The Italian Law Journal

Special Issue

Sustainable Legal Infrastructures: Comparative Responses Across Cultures and Systems

edited by Lucia Ruggeri, Lécia Vicente and Sara Zuccarino

Edizioni Scientifiche Italiane

www.theitalianlawjournal.it

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An International Forum for the Critique of Italian Law

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ISSN 2421-2156 October 2024 DOI 10.23815/2421-2156.ITALJ

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The Entrepreneurial Nature of Renewable Energy Communities and Distribution of Incentives

Ivan Libero Nocera*

Abstract

The essay seeks to explore a critical yet underexamined issue: the entrepreneurial or non-entrepreneurial nature of Renewable Energy Communities (RECs). This distinction is crucial since significant practical and operational repercussions derive from the adherence or non-adherence to this reconstructive option: consider the relevant tax effects resulting from the taxation of business income. Therefore, to exploit RECs for the purpose of increasing the production of energy from renewable sources, it is necessary to interpret their regulation, silent on the topic, to the best of its expansive capacity.

Keywords

Entrepreneurial or Non-entrepreneurial Nature, Incentives Distribution, Notion of Business Activity, Incentive Allocation.

I. Foreword

Energy efficiency is one of the main and most important ways to initiate and speed up the process towards ever greater sustainability as a way to achieve an 'ecological revolution'. However, for this to be practically feasible, it is necessary to compensate for the sacrifices with as many benefits, which can be done in new forms of work, opportunities and earnings.[1]

The launch of Renewable Energy Communities (RECs) has sparked significant interest of a civil law doctrine,[2] with interventions aimed at

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[1] On this point, see E. Del Prato, 'Sostenibilità, precauzione, sussidiarietà' *Contratto e impresa/Europa*, 405 (2023).

[2] See M. Renna, 'Le comunità energetiche e l'autoconsumo collettivo di energia. Tutela della concorrenza e regolazione del mercato' *Nuove leggi civili commentate*, 161 (2024); L. Di Cerbo, 'Il *nomos* delle comunità energetiche: tra Stato, mercato e comune' *Giurisprudenza italiana*, 2749 (2023); M. Meli ed, *La transizione verso nuovi modelli di produzione e consumi di energia da fonti rinnovabili* (Pisa: Pacini, 2023), *passim*; Id, 'Autoconsumo di energia rinnovabile e nuove forme di *Energy Sharing*' *Nuove leggi civili commentate*, 630 (2020); V. Cappelli, 'Appunti per un inquadramento privatistico dell'autoconsumo di energia rinnovabile nel mercato elettrico: il caso delle comunità energetiche' *Nuove leggi civili commentate*, 381 (2023); Id, 'Profili privatistici delle nuove discipline in materia di promozione dell'energia rinnovabile e regolazione del mercato

resolving the many theoretical and practical issues posed by this discipline. Although originally intended to be simple, the regulatory landscape governing RECs has turned out to be very complex due to multiple regulatory interventions that have followed one another over time.

RECs are defined by European Parliament and Council Directive 2018/2001/EU of 11 December 2018 on the promotion of the use of energy from renewable sources [2018] OJ L328/82 ('RED II')[3] as legal entities connoted by an open structure and voluntary participation endowed with autonomy and effectively controlled by members. These can include natural persons, small and medium-sized enterprises, and local authorities (including public administrations) situated near the energy production facilities owned by the RECs or otherwise available to the RECs. Therefore, the RECs represent a form of 'democratization of the energy system'[4] achieved through the co-ownership or availability of the means of production and co-management of distribution tools that allow users, as their members, to take on the role of producers, consumers, and managers of renewable energy.

In this sense, the RECs represent a multifaceted instrument, intersecting different aspects of considerable legal interest. This was demonstrated by recent doctrinal contributions that have highlighted key aspects such as the choices of legal form that can be adopted,[5]

elettrico' *Nuove leggi civili commentate*, 1185 (2022); L. Cuocolo, P.P. Giampellegrini and O. Granato eds, *Le comunità energetiche rinnovabili. Modelli, regole, profili applicative* (Milano: Egea, 2023), *passim*; S. Monticelli and L. Ruggeri eds, *La via italiana alle comunità energetiche* (Napoli: Edizioni Scientifiche Italiane, 2022), *passim*; E. Giarmanà, 'Autoconsumo collettivo e comunità energetiche. I primi interventi di regolazione' *AmbienteDiritto.it*, 1 (2021); E. Cusa, 'Sviluppo sostenibile, cittadinanza attiva e comunità energetiche' *Orizzonti del diritto commerciale*, 71 (2020); C. Bevilacqua, 'Le comunità energetiche tra *governance* e sviluppo locale' *Amministrazione in cammino*, 1 (2020).

[3] Acknowledged in our system through Art 42-*bis* of decreto legge 30 December 2019 no 162, Arts 31-33 of decreto legislativo 8 November 2021 no 199, ARERA's Resolution no 727/2022/R/eel of 27 December 2022 – Definition, pursuant to decreto legislativo 8 November 2021 no 199 and decreto legislativo 8 November 2021 no 210, of the regulation of diffuse self-consumption.

[4] In these terms M. Meli, 'Autoconsumo', n 2 above, 633.

[5] M. Meli, 'Le Comunità di Energia Rinnovabile: i diversi modelli organizzativi' *Giurisprudenza italiana*, 2761 (2023); C. Favilli, 'Transizione ecologica e autoconsumo organizzato di energia rinnovabile. La questione della forma giuridica delle comunità energetiche' *Responsabilità civile e previdenza*, 385 (2023); L. Balestra, 'Proprietà e soggettività delle comunità energetiche: profili privatistici' *Giurisprudenza italiana*, 2772 (2023); M. Pafumi, 'Il soggetto giuridico Comunità Energetica: quali soluzioni possibili?', in M. Meli ed, *La transizione*, n 2 above, 121; R. Piselli, 'Le comunità energetiche tra pubblico e privato: un modello organizzativo transtipico' *Diritto e società*, 776 (2022).

governance,[6] the ownership of production sources,[7] liability profiles[8] and the negotiation models useful for obtaining the enjoyment of an energy production plant.[9]

The present essay aims to address a specific application issue, which has so far remained in the background. This issue arises from the significant regulatory stratification and multilevel legal framework examined by a recent Study of the National Council of Notaries:[10] the entrepreneurial or non-entrepreneurial nature of the REC itself.

II. Does the REC Always Qualify as an Enterprise?

It is well known that an REC must not prioritize profit as its main purpose, here prudentially understood both as profit for its members (profit in the subjective sense) and as a realization of profits (profit in the objective sense).[11] In this regard, it is worth pointing out that the economic benefit deriving from a saving of expenses for the participants, proportional to their consumption, instead of a remuneration for investment in participation, must not be considered a profit motive.

However, while profit should not dominate the REC's purpose, it is not entirely excluded. Under certain conditions, members of an REC may achieve appreciable benefits in strictly economic terms (eg, in the form of dividends on the initial investment or savings on the cost of access to electricity) or through access to services offered by the REC. In addition, the REC's business model may be designed entirely for the benefit of its

[6] A. Davola, 'La *governance* delle Comunità Energetiche tra finalità mutualistiche, democraticità e sostenibilità economica. Un'analisi empirica' *Diritto e società*, 885 (2022); C. Iaione et al, 'La *governance* per la gestione sostenibile e inclusiva delle comunità energetiche: analisi di pre-fattibilità economico-giuridica', in *Report di ricerca per l'Agenzia nazionale per le nuove tecnologie, l'energia e lo sviluppo economico sostenibile (ENEA)* (2020), available at https://www2.enea.it/it/ricerca-di-sistema-elettrico/accordo-di-programma-MiSE-ENEA-2019-2021/tecnologie/tecnologie-per-la-penetrazione-efficiente-del-vettore-elettrico-negli-usi-finali/report-2020.

[7] L. Balestra, n 5 above, 2772.

[8] G. Grasso, '*Shared Energy*. Nuove questioni e improponibilità di vecchie soluzioni in materia di responsabilità' *Nuova giurisprudenza civile commentata*, 1406 (2023); Id, 'Profili di responsabilità nelle comunità energetiche e negli scambi di energia tra pari', in M. Meli ed, *La transizione*, n 2 above, 65.

[9] F. Bartolini, 'I contratti di godimento per lo sviluppo delle comunità energetiche' *Giurisprudenza italiana*, 2781 (2023).

[10] Consiglio Nazionale del Notariato, Study no 38-2024/i, E. Cusa, 'Le incentivate comunità energetiche rinnovabili e il loro atto costitutivo' published on 27 March 2024 and available at https://notariato.it/it/ufficio_studi/.

[11] According to Art 31, par 1, letter a of decreto legislativo 8 November 2021 no 199: 'The main objective of the community is to provide environmental, economic or social benefits at community level to its partners or members or to the local areas in which the community operates, and not to make financial profits'.

members or involve the partial outsourcing of energy supply to third parties.

This raises an important question regarding the necessarily entrepreneurial nature of RECs. Indeed, the question arises as to whether they always qualify as enterprises or only acquire the nature of an enterprise under certain circumstances (in particular, the placing on the market of the electricity produced).

In this context, Study no 38-2004/I of the National Council of Notaries classifies RECs as commercial enterprises 'for the following three reasons: (i) energy activities are distinctly commercial (ie, non-agricultural) by nature; (ii) the latter are not, as a rule, classifiable as connected within the meaning of Art 2135, para 3 of the Civil Code if exercised by an REC that is an agricultural enterprise within the meaning of Art 2135, paras 1 and 2 of the Civil Code; (iii) even when RECs are established as non-profit entities, their activities corresponding to commercial enterprises should usually be prevalent (if not exclusive) with respect to non-entrepreneurial activities'. As a result of this classification, RECs are subject to the regulatory statute of commercial enterprises, so 'if the relative prerequisites are met, an REC may thus, for example, be required to register in the companies' register (even when it is constituted in the form of an association or foundation) or be subject to judicial liquidation'.[12]

According to Study no 38-2004/I of the National Council of Notaries, even an REC that merely redistributes incentives among its members and delegates other economic activities to third parties retains its entrepreneurial nature. The Study asserts that 'the incentivized REC, on the basis of the activities that it can carry out, even if it limits itself to exercising virtual power sharing, is mostly classifiable as an energy enterprise (possibly only an aggregator of energy producers and consumers), even if it outsources many or all of its economic activities'.[13] Before going into the merits of the issue, we would like to highlight the significance of the topic because the issue of the entrepreneurial or nonentrepreneurial nature of RECs is intricately linked to the issue of who holds ownership of the incentives – the REC or its members – leading to complex implications.

Indeed, if an undertaking receives State aid that must then in turn be distributed to third parties, both the direct aid received by the first undertaking and the indirect aid received by third parties would be susceptible to scrutiny under the State aid rules because – as stated in European Commission Notice (2016/C 262/01) of the concept of State aid – 'the advantage may be conferred on undertakings other than those to

[12] See Consiglio Nazionale del Notariato, Study no 38-2024/i, n 10 above, 24.
[13] ibid. 23.

which the State resources are directly transferred (indirect advantage). A given measure may also constitute a direct advantage for the recipient undertaking and an indirect advantage for other undertakings, for example, those operating at successive levels of activity'.[14]

Now, in the European Commission's recent decision C(2023) 8086 final of 22 November 2023 on incentives for collective self-consumption, there is no examination of the possibility of State aid to RECs: it is quite clear that, if RECs were (almost) always undertakings and were also holders of the incentives, the Commission's decision would be in breach of the community rules on State aid. Therefore, one of two conclusions is true: either RECs are enterprises, in which case they cannot be holders of aid but merely vehicles for its transfer,[15] or RECs are holders of incentives and then they can qualify as enterprises. This excludes RECs from being both enterprises and incentive holders, leaving, of course, the other possibility open: they are not enterprises or that, if they are such, they are not incentive holders.

III. The Notion of Business Activity and Its Applicability to RECs

To assess the entrepreneurial or non-entrepreneurial nature of an REC, it should be recalled that the notion of business activity is one of the most complex in Italian and European law and has given rise to considerable controversy in various fields of law.

According to the classic definition outlined in Art 2082 of the Civil Code, an enterprise is any economic activity characterized both by a specific purpose consisting of the production or exchange of goods or services and by specific methods of performance, which take the form of organization, cost-effectiveness and professionalism.

The prevailing doctrinal opinion[16] holds that an entrepreneur is a

[14] Thus, Commission Notice on the concept of State aid in Art 107, para 1 of Treaty on the Functioning of the European Union (2016/C 262/01), para 4.3, 26.

[15] See footnote 179 on page 26 of the Communication from the Commission on the concept of State aid in Art 107, para 1 of Treaty on the Functioning of the European Union (2016/C 262/01): 'An intermediate undertaking which acts as a mere vehicle for transferring the advantage to the beneficiary and does not retain any advantage should not normally be considered to be a beneficiary of State aid'.

[16] For support for this thesis, see, among others, E. Desana, 'La fattispecie impresa nelle sue varianti', in G. Cottino ed, *Lineamenti di diritto commerciale* (Bologna: Zanichelli, 2014), 37; F. Ferrara Jr. and F. Corsi, *Gli imprenditori e le società* (Milano: Giuffrè, 2012), 21; G. Ferri, *Diritto commerciale* (Torino: Utet Giuridica, 1996), 46; F. Galgano, *Diritto commerciale*, *L'imprenditore. Impresa. Contratti di impresa. Titoli di credito. Fallimento* (Bologna: Zanichelli, 1996), I, 26; G. Auletta and N. Salanitro, *Diritto commerciale* (Milano: Giuffrè, 1996), 16; G. Cottino, *Diritto commerciale* (Padova: Cedam, 1993), I, I, 81. For the opposite minority thesis that does not consider market orientation an essential requirement of business activity, see G.F. Campobasso, *Diritto*

subject who performs an intermediary function between the owners of production factors and consumers. This implies that the destination of production to exchange and, therefore, its destination to the market is an essential requirement inherent in the professional character of the business activity, its economic nature or in the function of protection of third parties contained in the business discipline. Hence, the qualification of business is denied to the so-called 'own-account business', which includes hypotheses in which what is produced is consumed or appropriated by the producer without transferring it to third parties' so-called 'own-account undertaking', which encompasses cases in which what is produced is consumed or appropriated by the producer without being transferred to third parties.

However, under the impetus of EU competition law and the jurisprudence of the European Court of Justice, a broader and non-formalistic interpretation of the concept of enterprise, here based on functional, operational and organisational elements, has been established, according to which an undertaking 'encompasses any entity engaged in an economic activity regardless of its legal status'.[17]

The decisive criterion for the regulatory qualification of the undertaking is, therefore, the economic nature of the activity it performs. In other words, the community concept of an undertaking refers to an economic entity characterized by a unified organization of personal, tangible, and intangible elements, which consistently pursues an economic objective so that, according to the established case law of the European Court of Justice,[18] 'any activity consisting in offering goods or services on

commerciale. Diritto dell'impresa (Milano: Utet Giuridica, 2022), I, 37; G. Oppo, 'Principi', in V. Buonocore ed, *Trattato di diritto commerciale* (Torino: Giappichelli, 2001), I, 47; V. Afferni, *Gli atti di organizzazione e la figura giuridica dell'imprenditore* (Milano: Giuffrè, 1973), 235.

[17] In these terms, among others, Case C-97/08 *Akzo Nobel NV and Others* v *Commission of the European Communities*, [2009] ECR I-08237; Case C-309/99 *J.C.J. Wouters, J.W. Savelbergh and Price Waterhouse Belastingadviseurs BV* v *Algemene Raad van de Nederlandse Orde van Advocaten*, [2002] ECR 2002 I-01577; Case C- 55/96 *Job Centre coop. arl.*, [1997] ECR 1997 I-07119; Case C-41/90 *Klaus Höfner and Fritz Elser* v *Macrotron GmbH*, [1991] ECR 1991 I-01979; Case C-244/94 *Fédération Française des Sociétés d'Assurance, Société Paternelle-Vie, Union des Assurances de Paris-Vie and Caisse d'Assurance et de Prévoyance Mutuelle des Agriculteurs* v *Ministère de l'Agriculture et de la Pêche*, [1995] ECR 1995 I-04013, all available at https://onelegale.wolterskluwer.it/. On the evolution of the notion of undertaking see, among many, P. Montalenti, 'Dall'impresa all'attività economica: verso una nuova sistematica?' *Analisi giuridica dell'economia*, 45 (2014) and E. Desana, *Dall'impresa comunitaria alla tutela dell'impresa debole. Spunti per una nuova nozione di impresa* (Roma: Aracne, 2012), 85.

[18] In these terms, see Case C-113/07 *SELEX Sistemi Integrati SpA* v *Commission of the European Communities and Organisation européenne pour la sécurité de la navigation aérienne (Eurocontrol)*, [2009] 2009 I-02207, and more recently, Case C-

a given market constitutes an economic activity': consequently, in the absence of this element, it is not possible to qualify such entity as an undertaking.[19]

Coherently, the European legislation on public procurement (European Parliament and Council Directive 2014/24/EU of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, Art 2.1.10) states that '"economic operator" means a natural or legal person or a public entity or a grouping of such persons and/or entities, including any temporary association of undertakings, which offers on the market the execution of works and/or a work, the supply of products or the provision of services'. That the notion of 'economic operator' encompasses the notion of 'undertaking' is deduced from the previous European Parliament and Council Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, which are specified in Art 1, para 8: 'The term "economic operator" includes the contractor, the supplier and the service provider. It is only used to simplify the text'.[20] As a result, it is possible to say that an entity can only be defined as an enterprise if it operates by offering goods or services on the market.

That being said, it is necessary to verify in which cases an REC, here established as a nonprofit organization, can acquire the nature of an undertaking.

There is no doubt that the European directive intended RECs to be primarily enterprises and that, in many cases, an REC can take on the status of an enterprise in the electricity sector, producing energy and providing services on the market. *Nulla quaestio,* therefore, with respect to the recognition of an REC as an enterprise when it professionally participates in the energy market. In this case, the activities of producing, consuming, and sharing energy constitute an offer of goods on the market, thereby fulfilling the criteria for economic activity under the aforementioned community definition.[21] However, the entrepreneurial

128/21 *Lietuvos notarų rūmai and Others* v *Lietuvos Respublikos konkurencijos taryba*, [2024]; Case C-325/22 *TS and HI* v *Ministar na zemedelieto, hranite i gorite*, [2023], all available at https://onelegale.wolterskluwer.it/.

[19] In this sense, see, among many others, G. Cottino, M. Sarale and R. Weigmann, *Trattato di diritto commerciale, Società di persone e consorzi* (Padova: Cedam, 2004), III, 525 and A. Borgioli, *Consorzi e società consortili* (Milano: Giuffrè, 1985), 432.

[20] In this regard, see Corte di Cassazione 28 October 2019 no 27577; Corte di Cassazione 16 July 2018 no 18801; Corte di Cassazione 25 June 2018 no 16624; all available at https://onelegale.wolterskluwer.it/.

[21] As noted by L. Ruggeri, 'Comunità energetiche e modelli giuridici: l'importanza di una lettura euro-unitaria' *Actualidad Juridica Iberoamericana*, 1222 (2024), 'It is significantly founded on the economic nature of the activity of producing, consuming and sharing energy that makes the Energy Community a subject that professionally enters the energy market favouring its decentralisation and decarbonisation'. In this case, 'The

nature of an REC cannot be taken as a general rule, as such a legal entity may not always engage in energy production or the provision of services on the market. Indeed, the activity of allocating incentives to its members does not automatically qualify an REC as an undertaking.

On the contrary, the mere activity of allocating and distributing incentives among the members appears decisive in excluding the REC from qualifying as an undertaking, because, if it were limited to this activity, it would lack an economic entity with access to the market because the activity of the REC entity would be directed solely 'in-house', that is, to its members.

On the other hand, a consortium with internal activity – whose work is limited to regulating relations between consortium members, monitoring the performance of their obligations and imposing any sanctions – does not carry out its activity with third parties and does not take on the status of an undertaking.

Moreover, even the generally acknowledged[22] entrepreneurial nature of an outsourced consortium is not a foregone conclusion[23] because it is essential to consider the phase of the consortium members' production cycle.[24] Therefore, the entrepreneurship of an externally active consortium

Energy Community as a legal entity in charge of the production, consumption and sharing of energy produced and consumed is an "undertaking" as an entity that carries out an economic activity, regardless of its legal status and the way it is financed'.

[22] Corte di Cassazione 16 December 2013 no 28015, *CED Cassazione* (2013). In a similar vein, see, more recently, Corte di Cassazione 10 March 2023 no 7179 and Corte di Cassazione 29 December 2017 no 31191, all available at https://dejure.it.

[23] As E. Cusa, 'Il consorzio tra soggettività, responsabilità e tipicità' *Rivista di diritto civile*, 328 (2024), agrees: 'Common law itself, on the other hand, allows the consortium (even the internal one) to be an entrepreneur or not to be one'. Similarly, M. Sarale, in G. Cottino, M. Sarale and R. Weigmann, *Trattato di diritto commerciale*, n 19 above, 437, maintains that the entrepreneurial nature of consortia with external activity must be 'ascertained in concrete terms, and not attributed automatically'. In the same vein, G. Marasà, *Consorzi e società consortili* (Torino: Giappichelli, 1990), 85; A. De Martini, 'L'esercizio di imprese attraverso enti mutualistici ed organizzazioni consortili' *Diritto fallimentare*, I, 159 (1983); A. De Sanctis Ricciardone, 'Consorzio con attività esterna e natura di imprenditore' *Giurisprudenza commerciale*, II, 259 (1979). On the assumption of the entrepreneurial character of consortia with external activity, see also the reflections of G.V. Califano, 'La qualità di imprenditore del consorzio', in F. Preite ed, *Cooperative, consorzi e società consortili. Profili sostanziali, notarili e fiscali*, *Consorzi e società consortili: tipologie e operazioni sul capitale* (Milano: Giuffrè, 2019), II, 32; Id, *I consorzi per il coordinamento della produzione e degli scambi e le società consortili* (Milano: Giuffrè, 1999), 39; L. De Angelis, 'Sulla possibilità, per i consorzi, di utilizzare "in trasparenza" i requisiti delle imprese consorziate per l'aggiudicazione di appalti di lavori pubblici' *Contratto e impresa*, 1378 (2000).

[24] In fact, L. De Angelis, 'Ancora sullo scopo e sulla disciplina delle società consortili' *Le Società*, 32 (2018), footnote 31, sharply observes that 'the entrepreneurship of consortia, in addition to depending on the type of phase of the activities of the consortium members regulated or directly exercised on their behalf and in their interest, could also reside in a *lato sensu* auxiliary activity carried out by them for the benefit of the

is also questionable if it performs an activity somehow auxiliary to the activity of the entrepreneurs without the character of commerciality, for example, the provision of a joint warehouse management service. In this respect, the analogy of the activity of mere allocation and distribution of incentives carried out by an REC towards its members is obvious and cannot be considered entrepreneurial in nature.

In addition, it may be useful to reflect on another type of collective self-consumption envisaged by the RED II Directive: self-consumption between members of an apartment block (whether vertical or horizontal).

In this case, it is indisputable that:

(i) the condominium (meant as the set of owners of building units included in the vertical or horizontal condominium, respectively) through its administrator provides the service of sharing incentives to each condominium owner, incentives which are not a profit but a saving on the bill;

(ii) the condominium must try to strike a balance between self-consumption and incentives;

(iii) condominium plants or individual owners' plants[25] of renewable energy production, for the part that is not physically self-consumed, release the relevant electricity to the grid;

(iv) the adherence of the co-owners may be partial because only some of them may adhere.

One might argue that, in all condominiums, *de facto* companies are created between the condominium owners who constitute a self-consumption group aimed at managing the collective self-consumption enterprise. However, it seems clear that what we are seeing is the mere sharing of the respective production and consumption capacity referring only to the owners of building units included in the condominiums. This activity, which aims at reducing costs, falls within the scope of managing individual properties, inherently linked to the existence of vertical or horizontal condominiums. In other words, the self-consumers in the condominium do not intend to establish an electricity company but simply wish to share production and consumption to reduce property-related expenses.

One may question whether this conclusion is also applicable to RECs. Indeed, RECs carry out the same activity as condominiums but extend it to individuals owning or holding properties with relevant Energy Points of Delivery (PODs) within a wider, yet still defined local area (defined by the

consortium members themselves'. *Contra*, the jurisprudential orientation summarised by Corte di Cassazione 29 December 2017 no 31191, available at https://dejure.it.

[25] Individual owners of condominiums may be exclusive owners of renewable electricity production plants not only in the case of horizontal condominiums but also in the case of vertical condominiums (see Art 1122-*bis*, para 2 of the Civil Code).

primary substation). In doing so, they pursue the same purpose of pooling the electricity produced and consumed to allow a reduction in costs on the bill. The absence of a finalistic-functional element characteristic of a company is once again underlined, as RECs do not intend to carry out business activities in the market but aim solely to share energy locally.

The economic balance underlying purely incentive-sharing RECs does not, therefore, appear any different from that of apartment blocks: costs must be covered by revenue, and any surplus is redistributed to reduce expenses related to the consumption of electricity pertaining to a building.

Indeed, autoconsumption groups and RECs differ in the fact that, in the case of autoconsumption groups, they are bound by the inherent contiguity of vertical and horizontal condominiums, whereas RECs are bound by the inherent contiguity of the primary cabin area. Therefore, for the purpose we are concerned with, RECs can be considered a territorially 'enlarged' form of horizontal condominiums, and the relative activity aimed at sharing the energy produced and consumed by the buildings with PODs included in RECs could be linked to the same type of activity of a horizontal condominium; therefore, it would not be a business activity but a mere sharing of energy produced and consumed by the respective buildings to reduce the respective real estate expenses.[26]

IV. Incentive Allocation: A Case-by-Case Approach

Even if it were to be accepted that the activity of distribution of the incentives could constitute an economic activity, it would not be possible to always and in any event classify an REC as an enterprise. Instead, it would be necessary to proceed to an analysis *in casibus* to verify whether this entity exclusively and prevalently focuses on receiving and distributing incentives while delegating production to entities within or outside the REC (a model clearly admitted by the Operational Rules approved by decreto direttoriale 23 February 2024 of the Ministry of the Environment and Energy Security) or whether it operates in the production sector in a residual and minimal manner.

[26] Considering an REC structured as an association, it is important to recall that, as part of their activity, associations may reimburse expenses incurred by members in the interest of the association. (For the limits of admissibility of such reimbursements, see Corte di Cassazione 23 November 2015 no 23890, available at https://dejure.it). In the context of the present investigation, it is worth noting that while the electricity bill primarily addresses the end customer's primary needs, because of the manner and timing in which it is made (coinciding with the production of electricity by the RECs' plants), it also serves the interest of RECs, as it enables them to support and promote their social and environmental goals. The partial reimbursement of the bill (thanks to the incentives) can be seen, in essence, as a reimbursement of an expense also made in the interest of the association itself.

Consider the following possible arrangements:

(i) The REC allocates all incentives for charitable purposes.

If an REC is constituted in the form of an association (recognized or not) and, thanks to the generosity of its consumer and producer members, allocates all its incentives for charitable purposes, it would seem difficult to argue that it engaged in economic activity because it also lacks any function related to the distribution of contributions.

(ii) The REC allocates a minority share of the incentives to its members.

In a different scenario, where an REC established as an association or foundation, due to the generosity of consumers and producers, allocates the majority of its incentives for charitable purposes, while distributing a minority share to its members, according to the pacific orientation,[27] it would acquire the nature of an enterprise. Alternatively, according to the scope of Art 2082 or Art 2201 of the Civil Code, this would be the case only when the economic activity carried out by the entity becomes exclusive or, at least, prevalent, with the consequent application of the rules of the statute of the enterprise (general and special) and, in particular, those relating to potential bankruptcy proceedings of the entities.

In this regard, the now obsolete orientation that denied the entities in Book I of the Civil Code the possibility of qualifying as commercial enterprises appears to have been superseded. Indeed, there are no rules preventing associations or foundations from engaging in any commercial undertakings suitable for achieving the purposes allowed to them. Moreover, by virtue of the principle of form neutrality, according to which the legal system is normally indifferent to the forms that the subjects operating within it choose to achieve a lawful result, it follows that the company cannot be the only form for conducting a private collective enterprise.[28]

It is well known that, for a natural person, the prevalence of entrepreneurial activity is not required to acquire the status of

[27] A. Nigro, 'Gli imprenditori collettivi non societari nel diritto della crisi' *Rivista delle società*, 1597 (2020); A. Cetra, 'Enti del terzo settore e attività di impresa' *Rivista di diritto societario*, 689 (2019); Id, *L'impresa collettiva non societaria* (Torino: Giappichelli, 2003), 68; V. Montani, in G. Ponzanelli ed, *Le associazioni non riconosciute. Artt. 36-42*, in P. Schlesinger, *Il Civil Code. Commentario* (Milano: Giuffrè, 2016), 135; M. Mozzarelli, 'Impresa collettiva non societaria e procedure concorsuali', in G. Palmieri ed, *Temi del nuovo diritto fallimentare* (Torino: Giappichelli, 2009), 150; G.F. Campobasso, 'Associazioni e attività d'impresa' *Rivista di diritto civile*, II, 589 (1994). The applicability of Art 2201 of the Civil Code to associative bodies was sustained by S. Gatti, 'L'impresa collettiva non societaria e la sua disciplina fallimentare' *Rivista di diritto commerciale*, I, 88 (1980) and F. Galgano, *Delle associazioni non riconosciute e dei comitati, Libro I, Delle persone e della famiglia* (Bologna: Zanichelli, 1976), 100.

[28] See R. Costi, 'Fondazione ed impresa' *Rivista di diritto civile*, I, 13 (1968).

entrepreneur. However, for public entities this requirement does apply, as stipulated in Art 2201 of the Civil Code, according to which: 'public entities whose exclusive or principal object is commercial activity are subject to the obligation of registration in the business register'. By virtue of the unitary nature of the concept of entrepreneur, which does not tolerate differentiation between public and private entities, the provision in Art 2201 of the Civil Code is considered the expression of a general rule. Therefore, this rule also extends to foundations and associations, which would not be classified as entrepreneurs if they perform entrepreneurial activities that are accessory and instrumental to the institutional purposes of the entity.[29] According to this orientation, the application of the statute of commercial enterprise should be excluded for all noncorporate collective entities that engage in a purely accessory commercial activity.

However, it is necessary to clarify the meaning of 'exclusive or principal', here referring to the activity carried out by the foundation for the purposes of qualifying it as a commercial enterprise. On this point, it is deemed necessary to give continuity to the authoritative guideline[30] according to which the activity should be considered exclusive or prevalent in a qualitative rather than quantitative sense, that is, only if it is capable of directly achieving, in whole or in part, the purposes of the organization. Therefore, an economic activity will be ancillary both when it is flanked by other non-economic activities that qualitatively predominate or when it is instrumental with respect to the non-economic activity that constitutes the main object of the body in Book I of the Civil Code.

As a result, an REC that distributes only a minority portion of the incentives to its members and allocates the majority to its activities will not qualify as an undertaking because the distribution activity, even if considered a service activity, would not be predominant.

(iii) The REC distributes the majority of incentives to its members.

We still have to deal with a third and final case: an REC in the form of an association that, thanks to the generosity of consumers and producers, allocates a significant part of the incentives to charitable purposes but nevertheless distributes the majority of the incentives to its members. In this hypothesis, the very activity of the REC could fall within the objective

[29] See Corte di Cassazione 29 October 1998 no 10826, *Rivista italiana di diritto del lavoro*, II, 644 (1999). In jurisprudence, the thesis that rests on the analogical application of Art 2201 of the Civil Code, recognising as valid, for the status of commercial entrepreneur to be attributed, not the mere performance of one of the activities listed in Art 2195 of the Civil Code, See Corte di Cassazione 18 September 1993 no 9589, *Diritto fallimentare*, II, 436 (1994); Corte di Cassazione 17 January 1983 no 341, *Archivio civile*, 722 (1983); Corte di Cassazione 9 November 1979 no 5770, *Foro italiano*, I, 358 (1980).

[30] In this regard, the considerations of F. Galgano, 'Il fallimento delle società. Gli aspetti sostanziali', in *Trattato di diritto di diritto commerciale e di diritto pubblico dell'economia* (Padova: Cedam, 1988), 137.

of providing social benefits to its members; therefore, the REC management would represent the social and economic purpose indicated by Art 31, para 1, letter a of decreto legislativo 8 November 2021 no 199.

In this framework, the mere activity of promoting energy produced from renewable sources through the distribution of incentives addressed to its members would constitute the REC's own institutional activity,[31] even if the REC retains part of the incentives to cover its expenses and purposes. In any case, the incentives left to the REC would be qualified as contributions for its institutional purposes and not as fees for specific services differentiated among different members.

For tax purposes, it would appear that the mere activity of incentive distribution falls within the scope of the so-called 'decommercialization' referred to in Art 148, para 1 of the Consolidated Income Tax Act ('TUIR')[32] and Art 79 of the Third Sector Code. In essence, the activity of mere incentive distribution could be considered an institutional activity of the REC carried out towards the generality of its members and the incentives that are attributed by the members to the entity are configured as contributions for the pursuit of its institutional activities.[33]

It must be added that, according to Art 119, para 16-*bis* of decreto legge 19 May 2020 no 34, converted with amendments by legge 17 July 2020 no 77, 'The operation of plants up to 200 kW by Renewable Energy Communities established in the form of non-commercial entities or by condominium owners that adhere to the configurations referred to in Art 42-*bis* of decreto legge 30 December 2019 no 162, converted with amendments by legge 28 February 2020 no 8, does not constitute habitual commercial activity'. The matter consists in understanding whether or not such discipline is to be considered applicable to the RECs no longer regulated by Art 42-*bis* of decreto legge 30 December 2019 no 162. In any event, it is worth noting that, if this provision is indeed applicable, the decommercialization area should also extend (at least partially) to the direct activity of electricity production by RECs.

Obviously, the last considerations relating to this third case are only of fiscal nature and do not exclude the possibility that the REC may be

[31] It is no coincidence that the additional activities indicated in Art 31, para 2, letter f of decreto legislativo 8 November 2021 no 199 are possible additional activities.

[32] According to this rule, 'The activity carried out for members or participants, in accordance with institutional purposes, by associations, consortia and other non-commercial bodies of an associative nature is not considered commercial. The sums paid by the associates or participants by way of associative fees or contributions do not contribute towards forming the overall income'.

[33] In this regard, see L. Salvini, 'Profili fiscali delle Comunità Energetiche Rinnovabili', in S. Monticelli and A. Bonafede eds, *Comunità energetiche 2.0. L'autoconsumo alla luce dei recenti aggiornamenti normativi* (Napoli: Edizioni Scientifiche Italiane, 2024), 212.

considered an enterprise for other purposes (eg, for the application of the discipline of the Code of Corporate Crisis and Insolvency). This interpretation aligns with the definition now accepted in jurisprudence and recently reaffirmed by the Corte di Cassazione.

For some time, the case law of the Corte di Cassazione[34] has noted that the purpose of profit (so-called subjective profit) is no longer an essential element for recognizing the status of a commercial enterprise. Instead, what defines a business activity is the objective economic viability of management, understood as the proportionality between costs and revenues (so-called objective profit). Objective profit translates into the aptitude to achieve the remuneration of production factors,[35] or even in the tendential suitability of revenues to pursue a balanced budget.[36] This criterion is only excluded only if the activity is carried out entirely free of charge.[37] The altruistic purpose in the hypothesis pursued,[38] understood as the allocation of the proceeds to initiatives connected with the institutional purposes of the entity, does not affect the entrepreneurship of the services rendered. It remains legally irrelevant, like the subjective profit motive and any other motive that induces the enterprise to carry out its activity.[39]

V. Conclusions: The Practical Repercussions of the Chosen Theoretical Approach

In light of these reflections, and by applying the issues highlighted by the increasingly articulated legislative landscape in the field of energy, it becomes clear how essential it is to bridge the gap between 'law in the books' and 'law in action'. The interpretation of the jumbled legal framework of reference that regulates energy communities, an expression of the principle of public participation, must aim at enhancing the value of RECs. It is indeed necessary to ensure that Renewable Energy Communities are valued as a tool capable of generating significant social, environmental, and economic impacts, in the wake of the value fabric enshrined in the Constitution, including the principles of solidarity and civic cooperation under Art 2, and horizontal subsidiarity under Art 118, para 4.[40] These principles find their expression in the economic field in Art

[34] Most recently, Corte di Cassazione 10 February 2022 no 4418, *Il Fallimento*, 849 (2022) and Corte di Cassazione 20 October 2021 no 29245, *Il Fallimento*, 17 (2022).

[35] Corte di Cassazione 21 October 2020 no 22955, *Il Fallimento*, 130 (2021) and Corte di Cassazione 26 September 2006 no 20815, *CED Cassazione* (2006).

[36] Corte di Cassazione 3 January 2018 no 42, *CED Cassazione* (2018).

[37] Corte di Cassazione 12 July 2016 no 14250, *Il Fallimento*, 988 (2016).

[38] Corte di Cassazione 19 August 2011 no 17399, available at https://dejure.it.

[39] Corte di Cassazione 24 March 2014 no 6835, *Il Fallimento*, 875 (2016).

[40] In this regard, see the acute reflections of E. Cusa, 'Sviluppo sostenibile', n 2 above,

43 of the Constitution and in environmental protection in Arts 9 and 41 of the Constitution.[41]

From this perspective and in light of the supranational mosaic that makes up the RECs' regulation, it must be concluded that an REC does not necessarily qualify as an undertaking.

On the sidelines of the critical remarks set out above and recognizing the problematic profiles of the institution under consideration, one cannot overlook the hope that the described orientation will be affirmed. In light of previous reflections, this approach appears to be more aligned with and conducive to growth and success. Such an approach would activate the economic levers capable of influencing the behaviour of various market players and encouraging citizens to take direct responsibility in activities of general interest,[42] ultimately achieving a 'third way' between State centralization of functions and liberalization of energy production and exchange.

This is obviously not a question of a merely theoretical nature, given that significant practical and operational repercussions derive from whether or not we embrace the idea of RECs being entrepreneurial entities: consider, for example, the potentially relevant tax effects resulting from the taxation of business income.[43]

Therefore, it is necessary to address the institution of RECs by interpreting their regulation *magis ut valeat*,[44] that is, to the best of their expansive capacities, without harnessing an undeniably articulated phenomenon through theoretical forcing that would have the practical reverberation of making it more difficult for citizens to approach those forms of RECs (associations of mere incentive sharing) that are simpler and closer to the needs of the territory. Doing so would then thwart the

71; R. Miccù and M. Bernardi, 'Premesse ad uno studio sulle *Energy Communities*: tra *governance* dell'efficienza energetica e sussidiarietà orizzontale' *federalismi.it*, 4, 603 (2022). On this point the Corte Costituzionale has, in several rulings, declined the principle of civic collaboration in the argument of 'commonality of interests': see decisions 17 April 1968 no 23, 21 May 1975 no 112, 16 February 1982 no 40, 7 April 1988 no 423, 2 May 1991 no 188, ordinanza 6 July 2012 no 174, ordinanza 12 December 2012 no 285, 5 November 2015 no 223, all available at https://www.cortecostituzionale.it/actionPronuncia.do.

[41] On the constitutional foundation of RECs, see the considerations of F. Sanchini, 'Le comunità energetiche rinnovabili tra fondamento costituzionale e riparto di competenze legislative Stato-Regioni. Riflessioni alla luce della sentenza n. 48 del 2023 della Corte costituzionale' *federalismi.it*, 8, 152 (2024).

[42] It is no coincidence that Energy Communities are welcomed as 'spontaneous initiatives resulting from local civil society activism' by T. Favaro, *Regolare la «transizione energetica»: Stato, mercato, innovazione* (Padova: Cedam, 2020), 118.

[43] See L. Salvini, 'Profili fiscali', n 33 above, 212.

[44] This is a well-known cardinal principle of civil interpretative science (*Quotiens in actionibus aut in exceptionibus ambigua oratio est, commodissimum est id accipi, quo res de qua agitur magis valeat quam pereat*, Iul. l. 12 D. *de rebus dubiis* 34, 5).

essence of the current energy transition, which sees the State-market relationship as being replaced by a more virtuous balance between the State, market, and community.

Only in this way will it be possible to test an innovative model of 'horizontal' collaboration involving stakeholders. This model aims to empower individuals to participate in activities of general interest, thereby advancing the development of renewable energies.