a violation of the fundamental rights of the right holders. In practice, this represents a fairly high barrier. For instance, it could be challenging to argue that the right for an energy community to perform heat or transport related activities is a fundamental right (i.e., a right laid down in the Fundamental

⁵⁶ <https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX:32019L0944>

⁵⁷ <https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX:32018L2001>

⁵⁸ Since no RECs exist yet in Hungary, the effect of them being a sub-category of CECs in practice is still unknown.

Law of Hungary). The effectiveness of this tool as a means of redress is also questionable, as it can take years for constitutional complaint to be handled. There is some national case law establishing the state liability for the non-transposition of directives, although not yet for the incomplete transposition. However, the thresholds to prove the link between the damage suffered by concerned individuals and the behaviour of the state are very high, making it difficult to obtain reparations in such cases.

2.2.2.2. France

France transposed the definition of CECs and RECs in national law by ordinance 2021-335 of 3 March 2021.⁵⁹ The regime will be elaborated upon in an application decree, expected soon.

The key issues with the transposition of provisions on CECs is the fact that there are no restrictions on participation by companies, leading to a very high risk that large energy players make use of the system and divert it from its original objectives. Another issue is the fact that the regulatory authority has no monitoring role to oversee energy communities.⁶⁰

The French judicial order is divided between civil and administrative courts. Both categories of court can hear about the incompatibility of French law with EU law, can refer questions of interpretation of EU law to the CJEU and can disapply a national legislation or administrative act breaching EU law in a particular case. Administrative courts can order the state to pay damages to a harmed private party.⁶¹ However, only administrative courts have the power to annul an administrative act or order public authorities to amend or adopt a new act. None of them can annul a legislative act (or an ordinance after it has been ratified by the Parliament).

The choice between a civil or an administrative procedure is generally guided by the nature of the case and the defendant: a case against a non-legislative administrative act such as a decree or ordinance transposing an EU directive, or an action for failure to transpose or implement a directive, should generally be brought against the state in front of administrative courts. The claimant would need to demonstrate its quality and interest to bring a case that is, that it is affected by the act or the absence thereof.

Access to the constitutional court is more difficult and may not lead to satisfactory results if the aim is to force France to transpose REDII and IEMD quickly and correctly. The constitutional court (*Conseil Constitutionnel*) can be seized by members of the parliament, the Prime Minister or the President of the Republic, but not by private parties, upon the adoption of a law before it enters into force.

Once the law is in force, a claimant (including private parties) may ask a national court to refer a question on the constitutionality of the law or of an ordinance (*question prioritaire de constitutionnalité*) to the constitutional court in the context of an ongoing litigation (the procedure is comparable to the EU reference for preliminary ruling explained under section 2.2.1.4).⁶² The question must be "new" or "serious." In any case, the constitutional court will decide whether the law is compatible with the French constitution (that includes human rights provisions and principles such as freedom of entrepreneurship) but not with EU law.⁶³ The constitutional court can refer a question for preliminary ruling to the CJEU to determine if a matter falls within the scope of EU law.⁶⁴ (which is the case of provisions on energy communities in REDII and IEMD) but cannot refer a question of *interpretation* of EU law to the CJEU – only civil and administrative courts can do so.⁶⁵

59 Ordonnance n°2021-235 du 3 mars 2021 portant transposition du volet durabilité des bioénergies de la directive (UE) 2018/2001 du Parlement européen et du Conseil du 11 décembre 2018 relative à la promotion de l'utilisation de l'énergie produite à partir de sources renouvelables

60 <https://www.rescoop.eu/policy/france-rec-cec-definitions>

61 <https://www.vie-publique.fr/fiches/20287-quels-sont-les-pouvoirs-du-juge-administratif>

62 Article 61-1 of the French Constitution

63 Conseil Constitutionnel, Décision n°74-54 DC du 15 janvier 1975, *Loi relative à l'interruption volontaire de la grossesse*

64 Conseil Constitutionnel, Décision n°2013-314P du 4 avril 2013, *M. Jérémy F.*

65 Conseil Constitutionnel, Décision n°2014-439 QPC du 23 janvier 2015, *M. Ahmed S.*

2.2.2.3. Belgium

In Belgium, energy policy is a competence shared by the three Belgian regions: (i) Flanders and (ii) Wallonia and (iii) Brussels-Capital. The parliaments of these regions are therefore competent and responsible for the transposition of the IEMD and the REDII.

The IEMD was transposed in Belgium by decrees in Flanders and Wallonia and ordinance in the Brussels-Capital. In addition, those legislative acts are being further implemented by decisions of the respective governments (i.e., regulatory measures adopted in application of legislative acts). Similarly, the REDII in Belgium was transposed in Belgium by decrees in Flanders and Wallonia regions and ordinance in the Brussels-Capital region but also necessitated the modification of an important number of pre-existing legislative provisions. As for the transposition of the IEMD, those legislative acts transposing the REDII are being further implemented by decisions of the respective governments (i.e., regulatory measures adopted in application of legislative acts).

Legislative acts (such as decrees and ordinances) can be annulled by the Belgian Constitutional Court if they breach the Belgian Constitution. Natural or legal persons can bring such actions for annulment if they can demonstrate a current, real, and legitimate interest. The Belgian Constitutional Court can also seek a preliminary ruling to the CJEU to clarify the interpretation of EU law if necessary for ruling on the case. Similarly, in a civil litigation pending before a national jurisdiction involving a decree or ordinance, the national judge can also seek a preliminary ruling from the Belgian Constitutional Court if they have a question of interpretation or validity with the Belgian Constitution, or from the CJEU to clarify the interpretation of EU law if necessary.

By contrast, administrative acts (such as governmental decisions) can be annulled by the Belgian Council of state if they breach Belgian law (including the legislative act upon which it was adopted). Similarly to the above, the Council of state can also seek a preliminary ruling from the Belgian Constitutional Court if they have a question of interpretation or validity with the Belgian Constitution of a decree or ordinance (to be applied in its pending case), or from the CJEU to clarify the interpretation of EU law if necessary. During a pending civil litigation, national judges can also set aside the application of the governmental decisions if not in line with the law based on the "*exception d'illégalité*" under Article 159 of the Belgian Constitution.

Damages actions could also be brought before civil national courts against the Belgian state (i.e., the relevant region) for absence or failure to correctly transpose or implement a directive.

3. Summary table

	Requirements	Advantages
Complaint to the European Commission for infringement	<ul style="list-style-type: none"> • Subject matter: MS's failure to fulfil an obligation under the Treaties • Applicants: any citizen of the Union and any natural or legal person residing or having its registered office in a MS. No requirement to show formal interest in the subject matter 	<ul style="list-style-type: none"> • Relatively accessible mechanism with little formal requirements. • High chances that the matter gets solved through informal dialogue between the MS and the Commission • Useful way to support advocacy and raise Commission/public attention
Infringement procedure in front of the CJEU	<ul style="list-style-type: none"> • Subject matter: MS's failure to fulfil an obligation under the Treaties • Applicants: The Commission or another MS 	<ul style="list-style-type: none"> • Strong impact: final judgements are binding and authoritative. In case of infringement, the Court may impose a lump sum and/or penalty payment to oblige the MS to comply quickly with the decision. • Establishes authoritative interpretation on the subject matter
Petition to the European Parliament	<ul style="list-style-type: none"> • Subject matter: any subject which comes within the European Union's fields of activity • Applicants: any citizen of the Union and any natural or legal person residing or having its registered office in a MS. Petitioners must be directly affected by the subject 	<ul style="list-style-type: none"> • Very accessible mechanism with little formal requirements • Can increase the visibility of an issue if supported by MEP(s) / discussed in committees
National Ombudsman or non-legal complaint mechanisms	<ul style="list-style-type: none"> • E.g., violation of individual rights by a MS authority (exact scope will depend on the national rules), unconstitutionality of national legislation, etc. 	<ul style="list-style-type: none"> • Can be more accessible than judicial procedures • Can help raise the visibility of an issue nationally
Legal action at national level	<ul style="list-style-type: none"> • Subject matter: contesting the non or incorrect transposition or application of EU law • Procedures: administrative review (for compatibility of national measures with EU law); some limited possibilities of constitutional review; action for damages, etc. • Applicants: will depend on the type of procedure and national requirements, usually a requirement to have legal standing / be directly affected by the violation 	<ul style="list-style-type: none"> • Strong impact: final judgements are binding and authoritative. • If the state is deemed liable, damages can be paid to the applicant • High visibility if the case is mediated • Establishment of a legal precedent (across all MS)

Drawbacks	Timing	Costs and resources
<ul style="list-style-type: none"> • Uncertainty about the outcome • Highly politicised processed (can be an advantage if matches the Commission's priorities) • No possibility to appeal the Commission's refusal to open a case in front of the CJEU • Intensive preparation works and requires solid legal analysis to have a chance to convince the Commission 	<ul style="list-style-type: none"> • Confirmation of receipt within 15 days. • Assessment of the complaint within one year unless the matter is particularly complex 	<ul style="list-style-type: none"> • Submitting a complaint is free • A lawyer is not mandatory (although the intervention of a legal expert is crucial to develop persuasive arguments) • Preparing the complaint can be a very resource intensive process for the citizens or organisations involved.
<ul style="list-style-type: none"> • Not accessible for ordinary citizens • May be a long procedure 	<ul style="list-style-type: none"> • 19 months on average for the court proceedings (+ need to add the pre-litigation and informal phases which are also likely to take several months) 	<ul style="list-style-type: none"> • No cost since citizens are not directly involved
<ul style="list-style-type: none"> • Uncertainty about the outcome • Less efficient than complaint to the Commission in obtaining MS to change behaviour or legislation • Can be counterproductive if run in parallel to/as a way to trigger a complaint to the Commission 	<ul style="list-style-type: none"> • Petitions usually take less than a year to be treated once declared admissible 	<ul style="list-style-type: none"> • Submitting a petition is free • A lawyer is not mandatory (although relying on legal arguments increases the strength of the petition)
<ul style="list-style-type: none"> • No binding judgement 	<ul style="list-style-type: none"> • Will depend on each jurisdiction, likely to be shorter than court proceedings 	<ul style="list-style-type: none"> • Usually no procedural fees (but might differ according to national rules) • A lawyer is not mandatory (although relying on legal arguments could help increase the strength of the petition)
<ul style="list-style-type: none"> • Adversarial mechanisms, which in some cases can be counterproductive • Length and costs greatly vary between MS • Some procedures not always accessible to ordinary citizens, notably constitutional review • High burden of proof in action for damages (e.g., for establishing connection between the violation and the state behaviour) 	<ul style="list-style-type: none"> • Highly dependent on the cases, but can take several years, especially if there is an appeal or a preliminary ruling reference (which takes 15 months on average) 	<ul style="list-style-type: none"> • Procedural fees, depending on the procedures • Lawyer's fees, which can vary depending on the complexity of the case and applicable rates • Potential adverse costs if the case is lost

PART II
Overview of
transposition issues in
national frameworks
with regard to energy
communities

MS can fail to meet their obligations under the EU Treaties because it does not transpose a directive or does transpose it poorly. It can also breach EU primary law by failing to adopt certain measures or by adopting a measure contrary to EU law.

The table below is a first attempt to qualify the possible problems arising from the transposition of the provisions of the energy communities into the national framework. Those issues can be used by individuals and energy communities in the context of the EU and national mechanisms presented in this guidance document.

Note that only the core provisions of the directives (in the Articles) in relation to energy communities are legally binding. Preamble to directives have indeed no binding legal force, although they may help to interpret the directive's main provisions if necessary.⁶⁶

REDII/ IEMD provisions	Possible issues in the national framework	Transposition problems
Preamble	Transposing texts do not respect the "spirit" of the directives	Not legally binding -> can only reinforce an argumentation based on breaches of core provisions of the directive
Definitions: Article 2 (16) on the definition of 'renewable energy community' (RECs) Article 2 (11) on the definition of 'citizen energy community' (CECs)	No definition, or only one of the two definitions is transposed	Lack of transposition
	Definitions are transposed but some elements are missing, e.g.: <ul style="list-style-type: none"> no requirement of local proximity with projects for RECs' shareholders/members autonomy of the members not guaranteed definitions are just a copy-paste of the EU provisions, and there is no elaboration of what these terms mean in the national context 	Incomplete/ incorrect transposition
	Definitions are transposed but not in line with the directives, e.g.: <ul style="list-style-type: none"> financial profit remains the primary purpose overly restrictive transposition e.g., in Croatia, where membership in CECs is limited to those with residence, establishment or premises in the local self-government unit, while in the EU provisions for CECs there is no requirement of proximity 	Incorrect transposition

⁶⁶ See e.g. judgment of the Court of 19 November 1998, C-162/97, point 54.

<p>Admin-istrative procedures, regulations, and codes</p> <p>Article 15, para. 3 of the REDII</p>	<p>National competent authorities at national, regional, and local level do not include provisions for the integration and deployment of RECs</p>	<p>Breach of the requirements under REDII</p>
<p>Information and training</p> <p>Article 18 para. 1 and 6 of the REDII</p>	<p>No information on support measures is made available by MS to RECs</p>	<p>Breach of the requirements under REDII</p>
	<p>No suitable information, awareness-raising, guidance, training, or training programmes to inform citizens about how to exercise their rights as active customers, and of the benefits and practicalities, including technical and financial aspects, of developing and using energy from renewable sources, including by renewables self-consumption or in the framework of RECs</p>	<p>Breach of the requirements under REDII</p>
<p>Enabling frameworks</p> <p>Article 22 of the REDII</p> <p>Article 16 of the IEMD</p>	<p>No transposition of an enabling framework for RECs and CECs (Article 22 para. 4 of the REDII)</p>	<p>Lack of transposition</p>
	<p>Not all elements of the enabling framework are transposed: E.g., access to RECs by vulnerable and lower-income households.</p>	<p>Incomplete/ incorrect transposition</p>
	<ul style="list-style-type: none"> • No preliminary assessments of the existing barriers and potential of development of RECs (Article 22 para. 3 (a) of the REDII) • Discrimination against EC in terms of rights (e.g., rights to access to the networks) (Article 16 para. 3 (b) of the IEMD) • Lack of specific provisions ensuring non-discrimination of RECs in state aid schemes (Article 22 para. 7 of the REDII) • No tools to facilitate access to finance and information made available to RECs (Article 22 para. 3 (g) of the REDII) 	<p>Breach of the requirements under REDII and IEMD</p>

<p>Regulatory authorities' duties and Decisions and complaints</p> <p>Articles 59 para. 1 (z) of the IEMD on duties and powers of the regulatory authorities and Article 60 para 1 and 8 of the IEMD on decisions and complaints</p>	<ul style="list-style-type: none"> • No proper transposition of the National Regulatory Authorities (NRAs)'s duty to monitor the removal of unjustified obstacles to the development of CECs (Article 59 para. 1 (z) of the IEMD) • No proper transposition of provisions on complaint mechanisms/appeals against NRAs decisions that possibly affect energy communities such as regulations, deciding on network tariffs, network connection rules, registering energy communities, registering their activities, enforcing the definition, overseeing the removal of barriers, etc. (Article 60 para.1 and 8 of the IEMD) • No proper transposition of the provisions on the complaint mechanism in front of NRAs open to parties affected by TSOs or DSOs decisions (Article 60 para.8 of the IEMD) and NRAs' powers to require TSOs and DSOs to modify their terms and conditions and to fix and approve them directly in case they fail to do so in due delay (Article 60 para.1 of the IEMD) 	<p>Incomplete/ incorrect transposition</p>
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Annex: Direct effect of energy community provisions

This table provides an example of how an analysis of direct effect could be applied to the REDII and IEMD provisions related energy communities. However, **this is only an indicative table** and analysis of the relevant provisions should be performed by the claimant's lawyers in the context of the case at hand to identify whether they have direct effect. The content of this table therefore does not constitute legal advice. The final decision will belong to the national court, or to the CJEU, in the case of a preliminary reference procedure.

Citizen Energy Communities Internal Electricity Market Directive (EU 2019/944)		
Provision / right conferred to energy communities	First assessment of direct effect	First indicative assessment regarding the direct effect criteria set in the Francovich case (subject to further analysis)⁶⁷
<p>Article 16 (1) IEMD</p> <p>Member states shall provide an enabling regulatory framework for citizen energy communities ensuring that:</p>	Variable	<p>Identity of person entitled: "citizen energy communities" as a legal entity defined under Article 2(11)</p> <p>Content of entitlement: the wording "shall provide an enabling regulatory framework leaves a lot of leeway to MS. It is not clear whether the national judge would consider the entire article to be sufficiently precise and unconditional.</p> <p>Identity of entity liable as being the MS is clear and precise</p> <p>It is unclear whether the rights arising from this provision would be considered as having direct effect. Each provision must be analysed separately.</p>
<p>(a) participation in a citizen energy community is open and voluntary;</p>	Yes	<p>Identity of person entitled: anyone can claim the right to participate in a CECs</p> <p>Content of entitlement: if we read this Article together with recital 44 and Article 2(11) on the definition of CECs and who can participate in a CEC or not, this provides some clarity of the content of entitlement. Those two resources explain what open and voluntary participation is.</p> <p>Identity of entity liable as being the MS is clear and precise</p> <p>There seem to be sufficient clarity to claim direct effect</p>

⁶⁷ See ECJ, *Francovich v Italy* (1991) C-6/90, para 12: "It is therefore necessary to see whether the provisions of Directive 80/987 which determine the rights of employees are unconditional and sufficiently precise. There are three points to be considered: the identity of the persons entitled to the guarantee provided, the content of that guarantee and the identity of the person liable to provide the guarantee." [Our emphasis]

<p>(b) members or shareholders of a citizen energy community are entitled to leave the community, in which case Article 12 applies;</p>	<p>Yes</p>	<p>Identity of person entitled: members of shareholders of a CECs as defined in Art. 2(11) IEMD</p> <p>Content of entitlement: right of leaving the CECs</p> <p>Identity of entity liable as being the MS is clear and precise</p> <p>Sufficiently clear and precise to have direct effect</p>
<p>(c) members or shareholders of a citizen energy community do not lose their rights and obligations as household customers or active customers;</p>	<p>Unclear</p>	<p>Identity of person entitled: members of shareholders of a CECs as defined in Art. 2(11) IEMD</p> <p>Content of entitlement: the exact content of the rights and obligations as household or active customers is not defined in this article. The directive provides household customers with, among others, the right to not being charged any switching-related fees (art.12(2)); to freely access price comparing tools (Art.14); to enjoy universal service (Art. 27). The rights of active consumers are described under Article 15.</p> <p>Identity of entity liable as being the MS is clear and precise</p> <p>The provision could have direct effect if read in combination with other provisions in the directive related to household or active customers, or with other laws such as the Consumer Protection Directive 2011/83, which themselves have direct effect.</p>
<p>(d) subject to fair compensation as assessed by the regulatory authority, relevant distribution system operators cooperate with citizen energy communities to facilitate electricity transfers within citizen energy communities;</p>	<p>Unclear</p>	<p>Identity of person entitled: CECs as defined in Art. 2(11) IEMD</p> <p>Content of entitlement: this depends on the assessment by the regulatory authority, DSOs etc. Recital 43 somehow clarifies the entitlement: "Household customers should be allowed to participate voluntarily in community energy initiatives as well as to leave them, without losing access to the network operated by the community energy initiative or losing their rights as consumers."</p> <p>Identity of entity liable as being the MS is clear and precise</p> <p>Further analysis needed to identify if the content of the right is not clear and precise</p>
<p>(e) citizen energy communities are subject to non-discriminatory, fair, proportionate and transparent procedures and charges, including with respect to registration and licensing, and to transparent, non-discriminatory and cost-reflective network charges in accordance with Article 18 of Regulation (EU) 2019/943, ensuring that they contribute in an adequate and balanced way to the overall cost sharing of the system.</p>	<p>No</p>	<p>Identity of person entitled: CECs as defined in Art. 2(11) IEMD</p> <p>Content of the entitlement: the terms "non-discriminatory, fair, proportionate and transparent procedures and charges" are open to interpretation and can be applied differently by MS</p> <p>Identity of entity liable as being the MS</p> <p>The content of the right is not clear and precise: no direct effect</p>

<p>Article 16 (2) IEMD</p> <p>Member states may provide in the enabling regulatory framework that citizen energy communities:</p> <p>(a) are open to cross-border participation;</p> <p>(b) are entitled to own, establish, purchase or lease distribution networks and to autonomously manage them subject to conditions set out in paragraph 4 of this Article;</p> <p>(c) are subject to the exemptions provided for in Article 38(2).</p>	No	<p>The formulation “may provide” makes it clear that there is a margin of discretion for the MS.</p> <p>The right is not unconditional and the provision does not have direct effect.</p>
<p>Article 16 (3) IEMD</p> <p>Member states shall ensure that citizen energy communities:</p>		<p>Identity of person entitled: “citizen energy communities” as a legal entity defined under Article 2(11) of the IEMD</p> <p>Content of the entitlement: see assessment of each obligation below</p> <p>Identity of entity liable as being the MS is clear and precise</p>
<p>(a) are able to access all electricity markets, either directly or through aggregation, in a non-discriminatory manner;</p>	Yes	<p>No formulation suggesting that there is room for interpretation of the right: the provision has direct effect.</p>
<p>(b) are treated in a non-discriminatory and proportionate manner with regard to their activities, rights and obligations as final customers, producers, suppliers, distribution system operators or market participants engaged in aggregation;</p>	No	<p>Content of the right not clear and precise as activities, rights and obligations may vary among MS</p> <p>Not unconditional: MS have a margin of discretion to apply the criteria of proportionality.</p>
<p>(c) are financially responsible for the imbalances they cause in the electricity system; to that extent they shall be balance responsible parties or shall delegate their balancing responsibility in accordance with Article 5 of Regulation (EU) 2019/943;</p>	Irrelevant	<p>Seems irrelevant at first analysis - Not a right but an obligation on CECs</p>
<p>(d) with regard to consumption of self-generated electricity, citizen energy communities are treated like active customers in accordance with point (e) of Article 15(2);</p>	Yes	<p>Direct effect: Article 15(2) is very precise in terms of rights granted to active customers.</p>

<p>(e) are entitled to arrange within the citizen energy community the sharing of electricity that is produced by the production units owned by the community, subject to other requirements laid down in this Article and subject to the community members retaining their rights and obligations as final customers. For the purposes of point (e) of the first subparagraph, where electricity is shared, this shall be without prejudice to applicable network charges, tariffs and levies, in accordance with a transparent cost-benefit analysis of distributed energy resources developed by the competent national authority.</p>	No	Not unconditional right: " <i>subject to other requirements laid down in this Article and subject to the community members retaining their rights and obligations as final customers.</i> "
<p>Article 16 (4) IEMD</p> <p>Member states may decide to grant citizen energy communities the right to manage distribution networks in their area of operation and establish the relevant procedures, without prejudice to Chapter IV or to other rules and regulations applying to distribution system operators. If such a right is granted, Member states shall ensure that citizen energy communities:</p> <p>(a) are entitled to conclude an agreement on the operation of their network with the relevant distribution system operator or transmission system operator to which their network is connected;</p> <p>(b) are subject to appropriate network charges at the connection points between their network and the distribution network outside the citizen energy community and that such network charges account separately for the electricity fed into the distribution network and the electricity consumed from the distribution network outside the citizen energy community in accordance with Article 59(7);</p> <p>(c) do not discriminate or harm customers who remain connected to the distribution system.</p>	No	No strict obligation on MS: no direct effect

Renewable Energy Communities		
Provision / right conferred to energy communities	Direct effect?	Assessment
<p>Article 18 (1) REDII</p> <p>Member states shall ensure that information on support measures is made available to all relevant actors, such as consumers including low-income, vulnerable consumers, renewables self-consumers, renewable energy communities, builders, installers, architects, suppliers of heating, cooling and electricity equipment and systems, and suppliers of vehicles compatible with the use of renewable energy and of intelligent transport systems.</p>	Yes	<p>Identity of person entitled: very clear for the relevant actors listed in the provision. The list of relevant actors being non exhaustive, it is likely there won't be any direct effect towards non identified persons in this provision (even they consider themselves as "relevant actors").</p> <p>Content of entitlement: clear language</p> <p>Identity of entity liable as being the MS is clear and precise</p> <p>→ Direct effect for the relevant actors identified in the provision only</p>
<p>Article 18 (6) REDII</p> <p>Member states, where appropriate with the participation of local and regional authorities, shall develop suitable information, awareness-raising, guidance or training programmes in order to inform citizens of how to exercise their rights as active customers, and of the benefits and practicalities, including technical and financial aspects, of developing and using energy from</p>	No	<p>Identity of person entitled: wide category of citizens – lack of precision</p> <p>Content of entitlement: margin of appreciation of what is "suitable information," "benefits," "practicalities"</p> <p>Identity of entity liable as being the MS is clear and precise</p> <p>→ Not sufficiently clear and precise to have direct effect</p>
<p>Article 22 REDII - Renewable energy communities</p> <p>1. Member states shall ensure that final customers, in particular household customers, are entitled to participate in a renewable energy community while maintaining their rights or obligations as final customers, and without being subject to unjustified or discriminatory conditions or procedures that would prevent their participation in a renewable energy community, provided that for private undertakings, their participation does not constitute their primary commercial or professional activity.</p>	No direct effect towards private undertakings	<p>Identity of person entitled: final customers (specifically household customers)</p> <p>Content of the entitlement: strong language with no conditionality. Less clear for private undertakings as the right is under a condition that is subject to interpretation (i.e., what constitutes "their primary commercial or professional activity")</p> <p>Identity of entity liable as being the MS is clear and precise</p> <p>→ Art. 22 (1) has direct effect towards final customers, except for private undertakings</p>

2. Member states shall ensure that renewable energy communities are entitled to:		<p>Identity of person entitled: renewable energy communities as defined in Article 2(16) of the REDII</p> <p>Content of entitlement: strong language + see assessment of each obligation below</p> <p>Identity of entity liable as being the MS is clear and precise</p> <p>→ the direct effect of this provision depends on the level of clarity and precision of each obligation (see assessment below).</p>
(a) produce, consume, store and sell renewable energy, including through renewables power purchase agreements;	Yes	→ The list of activities is very clear and unconditional
(b) share, within the renewable energy community, renewable energy that is produced by the production units owned by that renewable energy community, subject to the other requirements laid down in this Article and to maintaining the rights and obligations of the renewable energy community members as customers;	No	→ Lack of clarity and no interpretation of "sharing" (i.e., does that include virtual sharing between the RECs and the consumers of the energy produced?)
(c) access all suitable energy markets both directly or through aggregation in a non-discriminatory manner.	Uncertain	→ The provision does not allow access to all energy markets, but to all "suitable energy markets." This may leave some room for interpretation by MS on what is an appropriate energy market for RECs.
3. Member states shall carry out an assessment of the existing barriers and potential of development of renewable energy communities in their territories.	No	<p>Identity of person entitled: no clear right holder</p> <p>Content of entitlement: no clear entitlement</p> <p>Identity of entity liable as being the MS is clear and precise</p> <p>→ Conclusion: No direct effect</p>
4. Member states shall provide an enabling framework to promote and facilitate the development of renewable energy communities. That framework shall ensure, inter alia, that:		<p>Identity of person entitled: no clear right holder (facilitating the development of RECs does not clearly create rights for them), it depends on the content of the enabling framework – see assessment below</p> <p>Content of entitlement: also depends on the content of the enabling framework. Generally speaking, providing "an enabling framework" is a vague formulation, which can mean many different things in practice, so there is an assumption that all the provisions under this article are conditional</p> <p>Identity of entity liable as being the MS is clear and precise</p> <p>→ Each of the provision must be looked at separately to see if they are clear and precise</p>

(a) unjustified regulatory and administrative barriers to renewable energy communities are removed;	No	<p>Identity of person entitled: RECs as defined in Art.2(16) REDII</p> <p>Content of entitlement: not clear and precise: the "barriers" are not clearly defined in the directive and are open to interpretation by Member states.</p> <p>Identity of entity liable as being the MS is clear and precise</p> <p>↓ No direct effect because of a lack of clarity</p>
(b) share, within the renewable energy community, renewable energy that is produced by the production units owned by that renewable energy community, subject to the other requirements laid down in this Article and to maintaining the rights and obligations of the renewable energy community members as customers;	No	<p>↓ Lack of clarity and no interpretation of "sharing" (i.e., does that include virtual sharing between the RECs and the consumers of the energy produced?)</p>
(c) the relevant distribution system operator cooperates with renewable energy communities to facilitate energy transfers within renewable energy communities;	No	<p>↓ Not clear/unconditional: no definition of what "cooperates" will mean in practice</p>
(d) renewable energy communities are subject to fair, proportionate and transparent procedures, including registration and licensing procedures, and cost-reflective network charges, as well as relevant charges, levies and taxes, ensuring that they contribute, in an adequate, fair and balanced way, to the overall cost sharing of the system in line with a transparent cost-benefit analysis of distributed energy sources developed by the national competent authorities;	No	<p>Identity of person entitled: RECs as defined in Art.2(16) REDII</p> <p>Content of entitlement: "fair, proportionate and transparent" and "cost reflective network charge" are open to interpretation by Member state</p> <p>Identity of entity liable: the legislator will establish the framework, but then may not cause the breach to RECs' rights (could be the relevant DSO, the national energy regulatory authorities may cause the breach to this provision)</p> <p>↓ No direct effect because of a lack of clarity</p>
(e) renewable energy communities are not subject to discriminatory treatment with regard to their activities, rights and obligations as final customers, producers, suppliers, distribution system operators, or as other market participants;	Yes	<p>Identity of person entitled: RECs as defined in Art.2(16) REDII</p> <p>Content of entitlement: the prohibition of any discriminatory treatment is quite detailed here</p> <p>Identity of entity liable: the legislator which will develop the enabling framework but may not cause the breach (could be any operators: TSO/ DSO, national energy regulatory authorities, etc.)</p> <p>↓ Direct effect only if the MS is at the origin of the damage</p>

(f) the participation in the renewable energy communities is accessible to all consumers, including those in low-income or vulnerable households;	Unsure	<p>identity of person entitled: all consumers (quite general)</p> <p>content of the entitlement: right to participate to RECs - pretty clear</p> <p>identity of entity liable: not specified here, we suppose it is the legislator which establishes the enabling framework</p> <p>↓ Conclusion: the provision is a bit general, it is unsure whether it could have a direct effect</p>
(g) tools to facilitate access to finance and information are available;	No	<p>Identity of person entitled: not specified</p> <p>Content of entitlement: Not clear and precise (no definition of "tools") - leaves room for interpretation</p> <p>Identity of entity liable: not specified here, we suppose it is the legislator which establishes the enabling framework</p> <p>↓ Conclusion: the provision is a bit unclear; it is unsure whether it could have a direct effect</p>
(h) regulatory and capacity-building support is provided to public authorities in enabling and setting up renewable energy communities, and in helping authorities to participate directly;	Yes	<p>↓ Beneficiaries in this case are public authorities. The provision could have a direct effect for them in relation to the rights described in this paragraph.</p>
(i) rules to secure the equal and non-discriminatory treatment of consumers that participate in the renewable energy community are in place.	No	<p>Identity of person entitled: consumers participating in RECs</p> <p>Content of entitlement: the content of the rules to secure the equal and non-discriminatory treatment is unclear and can be defined differently by MS. Moreover, defining those rules is different from not granting discriminatory treatment</p> <p>Identity of entity liable: not specified here, we suppose it is the legislator which establishes the enabling framework</p> <p>Conclusion: lack of direct effect</p>
5. The main elements of the enabling framework referred to in paragraph 4, and of its implementation, shall be part of the updates of the Member states' integrated national energy and climate plans and progress reports pursuant to Regulation (EU) 2018/1999.	Irrelevant	<p>↓ No clear right holder</p>
6. Member states may provide for renewable energy communities to be open to cross-border participation.	No	<p>↓ Not unconditional (no strict obligation on MS)</p>

<p>7. Without prejudice to Articles 107 and 108 TFEU, Member states shall take into account specificities of renewable energy communities when designing support schemes in order to allow them to compete for support on an equal footing with other market participants.</p>	<p>No</p>	<p>Identity of person entitled: RECs as defined in the REDII</p> <p>Content of entitlement: lack of clarity and precision (no definition of what "take into account" and "specificities of RECs" etc.).</p> <p>Identity of entity liable: not specified here, we suppose it is the legislator which establishes the enabling framework</p> <p>↓ Conclusion: not sufficiently clear and precise to have direct effect, not clear who is liable</p>
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