

LIFE-BECKON

Boosting Energy Communities massive deployment by equipping local authorities with comprehensive technical assistance cookboOk, integrated services and capacity building



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Selection of suitable legal entities

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This document aims at providing the necessary guidance for promoters of Energy Communities to choose the most suitable entity to create the EC: Cooperative, foundation, association, and commercial company. Finally, an example checklist for the incorporation of a cooperative in Spain is provided, and a questionnaire of matters to take into account when creating a checklist for the incorporation of other entities upon which to create an EC is included as well. **May 2023.**

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Table of contents

1. Introduction	3
2. Suitable legal entities for a REC	3
2.1. Cooperative	5
2.2. Foundation	6
2.3. Association	6
2.4. Commercial Company	7
2.5. Summary table	8
3. Implementation of the legal entity	8

1. Introduction

This document focuses on describing the criteria legal entities must comply with in order to establish a Renewable Energy Community (REC) according to Directive 2018/2001. A description of the most used legal entity modalities for REC (cooperatives, foundations, associations and commercial companies) is also attached, along with a summary table. Finally, a general checklist of aspects that need to be taken into account for the incorporation of a legal entity is also attached.¹

2. Suitable legal entities for a REC

Preselection criteria of suitable entities for a REC

1. Participation should be open and voluntary
2. Should be an autonomous and effectively controlled entity by partners or members
3. Own or have developed renewable energy projects mentioned in the previous point
4. Partners must be individuals, SMEs or local authorities, including municipalities
5. Their primary purpose should be to provide environmental, economic or social benefits to members or local, rather than financial gains

The concept of the Renewable Energy Community has been defined in Article 2.16) of Directive 2018/2001. This definition reads as follows:

¹ For additional information regarding the possibilities of energy communities for legal entities, see the JRC Science for Policy Report (2020) *‘Energy communities: an overview of energy and social innovation’*, pp. 14-16, available at <https://energy-communities-repository.ec.europa.eu/energy-communities-repository-support/energy-communities-repository-toolbox/energy-communities-overview-energy-and-social-innovation_en>.

'renewable energy community' means a legal entity:

- (a) which, in accordance with the applicable national law, is based on open and voluntary participation, is autonomous, and is effectively controlled by shareholders or members that are located in the proximity of the renewable energy projects that are owned and developed by that legal entity;
- (b) the shareholders or members of which are natural persons, SMEs or local authorities, including municipalities;
- (c) the primary purpose of which is to provide environmental, economic or social community benefits for its shareholders or members or for the local areas where it operates, rather than financial profits;

Therefore, it follows from that definition that a REC must be a formally constituted entity with legal personality and fulfil the requirements described in the regulation. In this sense, under European law, it is not specified what legal form it should take, nor are established preferences in this regard (association, cooperative, foundation, commercial company, non-profit organisation...). However, RECs are narrowly defined since:

- Member's participation should be open and voluntary.
- It should be an autonomous and effectively controlled entity by partners or members located in the proximity of renewable energy projects.
- In turn, it must own and have developed the renewable energy projects mentioned in the previous point. Thus, the REC needs to be the owner of a renewable energy project.
- Its partners must be individuals, SMEs or local authorities, including municipalities. Therefore, even if the participation of public bodies is included, it is optional and not required.
- The primary purpose should be to provide environmental, economic or social benefits to their partners or members or the local areas where they operate, rather than financial gains. In this sense, it is possible for REC to make financial gains. However, these cannot be its primary purpose.

Of all the requirements listed in the previous paragraph, the first two are the ones that impact the most the choice of the legal entity and the organisation of the REC.

In light of those criteria, the possible legal forms that generally adapt the best to the legal requirements of a REC are defined hereinbefore. The main characteristics of each one of them are explained. However, the processes of constitution of each of the legal forms are not detailed.

2.1. Cooperative

A cooperative is a legal entity that generally allows the creation of a REC, since it permits complying easily with the requirements established in Directive 2018/2001. Indeed, it is the most common legal entity to organise RECs.² Thus, according to the International Cooperative Alliance, cooperatives are voluntary organisations that are open to all persons that are willing to participate in them. Moreover, cooperatives are subject to the principle of democratic member control, which means that members participate in setting the cooperative's policies and making its decisions. In conclusion, the organisation is controlled by its members. Moreover, generally members have equal voting rights (one member, one vote) and the cooperative is an entity independent from its members, which ensures that the cooperative is autonomous. Finally, it is possible for cooperatives to be non-profit, but it is not a requirement.

Taking into account the democratic principle to which cooperatives are subject, this legal entity would be most appropriate to RECs the participation in which is intended to be egalitarian and collective. Moreover, the open character of cooperatives also allows for persons to acquire membership in the REC easily. This legal entity gives, predominantly, benefits to its members. Thus, a cooperative is also optimal if it is expected that the Community will grow fast.

Please also note that a cooperative may also be interesting because they may be considered Commercial Companies in the law of a Member State. This may facilitate RECs based on cooperatives to act as other agents of the electricity market, such as suppliers, since only some specific legal entities may be legally able to carry out the activities of those market agents. For example, in Spain, Suppliers are required by law to be Commercial Companies.

Moreover, other forms of energy sharing, such as collective self-consumption, are not limited to a specific kind of legal entity. However, it is possible that other activities, such as aggregation services, commercial energy services or distribution system operation are limited to certain legal entities, depending on the Member State.

² JRC Science for Policy Report (2020) '*Energy communities: an overview of energy and social innovation*', pp. 14-16, available at https://energy-communities-repository.ec.europa.eu/energy-communities-repository-support/energy-communities-repository-toolbox/energy-communities-overview-energy-and-social-innovation_en.

Examples of cooperatives are common, for instance, in Germany and Sweden, since these countries share a strong community tradition. In addition, at the European level REScoop.eu (the European federation of renewable energy cooperatives)³ represents more than 1500 energy cooperatives.

Cooperatives are known as “кооперация” in Bulgaria, as “Andelsselskab” in Denmark and as “Sociedad Cooperativa” in Spain.

2.2. Foundation

Foundations are non-profit entities created by their founders, who provide the foundation with resources which shall be used to achieve the objectives of the foundation, established in its internal governing rules. Even though foundations are necessarily non-profit, foundations are allowed to participate in commercial activities. Thus, they cannot distribute profits between their members, but can reinvest the profits in the Foundation or spend them in achieving its objectives. The main objective of a Foundation is not to pursue economic goals of benefits for the members but rather pursue a social goal and generate social value and local development. In consequence, Foundations are most suitable for energy communities focused on providing benefits to the area in which they are situated, instead of to their members.

Foundations are very popular in many Member States as they are not considered Commercial Companies and they usually have their own regulation which in many cases matches with the aforementioned requirements for RAC. However, not being considered a Commercial Company may be difficult acting as some agents of the electricity sector, since the law limits some agents to some specific legal entities. For example, under Spanish law, a foundation would not be able to be a supplier, since Spanish law requires this electricity market agent to be a Commercial Company.

Foundations are known as “фондация” in Bulgaria and as “Fundación” in Spain. They are not allowed in Denmark for energy communities, according to Article 6 BEK nr 1069 of 30/05/2021.

2.3. Association

Associations are legal entities created by persons or by other legal entities that pursue a common interest. Associations match with the requirements in the definition of REC because participation in them is necessarily voluntary and open and participation in them is based on democratic principles. Generally, associations are non-profit legal entities, which means that they cannot distribute profits

³ See [REScoop](#).

between their members. However, they can engage in commercial activities in order to sustain themselves.

The stress in the open character of Associations makes them suitable for RECs which expect to grow fast.

Associations are not considered Commercial Companies, which may make it difficult for them to act as agents of the electricity system pending the full implementation of REC. For example, under Spanish law, suppliers are required to be Commercial Companies.

Associations are known as “сдружение” in Bulgaria, as “Forening” in Denmark and as “Asociación” in Spain.

2.4. Commercial Company

Commercial Companies are legal entities created under commercial law by one or more persons or entities with the aim of engaging in commercial activities and to obtain profits from those activities.

Please note that, although the law usually provides flexibility with regard to the membership and the organisation of companies, in order for a company to be able to be a REC, it is necessary for it to comply with the requirements established under EU law, and also under national law, for REC. Thus, even if it is possible for a single entity or person to constitute a company, a unipersonal company would never be able to be a REC, since they are essentially communities formed by more than one person. Similarly, although it is possible to establish strong limitations to the membership of the company, in order to become a REC, membership in the company needs to be necessarily open. Finally, RECs are necessarily governed by their members and autonomous. Thus, even though it is possible for companies to be effectively controlled by one single member, this is not allowed if the company is to constitute a REC.

In conclusion, in case a REC is organised as a company, care should be taken for the entity to comply with the requirements of such entity under European and national law.

Moreover, in some Member States some agents of the electricity market are required by law to be Commercial Companies. For example, under Spanish law, Suppliers are legally required to be Commercial Companies. Thus, a Commercial Company may be a good choice for a REC that wants to start carrying out its activities before RECs are completely developed under national law.

Commercial Companies are known as “търговско дружество” in Bulgaria, as “Kapitalselskab” in Denmark and as “Sociedad de Capital” under Spanish law. Please note that in each Member State, different kinds of Commercial Companies will exist.

2.5. Summary table

Cooperative	The most common legal entity. Cooperatives easily meet the requirements of the 2018/2001 Directive, since they are voluntary and democratic, of egalitarian and collective nature. Cooperatives may be considered Commercial Companies, which may facilitate its operation.
Foundation	Their main objective is not economic, but rather to pursue a social goal, generating social value and local development. Foundations are non-profit entities.
Association	The members assemble their efforts to pursue a common interest. Associations are voluntary, open and democratic by nature, which meets the requirements of RECs. Associations are non-profit but may engage in commercial activities.
Commercial Company	Created under commercial law, in order to pursue commercial activities and obtain profits. To be a REC, they shall not be a unipersonal company or be controlled by one single individual. A commercial company may be required to effectuate some activities when RECs national regulation is underdeveloped.

3. Implementation of the legal entity

Whatever legal entity is chosen to organise the REC, it will be necessary to create and incorporate that legal entity. This section provides a general checklist of aspects that need to be taken into account for the incorporation of a legal entity and a filled in example of the checklist for a specific entity. In this case, a Spanish cooperative situated in Castilla y Leon is chosen among the suitable entities to constitute a REC.

First of all, we note that the requirements for implementing the cooperative are to be found in the regulation of the type of entity to be constituted. Indeed, in this case, Law 4/2002 regulates the constitution of a cooperative in the autonomous community of Castilla y León. The implementation procedure of a cooperative is similar throughout Spain. However, when implementing a specific entity, the specific regulation applicable to the entity in its specific location shall be consulted. In the present case, the regulation of the implementation of the

cooperative is to be found in Title I, Chapter II ‘On the constitution of the cooperative’ of Law 4/2002.

The cooperative shall be constituted by means of a public deed, and this shall be inscribed in the Cooperatives Registry. Once it is inscribed, it will acquire juridical personality (art. 7).

The process is constituted by three phases: preparatory acts, constitutive process and inscription of the cooperative.

The following table represents a checklist of the implementation:

Preparatory acts While the inscription does not take place, the proposed cooperative shall add in its name the words ‘in constitution’ (<i>‘en constitución’</i>).	1	<u>Company name clearance certificate.</u>
	2	<u>Necessary activities for the constitution</u> , which may include: <ul style="list-style-type: none"> ● Call for possible aspirants to integrate the cooperative, if a Constituent Assembly is held. ● Joint and several liability for the persons who act and sign contracts on behalf of the cooperative but before its inscription. Those acts are assumed by the cooperative after its inscription, as well as the costs incurred. Thus, the joint and several liability will cease. ● If the articles of incorporation were not inscribed in the Registry within one year of its granting, the assets contributed to the cooperative and its fruits shall be affected by the acts and contracts concluded on behalf of the cooperative (without prejudice to joint and several liability).
Constitutive process	3	<u>Constituent Assembly.</u> This body is constituted by the promoters and each of them has a vote. It shall elect a President and a Secretary. The holding of the Constituent Assembly would not be necessary if the public deed of incorporation was granted by all the promoters.
	3.a	Approval of the Act of Incorporation.
	3.b	Adoption of the Statutes draft.
	3.c	Election of management bodies in accordance with their Statutes.
	3.d	Appointment of promoters-managers for the granting of public deeds, banking procedures, conclusion of contracts and registration.

	3.e	Definition of the type of cooperative envisaged.
	3.f	Approval of the form, amount, and time frame within which the promoters must pay out the share of the minimum mandatory contribution to become a member.
	3.g	Approval of the value of non-monetary contributions, if any.
	4	<p><u>Report of the Constituent Assembly.</u></p> <p>It shall be certified by the Secretary, with approval of the President, and contain the agreements adopted and the relation of the promoters that have the requirements to acquire the condition of member (<i>'socio'</i>).</p>
	5	<p><u>Prior qualification.</u></p> <p>This might be requested before the competent section of the Registry of Cooperative Societies. The resolution shall be given within 1 month from the request, and if there is no resolution, silence shall constitute approval.</p> <p>Documents needed:</p> <ul style="list-style-type: none"> ● Company name clearance certificate. ● Two copies of the Statutes draft. ● If held, two certificates of the Report of the Constituent Assembly, within two months of its approval.

	6	<p><u>Articles of incorporation</u> (<i>‘Escritura de constitución’</i>).</p> <p>The articles of incorporation must be submitted to a public deed, within two months from the date of approval of the Statutes draft, from the notification of the favourable decision of prior qualification or from the date on which administrative silence is to be deemed.</p> <p>The Articles of incorporation shall include:</p> <ul style="list-style-type: none"> ● The identity of the granting members. ● A manifestation that they fulfil the requirements necessary to be a member. ● The will to constitute the cooperative and the specification of the kind of cooperative that is constituted. ● Proof that the granting members have signed and paid their share of the cooperative. ● Proof that the payments made by the members at least cover the minimum company capital established in the Statutes. ● The names of the persons that will hold the governing positions within the cooperative upon the moment of its constitution, and a declaration that they are not affected by any incompatibility or prohibition. ● In case some of the shares are not provided in capital, a valuation of the goods that are provided as contribution. ● The company name clearance certificate. ● A copy of the Statutes.
Inscription of the cooperative	7	<p><u>Registry inscription.</u></p> <p>The cooperative shall be registered in the Cooperatives Registry within two months since the issuance of the Articles of Incorporation.⁴ The Cooperatives Registry will decide on the registration within a month.</p>

Moreover, the following table provides a blank checklist of matters that shall be taken into account when incorporating a legal entity with the aim of establishing an EC.

Preliminary	1	<p><u>Analysis of the legal regime of the legal entity:</u> Does the legal regime applicable to the legal entity satisfy the needs of the REC? Does the legal regime permit the REC to comply with the requirements in European and national legislation?</p>
	2	<p><u>Filling of the checklist:</u> Fill the checklist table. This will provide you with</p>

⁴ In some circumstances it is possible to register the cooperative up to 12 months since its incorporation (17.2 and 3 Law 4/2002).

		a general picture of the implementation of the entity and will provide an ordered guidance during the process.
Preparatory acts	1	<u>Company name clearance certificate:</u> Is it necessary?
	2	<u>Necessary activities for the constitution:</u> What are the necessary steps to take before the constitution of the entity? Do we have enough suitable members to create the entity? Do we have enough resources to create and sustain the entity? What is the responsibility regime of promoters of the entity during the procedure of constitution of the entity?
Constitutive process	3	<u>Constituent meeting:</u> Is it necessary to hold a constituent meeting? What are its requirements? What decisions need to be taken in the meeting?
	3.a	<u>Governing regime:</u> What document or documents shall rule the governance of the entity? What are the requirements of these documents? What is the necessary content of those documents? Does the law prescribe or prohibit some arrangement with regard to the governing regime of the entity? Does the designed legal regime comply with the law?
	4	<u>Report of the Constituent Meeting</u> How is the meeting required to be documented? Which decisions need to be documented?
	5	<u>Prior qualification.</u> Do the decisions taken in the constituent meeting or the documents including the governing regime require the approval of any authority or institution?
	6	<u>Incorporation:</u> is it necessary to incorporate the entity via a public deed before a notary or through another similar formality? What is the necessary content of the incorporation document? Is there a time limit to incorporate the entity? Who is empowered to incorporate the entity?
Inscription of the entity	7	<u>Registry inscription:</u> Is it necessary to register the entity? Before which registry? What is required? Is there any time limit for the registration of the entity? Who is empowered to register the entity? Does the registering authority have a time limit to effectively register the entity? What happens if the registering authority does not comply with the time limit?