Abstract
In the current European energy transition we witness that the recent (and in part still ongoing) shift from energy provision by government enterprises to provision by private corporations (albeit not always fully privatized), is followed by a shift towards energy provision by private collectives (e.g. communities) - as the energy market does not seem to live up to the desired sustainability objectives. From a legal governance perspective this latest shift begs the question if upon the hybrid outcomes of the first shift (leading to 'regulated markets' as institutional environments in between public hierarchy and the free market) we find ourselves confronted by further hybridization, matching regulated markets to the institutional arrangements of civil society co-operatives. The paper focuses especially on the normative understanding of these institutional shifts, i.e. the related normative alignment or institutional resilience in terms of legal opportunities and constraints to these shifts. While 'normative alignment' focuses attention to the legal liberties and legal abilities that, as legal opportunities, characteristically fit a particular institutional environment (including the use of green certificates), ‘institutional resilience’ is especially about the question to what extend normative institutional settings are legally constraining to certain governance arrangements, especially when either governments and/or corporations become strongly involved in community initiatives. The paper presents an analytical approach built upon institutional legal theory and geared towards supporting legal design in the field of the European energy transition.

* Michiel A. Heldeweg is full professor of Law, Governance & Technology at the University of Twente, the Netherlands. (https://www.utwente.nl/bms/cstm/people/full-professors/heldeweg/) (m.a.heldeweg@utwente.nl)
Normative Alignment and Institutional Resilience in Legal Governance of the European Energy Transition

Michiel A. Heldeweg

1. Introduction – the energy trilemma and institutional shifts in mode of governance

In the current European energy transition we witness that the recent (and in part still on-going) shift from energy provision by government enterprises to provision by private corporations (albeit not always fully privatized), is followed by a shift towards energy provision by private collectives (e.g. communities).

From the viewpoint of the energy trilemma – reliability, affordability, sustainability – there are various reasons for this new shift. Not so much a concern over affordability as the market is generally believed to (best) deliver on this, but certainly a concern over reliability, especially in view of geopolitical concerns, and also over sustainability, in view of the need for a more expedient response to the threats of climate change (i.e. the need to reduce fossil fuel energy sources).

Meanwhile the shift from government to market is incomplete, placing energy production and delivery in a hybrid zone of the regulated market. This is largely due to the desire to the public value side of the energy trilemma: human rights and distributive justice demands add a particular perspective to affordability, which has give rise to regulatory interventions in the price/demand & supply mechanism (esp. unbundling requirement, regulation of tariffs, duty of supply; policies to avoid being disconnected from delivery etc.). Further there is uncertainty about whether the market will deliver, not only static efficiency that can deliver low prices, but also dynamic efficiency, which can provide reliable and sustainable energy services.

Two public governance types of responses, typical of the current regulated market (of incomplete privatization & liberalization), have addressed the latter problem: 1. retaining public ownership over energy grids; 2. regulating production and supply to secure reliability and sustainability (esp. through technical standards concerning type of production, delivery). There is however also a third response, which pulls in another mode of governance, aside public hierarchy (featuring government) and competitive market (featuring private enterprise): civil society, featuring private community collectives. This paper discusses the nature of this third response from the viewpoint of the institutional balance between public hierarchy, competitive markets and civil networks. This balance is discussed from a legal governance perspective and addresses the legal characteristics of community energy services as an institutional concept, and how it relates to the current institutional setting of a regulated energy market.

The latter issue is discussed from the viewpoint of legal consistency in alignment of actor form, actor relations and actor behaviour and the institutional setting in which they are placed,
specifically in view of possible institutional hybridity (aside from the regulated market; i.e. between public hierarchy & civil networks, or in-between competitive markets & civil networks). This issue is discussed as one of institutional resilience vis-à-vis misalignment: when and how do prescriptive rules concerning legal institutions, such as civil networks, resist misaligned actor form, actor relations and actor behaviour? Do institutions settings adapt to actors or vice versa, and to what extent are institutional settings indifferent to actor form, relations and behaviour or do they indeed resist fallacious framing (when, for example, governments or private corporations (e.g. to reduce NIMBY-ism) frame their hierarchical and competitive actions as civil network actions? The latter has practical legal significance particularly in cases where in the cause of the energy transition community initiatives are specifically fostered, such as by subsidies or experimental licenses. Aside from this practical relevance the above questions are also about understanding shifts in institutional settings of energy governance, particularly from a legal governance perspective.

The paper is structured as follows. In par. 2 we will look at three modes of governance as institutional environments, to next, in par. 3 explore the notion of legal institutions, applied to both institutional environments and to actor forms, relations and behaviour. Par. 4. then applies these concepts in addressing the issue of institutional alignment and resilience, with a particular focus on Dutch experimental arrangements for community energy initiatives. On that basis some attempts at general conclusions are presented in par. 5., trying to make sense of shifts in governance.

2. An Institutional Energy Governance Perspective

The shifts in energy governance alluded to in the introduction relate to a distinction between different modes of governance (and the possibility to change from one to the other mode). Here we focus on public governance, which pertains to modes of coordination of interactions between different actors in as much as these interactions have societal relevance. This coordination can come with (a combination of) structures, mechanisms and procedures, and are thus often also perceived as institutional environments in which actors, especially organizations, engage in interactions. In the approach by Williamson (Williamson, 2000) they are about the ‘rules of the game’ that allow for ‘play of the game’ between actors. Scott refers to institutional environments as being “characterized by the elaboration of rules and requirements to which individual organizations must conform if they are to receive legitimacy and support”. (Scott, 1995: 132). By analogy one could regard institutional environments as the ‘habitats’ in which ‘organisms’ interact – analogous to animals and plants interacting in water, on land and in the air. The general rules of institutional environments act together preordain a characteristic pattern of behaviour that enables and constrains (certain types of) actor interactions (whether by form or outcome).

Such rule-guided patterns or modes can exist as mere empirical features, as their institutional character follows from strategies (as rational equilibriums upon mutually understood actor preferences) or from norms (following from shared actor perceptions about proper behaviour) (Crawford & Ostrom, 1995: 581-583). Alternatively, such modes exist in a prescriptive sense,
whereby that are not matter-of-factly true or false, but normatively valid and binding or not. Institutional environments have both an empirical and a normative dimension (Ruiter, 200: 349-366), which may or may not align.¹

2.1 – Three modes of governance
Before we elaborate on the normative side of institutional environments (as a particular order of legal institutions – in 3.3), and connect this to the energy transition, some specification of modes of governance at the level of institutional environments is needed. In the introduction we alluded to a trichotomy of (indeed, three) modes of such governance, relevant to our narrative. While emphasizing prescriptive elements, they may be characterized as follows:

- **public hierarchy**, with coordination guided by the underlying value of public interests, fostered and protected by government, versus citizens (and organizations), interacting through unilateral instructions by the former, with binding effect on the latter (e.g. commands and prohibitions). In the EU (member states), guidance by a public interest follows decision-making processes and institutional settings founded by servient government under the rule of law, operating democratically/upon democratic mandate (securing ‘voice’ of citizens), and respectful of human rights.

- **competitive market**, with coordination guided by the underlying value of private interests of businesses (B) and consumers (C), interacting through B2B and B2C consensual exchanges in the context of a (B and C) competition driven mechanism of demand & supply. In the EU (member states) competition law and consumer protection are key legal safeguards (securing ‘exit’/voluntarism) to the proper working of a free/competitive market.

- **civil society**, with coordination guided by collective/common/social interests, fostered and protected by voluntary cooperation as a matter of collective private interaction through a sharing of resources and/or co-production in networks, either formal (and perhaps as organisation) or informal. In the EU (member states) the freedom of (peaceful) association/assembly is generally accepted, together with the right of freedom of political, economic, cultural and religious expression, and the ability to form private legal persons.

In Table 1, the above characteristics are summarised in five categories.

<table>
<thead>
<tr>
<th>Environment Characteristics ↓</th>
<th>Public hierarchy</th>
<th>Competitive market</th>
<th>Civil society</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dominant interest-type</td>
<td>Public</td>
<td>Private/self</td>
<td>Common/Community</td>
</tr>
<tr>
<td>Dominant actor-types</td>
<td>Government v. citizens (gov’t-gov’t)</td>
<td>Buyers and sellers (B2B/B2C)</td>
<td>member-member (v. non-members)</td>
</tr>
<tr>
<td>Dominant relation-type</td>
<td>Command &amp; control</td>
<td>Competitive contracting</td>
<td>Voluntary cooperation</td>
</tr>
<tr>
<td>Legitimacy of outcomes</td>
<td>Voice Distributive justice</td>
<td>Exit Commutative justice</td>
<td>Loyalty Collective justice</td>
</tr>
<tr>
<td>Basic prescriptive rules</td>
<td>Servient government, rule of law democracy, human rights</td>
<td>Autonomy, fair competition &amp; consumer protection</td>
<td>Autonomy, free association / assembly; voluntarism</td>
</tr>
</tbody>
</table>

¹ Crawford & Ostrom provide a normative grammar as a logic of norm components (ADICO) that neatly distinguishes norms from strategies (the latter has no deontic/mode of ought, the former does) and between norms and legal rules (the latter has ‘or else’/enforcement, the former does not).
Of course this is an ideal-type kind of characterisation. Although presented here as distinct on all characteristics, there will be characteristics that are shared (e.g. consensualism both in markets and in civil society). The ideal-types are not contradictory, which could apply only were there only two, but can be contrary, with contradictoriness only on some characteristics (e.g. public versus private). Implicitly this is also saying that there is a possibility for overlapping characteristics and that there may be (certainly theoretically, but also in practise) hybrid forms. This immediately becomes clear when we study the modes of governance from a more schematic representation of institutional environments in Table 2: the ‘governance triangle’ (Abbott & Snidal, 2009).

<table>
<thead>
<tr>
<th>Table 2 – Governance Triangle (with governance modes - Pure &amp; Hybrid)</th>
</tr>
</thead>
<tbody>
<tr>
<td><img src="image" alt="Governance Triangle" /></td>
</tr>
<tr>
<td>Ph=Public Hierarchy; Cm = Competitive market; Cs = Civil society (networks)</td>
</tr>
<tr>
<td>(for 1, 2, 3, 4 - see text)</td>
</tr>
</tbody>
</table>

This representation builds upon the basic distinction of three ideal-type institutional environments, while recognizing that – if only because these types are multi-dimensional (combining a mode of coordination with particular interests) – there are hybrid environments that otherwise combine dimensions (without elaboration):

a. dual hybridity of public hierarchy & competitive market, such as regulated markets with public interest regulation conditioning the freedom of competitive exchange.
b. dual hybridity of competitive market & civil society, such as networks for socially responsible markets.
c. dual hybridity of civil society & public hierarchy, such as regulated networks with public interest regulation of voluntary organisations (directly or through financial instruments).
d. trial hybridity of societal platforms between civil society, public hierarchy and competitive markets, such as negotiating procedures towards signing an energy transition compact.

Whether these hybrid forms in exist in reality, or whether indeed the pure forms exist in reality, is a matter for empirical research, but also for normative research in establishing if indeed a legal regime exists that prescribed a particular, hybrid, mode of governance. To exist in
practice, these hybrid forms need to possess ‘feasibility’ both in empirical (world-to-word) and in normative sense (word-to-world) – being effective and legitimate (to say nothing of efficiency). The assumption is that in pure/ideal-type modes there is consistency, so that patterns of behaviour exist or are programmed without ‘static’: whatever constrains is also enabling (e.g. rule of law & unilateral power; autonomy/agreement & commutative justice). With hybrid forms one needs to be careful to not arrive at (more or less) impossible/ineffective or undesirable/illegitimate modes: e.g. command without democratic mandate; contracting under monopoly; association without say. The crucial element is that while inevitably hybridity involves inconsistencies, these should not be contradictions, but rather inconsistencies on aspects indifferent to the object of governance (e.g. no perverse or undesired distributive effects on actor interests; regulated market limits freedom of contracting, without (vitaly) compromising demand response) – congruence (harmonious operations) over consistency (of underlying incentives).

2.2 - Modes of governance, collective action situations & institutional choice

Institutional environments are about proper balances between constraints and opportunities relevant to various forms (i.e. modes) of collective action behaviour. They follow either from evolution in and through practice (e.g. a local food market), from design (e.g. the EU emissions trading scheme), or from combinations of both (e.g. government & constitution building). Whichever applies, all cases will involve empirically observable and normatively prescribed conditions. These conditions are the formal and informal rules, norms and strategies that structure types of institutional environments, instantiated as ‘Action Situation’ in the sense of Elinor Ostrom’s IAD framework (Ostrom, 2005). As in the IAD’s analytical perspective, the if and how of instantiation of an institutional environment, as an Action Situation in practice, will depend on exogenous factors, such as biophysical/material conditions (e.g. operating an energy service system), attributes of the community (e.g. views on energy justice) and rules (e.g. in-use/as relied upon in practice, either or not upon rules-in-form/legal rules).

When held against the major shifts in energy governance, as suggested in the introduction, it is argued here that there are two consecutive shifts:

- one shift from energy services (production and supply) as a matter of a public hierarchy mode of governance, or perhaps one of a hybrid (a.) setting of a public natural monopoly, towards a competitive market mode of governance, but settling somewhere in between (as a regulated market).
- another shift from energy service (production and supply) as a matter of a regulated market mode of governance, towards a civil networks mode of governance, settling perhaps again in a hybrid zone, perhaps with a tilt towards either public hierarchy (upon stronger government involvement) or competitive market (upon stronger corporate involvement).

A key question following from these consecutive shifts is whether these are in alignment or in conflict, when considered as encompassing mode of energy governance. Conflict could arise, for example, because a ‘prosumer doctrine’ of a civil networks mode of energy governance would not agree with a competitive market mode of energy governance based upon the doctrine of competitive contracting & vertical unbundling.
Should doctrines/modes conflict, a solution may yet be achievable as a matter of ‘peaceful co-existence’, where energy services are provided either by the one or the other mode of governance, in as much as a technical, economical and legal requirements allow (and dependent on the specific mode of co-existence: in time, space, jurisdiction – or combinations thereof, e.g. only on an experimental basis). Certainly this would, as with hybrid institutional environments, beg the question if the ensuing ‘institutional fragmentation’ is not causing too much static (ineffectiveness, inefficiencies, (distributive) injustices – such as when there are additional government interventions in play, e.g. subsidies or taxes), and if and how institutional integrity is maintained if a particular mode of governance is considered vital to policy objectives. Two types of objectives seem particularly relevant:

Firstly, as a matter of handling the energy trilemma concerns, it may be that meeting separate objectives or achieving the best possible trade-off between the three objectives (reliable, affordable, sustainable), does not agree with fragmentation, or does require that a particular choice of mode of governance is pursued without compromise – e.g. when, in relation to technological, economical, organisational requirements of scale, affordability or reliability becomes problematic or seriously less than satisfactory when too many households are ‘prosuming’ (upon intermittent sources of energy). Under certain conditions, the ‘one size fits all’ adage is imperative, ‘size’ referring to a particular mode of governance.²

Secondly, as a matter of meta-energy policy concerns, as broader political objectives, it may be that a particular choice of governance mode is preferred or avoided, such as the move towards competitive/regulated markets in the end of 20th century era of privatisation and liberalisation (of, inter alia, energy services), and more recently, with non-exclusive energy service relevance, promoting civil society activity/activism, as in ideas on participatory societies, (distributed) democratisation, public-private co-production, and decentralisation – fitting the move to promote community energy initiatives.

3. Legal Institutions (esp. of the third kind)

So far we have focused on institutional environments (as ‘habitats’) and little was said or suggested about actors (as ‘organisms’) within. On two counts we alluded to the actor perspective.

Firstly, the suggestion was made that the balance between constraints and opportunities of institutional environments determine if there is an effective and legitimate pathway for collective action by actors. This calls for further elaboration if we want to know how to strike such a balance in the practice of energy governance.

Secondly, in the immediately above we touched on the sensitiveness of energy governance modes in terms of compatibility between modes and integrity of modes, creating a

---

² Small Island Developing States being an interesting case in point PM
sensitiveness that can only be properly understood when we elaborate on the behavioural constraints and opportunities that follow from a choice of governance mode. On both issues elaboration focuses on relational patterns of behaviour in given contexts of a particular mode of governance, that manifests in practice as an Action Situation operating towards an improved ‘energy trilemma performance’, especially with respect to reliability and sustainability, through community energy initiatives.

3.1 - Legal Institutions
To elaborate with sufficient sophistication on the issue of establishing a legitimate pathway, it is helpful to support the analysis by drawing on concepts from Institutional Legal Theory (ILT; MacCormick and Weinberger, 1986; Ruiter, 1993). Collective action situations mostly draw upon patterns of behaviour that are guided (not by single rules or norms but) by a clustering of rules as rule regimes. Adulthood, ownership, public authority, contracts, permits, companies, are examples of phenomena that operate on the basis of combinations of rules (about, inter alia, claims, duties, privileges, liability, powers and immunities) and as such, empirically, are social institutions (when we observe behaviour in accordance with such rules), while at the same time these phenomena have been acknowledged as legal institutions. When understood as legal institution a prescriptive element applies to a pattern of behaviour through (MacCormick and Weinberger 1986, 52-3; Ruiter 1997, 359-61):
- prescriptive norms as regards recognition or design of a social institution (in existence or perceivably existent), as a (type of) legal institution within a given legal order, by way of ‘constitutive rules’, such as of contracts or of trading emission rights;
- prescriptive norms as regards how an instance of such a type of legal institution can be brought about, by way of institutive rules, such as about factual and/or legal acts that need to be performed, such as in granting a permit or establishing a firm.
- prescriptive norms which apply upon instantiations of legal institutions, by way of consequential rules, such as about the (conditions to) powers following the public authority of a particular public office, or duties and claims of parties to a particular contract.
- prescriptive norms as regards how an instance of a type of legal institution can be ended, by way of terminative rules, such as about factual and/or legal acts that need to be performed, such as in withdrawing a permit or dissolving a firm.

In the context of shifting modes of energy governance it is important to see that institutional environments (the ‘habitats’), and the actors within (the ‘organisms’), as well as legal relations relevant to these actors, can be understood, analysed, evaluated and designed as legal institutions.

Legal relations relevant to actors belong to the first order of legal institutions (Ruiter, 1997: 364-). These are institutions about legal attributes of persons (e.g. adulthood), of objects (e.g. a monument) and, indeed institutions about relations: between persons (P2P; e.g. contracts, permits), between a person and an object (P2O; e.g. ownership) and between objects (O2O; e.g. an easement). Relevant second and third order legal institutions will be introduced in the next two sections (3.2 and 3.3).
3.2 – Legal persons as legal institutions

While first order legal institutions include attributes of persons, personhood itself is taken as a natural phenomenon. This makes sense as regards ‘natural persons’ (i.e. humans born into this world), but less as regards personality of organisations. In energy governance the former are relevant certainly, especially as private households (whether consumers or prosumers), but energy provision clearly depends also on organisations, whether as governments, as firms or as communities or collectives.

Such organisations can be understood as legal persons in that they are personifications of relational, first order legal institutions: P2P, P2O, O2O. From this operation, Ruiter has concluded three basic forms of legal persons (Ruiter, 2004):

1. **associations** – entities in the form of ‘personified alliances’ that combine membership relations with collective decision-making. Generally speaking, the membership element secures a strong element of internal legitimacy and/or collective/community purpose.

2. **corporations** – entities in the form of ‘personified partnerships’ that combine shareholding relations with collective decision-making. Generally speaking, the shareholding element secures effective and efficient/profitable ownership.

3. **foundations** – entities in the form of ‘personified funds’, that combine assets devoted to a specific objective with collective decision-making. Generally speaking, the combined assets element secures purposive action.

Of course, aside from these three ideal-type forms there will be hybrid forms. An important example is that of the co-operative, well known to private community smart grid energy initiatives: a hybrid of an association and an corporation, combining membership and ownership/shareholding with a variety of forms as regards the ability to manage stock or to generate profit, and as regards liability of members-owners for acts of the cooperative.

With all forms, as Ruiter explains (Ruiter, 2001: 102-3; Ruiter, 2004: PM), three elements are key minimum features to their ‘legal personhood’:

a. the existence of an internal decision-making process;

b. the existence of practices that can be understood as external behaviour;

c. the existence of behaviour of others that has bearing on the legal person.

Clearly, upon these features it is of vital importance to properly distinguish between the legal person, as a fictitious entity, and natural persons acting within the legal person. The latter are indispensible to render a legal person capable of acting – by taking decisions and representing the legal person in relation to the outside world. Decisions are taken by organs within the legal person, which may consist of members (of associations), owners (of shares in corporations), or appointed representatives of executives (as members of representative or executive organs – e.g. of (supervisory) boards. These natural persons (perhaps jointly) decide on behalf of the legal person (feature a.), or represent the legal person in external transactions (features b. and c.), but they should not be legally identified with that legal person. For example, liability of the legal person for activities upon decisions taken by natural persons as part of this legal person’s organs, in principle does not lead to liability of these legal persons – unless ‘the corporate veil is pierced’ (reference to be added).
Founders of legal persons also stand, as founders, apart from the legal person they have established, but they may, in the capacity of member of an organ, be part of that legal person. As founders they have engaged in the use of a first order legal institution, usually that of P2P legal relations, mostly of the type of a contract or a legislative act, to establish a legal person. How they have successfully performed this creative act is the subject matter of the institutive rules specific to the particular type of legal person. The afore three key features of legal personhood will be the core matter of consequential rules applicable to all legal persons, but consequential rules will further specify the distinctions connected to the distinctive types (pure and hybrid), and can be further specified with each particular instantiation (e.g. energy community X).

3.3 – Institutional environments as legal institutions
To answer the question of how types of legal persons relate, as ‘organisms’ to institutional environments, as ‘habitats’, whether there is alignment between the two (such as in legal persons facilitating prosumerism in regulated markets), but also of institutional resilience (such as against legal persons wrongfully suggesting prosumerism in civil networks), requires a brief investigation in the nature and characteristics of institutional environments as third order legal institutions.

Heldeweg & Lammers suggest that institutional environments – public hierarchy, competitive markets, civil society, and hybrid forms – may also be regarded as legal institutions (Heldeweg & Lammers, 2015; Heldeweg, 2015). As legal institutions they descriptively recognise (‘world-to-word’) the existence of typical patterns of behaviour in coordinating public governance, and they prescriptively project (‘word-to-world’) how instances of such patterns can be established, are regulated and may be terminated. Furthermore, they explain how the operation of ‘contextualisation’ of legal relations leads to a distinction between three types of these legal institutions, with public hierarchies as object-to-object contexts, civil networks as person-to-person contexts, and competitive markets as person-to-object contexts. Other than the establishment of a particular legal person, instantiation of institutional environments may not always be based in an express legal design (such as a Civil Law Code may hold the design and the related guidelines for the making of associations), but rather on the bases of recognition of existing examples (such as of existing markets or civil networks), sometimes simultaneously combining constitution and instantiation; implicitly expressing institutive and consequential rules (as ‘design by example’). Further, as may be the case in legal persons, the exact form of an institutional environment may evolve and change over time (and may in fact follow from mere factual acts) as a matter of shifts in governance, as displayed in the package of EU directives that have lead in consecutive steps, through (privatisation and) liberalisation, from public hierarchy energy services to regulated market energy services – particularly visible in changes of consequential rules towards energy market regulation.

The below table (no. 3) is taken from a submitted publication by Lammers & Heldeweg, and shows three types of institutional environments as third order legal institutions, next to legal institutions of the first and second order.

3 Alternatively one can argue that conception takes place at a ‘metaconstitutional level’ PM
Table 3 - Three Orders of Legal Institutions

<table>
<thead>
<tr>
<th>Orders of institutions</th>
<th>Legal institutions (placing in this table does not mean to suggest relations across levels)*</th>
<th>Characteristic</th>
</tr>
</thead>
<tbody>
<tr>
<td>1st order</td>
<td>Legal Quality (e.g. public authority)</td>
<td>Attributes of and relations between objects &amp; subjects</td>
</tr>
<tr>
<td></td>
<td>Legal Status (e.g. public good)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>P2P-relation* (e.g. contract)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>P2O-relation (e.g. ownership)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>O2O-relation (e.g. easement)</td>
<td></td>
</tr>
<tr>
<td>2nd order</td>
<td>Legal Persons (e.g. associations, foundations, corporations) (public or private)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Legal Objects e.g. tradable private or public rights (following P2P/P2O/O2O) relations</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Personalization or Reification of legal relations</td>
<td></td>
</tr>
<tr>
<td>3rd order</td>
<td>Public Hierarchy (e.g. states, municipalities) ΩO2O</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Civil Networks (e.g. NGOs, communities) ΩP2P</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Competitive markets (e.g. commodity markets) ΩP2O</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Contextualization of legal relations</td>
<td></td>
</tr>
</tbody>
</table>

* 1st order is logically conditional to 2nd and 3rd orders; existence of 3rd order institutions influences scope for other institutions within.

The evolution of energy market regulation affects the ‘legal space’ available to actors involved in energy services in the sense that upon conception and instantiation, consequential rules determine what legal abilities (e.g. powers, immunities) and legal liberties (e.g. claims, duties, privileges) apply. Thus the legal space for instantiating legal persons or legal relations and other 1st and 2nd order legal institutions is either enabled or constrained, which in turn influence the structures at various levels of collective action situations concerning energy service delivery. When a regulated energy market concept holds provisions requiring vertical unbundling of grid management, production and delivery, universal access, an licenses for energy delivery, these connected rules of conduct limit legal liberty space, such as that of community organisations wanting to establish a prosumer energy grid.

* liberty space is about rules of conduct, broadly speaking a prescriptive determination of normative positions (e.g. prohibition, command, permission, and dispensation; and relative exceptions) with a particular scope of application (i.e. binding to which norm subjects and under which norm conditions). Ability space is about rules of power, broadly speaking a prescriptive determination of which acts may, under certain conditions (performed by whom, when, where, in what form, with what intent etc.), count as legal acts with intended legal effects – or not (in case of immunity). (Lindahl, pm; Hohfeld, pm; Hart, pm – see also fro a brief summary, Heldeweg, 2015b)

In terms of levels of Action Situations concerning decision-making on energy services, the ILTIAD-model of Heldeweg&Lammers shows how the choice and/or development (i.e. conceptualisation and instantiation) of institutional environment for energy services takes place in a ‘constitutional level’ action situation (at EU and national Member State level), to then lead, in collective choice level action situations, to the making of legal arrangements (e.g. establishment of energy companies, community initiatives, smart grid settings), for operational activities (factual acts) concerning production and delivery of energy in operational level action situations.

The next table (no. 4) presents the way in which action situations interact as a matter. Start the process from 4. (green, bottom-left corner), follow collective action (yellow bars), and output (white bars), to the top, and go left to evaluate outcomes at lower levels (if necessary).
As said, in practice there may be hybrid institutional environments, but also fragmented institutional environments, where various institutional environments simultaneously apply. Theoretically this choice between these could be discretionary (as a matter of actor preference), of mandatory (on the basis of fulfilment of particular conditions). The Netherlands offer an interesting arrangement in which the Electricity Act (EA) prescribes by default that energy services are arranged in accordance with the (hybrid) regulated energy market, but also holds a provision on arrangements for experimentation for future energy services. If so, this would lead to adjustments in the law (specifically the EA) to create permanent arrangements for such civil network governance. This approach is based upon the Dutch NRAP (National Renewable Energy Action Program), which is based upon the EU directive on renewable energy (RED). It has been designed particularly to see, with respect to both technology development and innovation of governance, if community energy projects do indeed hold a promise that can support sustainability and reliability of future energy services. If so, this would lead to a case by case decision by the minister of Economic Affairs on whether or not to grant a permit to experiment.

This approach is schematised in the below table (no. 5; without metaconstitutional level), following the Dutch example, whereby the EA allows experimentation (Y – civil networks), alongside the default arrangement (X – regulated market).

---

**Table 4 – Connected Action Situation Levels**

<table>
<thead>
<tr>
<th>Action Situation levels</th>
<th>Activity / outcomes</th>
<th>Evaluation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Operational level</td>
<td>r* Default (reg. market) energy service practice</td>
<td>Experimental knowledge Comparing out cmes X &amp; Y</td>
</tr>
<tr>
<td></td>
<td>↑ r* Experimental (civil network) ren.energy projects</td>
<td>↓</td>
</tr>
<tr>
<td>2. Collective choice level</td>
<td>r* Instantiating 1st and 2nd order LIs ↓</td>
<td>Evaluation</td>
</tr>
<tr>
<td></td>
<td>↑ r* rules on legal abilities ↓</td>
<td>↓</td>
</tr>
<tr>
<td>3. Constitutional level</td>
<td>r* Instantiating inst. environments / 3rd order LIs ↓</td>
<td>Evaluation</td>
</tr>
<tr>
<td></td>
<td>↑ ↑ ↑ ↑ ♦ Conceptualisations/conventions ↓</td>
<td>↓</td>
</tr>
<tr>
<td>4. Metaconstitutional level</td>
<td>Informal &amp; proto-legal practices ↓</td>
<td>← Appraisal</td>
</tr>
</tbody>
</table>

---

**Table 5 – Connected Parallel Action Situation Levels (incl Experimentation)**

<table>
<thead>
<tr>
<th>Action Situation levels</th>
<th>Activity / outcomes</th>
<th>Evaluation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Operational level</td>
<td>r* Default (reg. market) energy service practice</td>
<td>Experimental knowledge Comparing out cmes X &amp; Y</td>
</tr>
<tr>
<td></td>
<td>↑ Legal liberties default licenses X ↓ ♦</td>
<td>Legal liberties experimental licenses Y ↓ ♦</td>
</tr>
<tr>
<td>2. Collective choice level</td>
<td>r* Arranging default ↓ ♦ market settings</td>
<td>← Ministerial Evaluation (X v. Y)</td>
</tr>
<tr>
<td></td>
<td>↑ Legal abilities regarding X (EA –not DSEG) ↓ ♦</td>
<td>Legal abilities regarding Y (EA &amp; DSEG) ↓ ♦</td>
</tr>
<tr>
<td>3. Constitutional level</td>
<td>EA default rules X ↓ ♦ (regulated market)</td>
<td>← Legislative Evaluation (change X in view of Y?)</td>
</tr>
<tr>
<td></td>
<td>EA experimental rules Y ↓ ♦ (civil networks)</td>
<td>↓</td>
</tr>
</tbody>
</table>

---


Through this experimental approach it becomes possible to achieve a more dynamic form of alignment across the levels, whereby experimental information from projects can lead to incremental or perhaps radical changes in default arrangements, and thus to an institutional shift – if indicated by experimental results. Experimentation, however, can be a sensitive issue, both in terms of epistemic/methodological conditions, on how to perhaps achieve evidence-based legislative upscaling of experimental findings, and in terms of legal values, whether on avoiding physical risks or on risks regarding legal certainty and legal equality (e.g. temporary distortions of the regulated market; certainly when subsidies come into play). Consequently, legal arrangements need to be precise. In our case, what matters specifically is how to secure that experiments do indeed target civil network energy initiatives. In a more general sense the issue is how types of institutional environments as legal institutions are distinct from each other in terms of institutive, consequential and terminative rules, while tailoring such rules to the challenge of energy governance, particularly in terms of legal abilities and legal liberties specific to these types – while ignoring indifferences.6

4. Institutional Alignment v. Resilience – Beyond frame

The particular concern of this paper is what makes for community driven experimental projects. The key concern is if and how the civil network (‘habitat’) specifications at constitutional level are indeed resilient to the effect that they will not allow alignment at collective choice level, if the project organisation (‘organism’) is not authentically one of a civil network nature or pedigree. How and to what degree is it possible and necessary to at constitutional level provide a type-specification of a institutional environment that defines what makes for civil network cooperation in the context of energy governance? More specifically, what is the main purpose: decentralisation of energy production, prosumerism, and/or community-initiative/control?

4.1 – Three narratives

To focus on the issue of institutional alignment and resilience in energy governance was primarily triggered by three ‘experiences’.

First of all, hearing about and reading the ECPR paper by Angela High-Pippert and Steve Hoffman on Community Solar Programs and the Democratization of the Energy System, describe … >> summary yet to be added: crucial element was whether a subsidy arrangement was about decentralised renewable energy generation, or (also) about democratisation/enhancement of community energy governance, especially as regards big utilities aoplications for subsidies <<

Secondly, being presented with yet another paper to the same conference, by Julie MacArthur, discussing ‘Power Play: Transformation and co-optation in Community Energy Policy’,

---

6 Institutional environments are legal institutions that broadly define action situations at collective choice level. These definition may sometimes be quite specific and mandatory, but will also allow for regime tailoring in ‘on the ground’ settings. [in text?]
addressing how decentralised energy initiatives are co-opted by incumbent energy sector actors, framing these initiatives as community-driven while in fact reducing NIMBY-ism is at the forefront of their mind. >> summary yet to be added: crucial element was indeed that firms (and governments) would be quite involved and in fact take the lead in decentralised energy projects and frame these as community projects to, indeed, reduce NIMBY-ism <<

Thirdly, gaining insight, through interest in legal governance of the energy transition and in the theme of legal experimentation (Heldeweg, 2015) In the abovementioned Dutch EA/DSEG legislated experiments ..... >> summary about program yet to be added: see also the contribution by Diestelmeier and Lammers <<

4.2 – The Institutional Perspective

Clearly, these examples touch first of all on the issue of the exact policy objective that is at stake: is this merely about enhancing the use of renewable energy sources through decentralisation (which could suffice in terms of reducing dependency on large fossil fuel-based utilities), is it about enhancing such use through community involvement (as MacArthur writes: “... to potentially strengthen the quality and effectiveness of energy transitions.”), or is it about promoting a participatory society upon the assumption that energy democratisation could be a stronghold towards this type of (perhaps ‘big’) society. 7

Schematically these different shifts could be represented as follows (table 6):

| Table 6 - Policy Objective behind Community Energy Engagement (EnGov = energy governance) |
|-------------------------------------------------|-------------------------------------------------|-------------------------------------------------|
| ![Diagram](image)                               | ![Diagram](image)                               | ![Diagram](image)                               |
| 1. Community engagement supporting current regulated market mode of energy governance | 2. Community engagement to cause a shift in the current mode of energy governance | |
| - i.e. ‘marginal means to the en-gov end’        | - i.e. ‘radical means to the en-gov end’         | |
| - remain in hybrid zone or move towards trial hybrid. | - move from hybrid zone of regulated market into pure zone of civil networks |  

7 And of course there may be in-between positions, such as, perhaps, ‘The Democratic Smart City’ concept in which the Dutch TSO Alliander is involved. Vide: [http://gr1p.org/en/the-democratic-smart-city/background-the-democratic-smart-city/](http://gr1p.org/en/the-democratic-smart-city/background-the-democratic-smart-city/)
The essence of this distinction is whether shifts are the subject matter of policies, experimental or otherwise, with intent to design new or shift towards other existing institutional settings or (merely) as a matter of incrementally muddling through (i.e. following ad hoc policy concerns, without serious concern for institutional settings). If they are about shifts, as is assumed in Shifts 1-3 in Table 6., in what direction does the shift move and is the shift indeed about energy service transactions or rather about other policy field, indirectly affecting energy services? Whichever is the case, when shifts in governance are intended the key determinants of pure and hybrid institutional environments as legal institutions have to be settled, both in terms of legal abilities and/or of legal liberties, across institutive, consequential and terminative rules. Not only should this be done to specify general legal constraints and opportunities, but also with a view to specification tailored to energy governance.

Some of the relevant key characteristics to our narrative on institutional shifts would be:

- **Competitive energy markets** would come with vertical unbundling and a strict distinction between grid management actors and actors involved in supply and demand (through the market – separating suppliers and consumers; i.e. no prosumerism).

- **Regulated energy markets** would come with the above characteristics, but with additional requirements as regards universal access, as regards affordability, and further demands as regards reliability (e.g. technical standards) and sustainability (e.g. technical standards, quota in use of renewable energy in production; green certificates).

- **Civil energy networks** would specify the nature of such networks, such as through requirements concerning (shared) communityship, authenticity of community initiative, and community control – perhaps extending to membership specifications (e.g. private/natural persons only/in majority), and would probably allow prosumerism (or indeed foster this).

Looking at the Dutch EA set-up concerning experimentation, it remains to be seen to what extent the governance shift that is experimented on is a Shift 1 or Shift 2 setting (see table 6.). There are elements that clearly take distance from a competitive market perspective. In the most basic sense what sets the experimental regime apart from the existing regulated market regime is that the latter builds upon the principle of vertical unbundling (to avoid natural monopolies) and does not allow one and the same organization to be involved in electricity generation and/or transportation and/or storage and/or supply, whereas the former does allow (all of) these combinations, albeit under certain conditions (Diestelmeier and Lammers, 2016).

In other words, if in this Dutch case we compare the standard and the experimental regimes we find:

- as regards grid operation that under the regulated market this is separated from market transactions in terms of generation and supply of electricity (by energy companies), while under the experimental regime (following Article 2 DSEG, exempting from Article 16 EA),
allowing a combination of grid-management and market functions (e.g. generation, transport, generation and (peer-to-peer) supply).

- as regards *electricity generation*, following liberalisation this became a matter for the market, while under the regulated market regime electricity ‘producers’ (described in Article 1(g) EA as ‘organisational entities involved in generating electricity) do not need a license to produce electricity (at least not on the basis of the EA or as a matter of regulating production), but government has retained the right to start a public procurement procedure towards increasing existing production capacity (see Article 9a and following). The experimental regime does in itself not create more legal space for electricity generation, but as associations they do fit the description of being an organisational entity.\(^8\)

- as regards *electricity supply*, following liberalisation this too became a matter for the market, while under the regulated market regime electricity ‘suppliers’ (described in Article 1(f) EA as ‘organisational entities involved in supplying electricity) do, according to Article 95a para. 1 j\(^0\) Article 95d EA, require a license,\(^9\) issued by the minister for Economic Affairs (and handled by the Consumer & Competition Authority – ACM, which is (also) the National Energy Regulatory/Supervisory Authority). Aside from the mere fact of licensing indicating some regulation of the market, specific requirements, such as on reliability, fair tariffs, a policy to avoid customers being shut-off in case of default (Article 95b EA). As we will see in the below, the novelty of the experimental regime is that the electricity generated by the association can be sold to others, albeit only a limited category (members, and legal persons under the associations control) – see Article 7, para 1., sub f. DSEG. This is legally arranged by the stipulation (in Article 13 DSEG) that upon receiving a license to experiment from the minister of Economic Affairs, the association is *ipsa jure* granted the general supply-license. This element is particularly interesting as it suggests that the experiments are intended rather more as a Shift 2. setting (i.e. shift to an alternative energy governance mode: of civil networks) then Shift 1. (or 2 for that matter) – stronger wording than ‘suggests’ seems inappropriate as this constraint may be seen only as a necessity in the (early stages of) experimentation.

Furthermore we find, specifically to the nature of the key experimental project organisation:

- that the experimental exemptions apply only to ‘associations’ (Article 3 DSEG: ‘verenigingen’), which, according to Article 1 DSEG is to say: a co-operative (i.e. an association acting upon the physical needs of its members – e.g. energy service)\(^10\), or an association of owners as named in Article 5:124, para. 1 Dutch Civil Law Code as having legal personality. Effectively the Crown decree allows legal persons as associations and hybrid type legal persons, in-between an association and a named in par. 3.2).

---

\(^8\) Other than natural persons as prosumers, who produce for their own use and can supply their surplus tot their own energy company (see Article 95c, para. 2 EA).

\(^9\) Following a general prohibition, except when licensed: Het is verboden zonder vergunning elektriciteit te leveren aan afnemers die beschikken over een aansluiting op een net met een totale maximale doorlaatwaarde van ten hoogste 3*80 A.

\(^10\) As defined in Article 2:53, para. 1 Dutch Civil Law Code): “De coöperatie is een bij notariële akte als coöperatie opgerichte vereniging. Zij moet zich blijkens de statuten ten doel stellen in bepaalde stoffelijke behoeften van haar leden te voorzien krachtens overeenkomsten, anders dan van verzekering, met hen gesloten in het bedrijf dat zij te dien einde te hunne behoeve uitoefent of doet uitoefenen.”
- Article 7 DSEG holds further requirements to these associations as grounds for refusal of an experimental license. Aside from technical, organisational, expertise and financial requirements to safeguard technical and economical feasibility, reliability, safety, consumer protection and due environmental care, there are important elements such as:
  o para 1.(f) – supply of electricity to customer who is not a member of the association is allowed only if it concerns a legal person under full control of the association.
  o para 1.(i) – no other person than the association, aside from a legal person that is under full control of the association, is generating the renewable electricity.
  o para 1.(j) – no T/DSO or (legal) person who is (in)directly producer or supplier of electricity (larger than produced by the association) has any say in the management of the association.
  o para 1.(k) – the general assembly of members of the association is in no way excluded from control over the set-up, progress or cost distribution of the project.
  o para 1.(l) – members of the association should be able to bear the costs of the project in the short and in the long run.
  o para 1.(q) – no less than 80% of the customers shall be private consumers.

Diestelmeier and Lammers (2016) insist that the experimental arrangements in the EA (and DSEG Crown Decree) are not designed specifically for ‘smart grids’, but clearly does fit the purpose of such grids in the objective of ‘efficient integration of’ distributed generation from renewable energy sources (Diestelmeier & Lammers, 2016: 12). It does however also fit, as they confirm, the objective of enhancing efficient use of the grid infrastructure and, particularly relevant here, ‘involvement of grid users’. As regards efficient integration they applaud the introduction of the possibility of flexible pricing within experimental smart grid projects Article 12 DSEG), while regretting the fact that the scope of experimental arrangements does not extend beyond associations, such as, presumably service organisations which ‘act as aggregators who manage flexibility of grid users (...) in larger scales, or operators of storage facilities that are crucial for operating the grid.’ From the perspective of this paper, the reluctance to allow such a broader scope for experimentation may be taken as a sign of ‘institutional resilience’ (by ‘eloquent silence’)\(^{11}\) that resists ‘capture’ of community energy initiatives by firms or governments.

5. Making sense of shifts in governance

Two issues follow from the above. Firstly, the general legal understanding of the specificity of community energy initiatives, as the references to High-Pippert & Hoffman, and to MacArthur, and the concise analysis of the Dutch experimental arrangement demonstrate that this specificity matters as regards institutional alignment (proper fit of legal institutions across Action Situation levels) and resilience (versus wrongful framing or non-compliance) – assuming intended general shifts in governance.\(^{12}\) Secondly, shifts in governance matter in terms of our

\(^{11}\) Further check on Explanatory memorandi & Policy documentation is still needed.

\(^{12}\) Again, shifts may also occur as side-effect of piecemeal/ad hoc policy-making. Alignment and resilience would still matter, but less from a concern over the general direction that the energy transition is taking – see the next point in the main tekst.
'view from the balcony': in what direction is the energy transition moving, is that intentionally and how do energy policy factors and general political policy factors (market versus civil networks – or a big society) influence each other and (together) impact further development, how does this translate in terms of relevant legal institutions and what is our evaluation of this?

The following should be seen mainly as a first attempt to map the most relevant legal governance aspects of these issues & questions.

5.1 - Institutional Alignment and Resilience - legal personality revisited

Community energy initiatives beg the question which candidates of 1st and 2d order legal institutions would fit such initiatives, especially as regards their fit with a specific choice of 3rd order legal institution – such as in Shift 2 (a radical change towards civil energy networks). Amongst these candidates are legal relations of the P2P and P2O kind. Contractual relations (P2P) could shape a community initiative, but perhaps the requirements of (some) permanency, executive expediency and professionalism, and financial capacities and risks make this a less relevant option. Alternatively, legal personality would be an option, and clearly the Dutch experimental arrangements fit with this, while separating between standard associations, and co-operatives of ‘ associated owners’. While leaving the exact meaning of shared ownership aside (see Goedkoop and Devine-Wright, 2016), a brief analysis could be added to the types of legal persons (with a basic distinction between three ideal- and one hybrid-type), as regards their fit with 3rd order legal institutions.

One may argue that there is no strict and exclusive correspondence between the three basic forms of legal personality and the (ideal-type) institutional environments discussed in the above (public hierarchy, competitive markets and civil networks). The strongest fit seems that between corporations and the market, with a strong shareholder-private profit orientation, linking hopes at private profit to willingness to invest, but there are also public corporations, often organized to secure the (monopoly) provision of public goods and services in an effective and efficient way – on the assumption that market or civil network failure excludes a proper private alternative. Similarly corporations can be owned by a civil society collective, with efficiency to immediate advantage of the community. As to associations and foundations we find that they are less present in markets, and that they exist especially in public hierarchy environments (public communities and ‘quangos’) and in civil network environments (private communities, professional-not-for-profit organizations) – upon public or private missions and interests respectively. It could however be argued that certain forms do provide a better fit in terms of effectiveness and legitimacy of operations, and that certain forms, such as the public enterprise, or civil network owned corporations, do rely on different modes of coordination (i.e. governance), that seem more in tune with hybrid settings (dual hybridity of public hierarchy and competitive markets, and of the latter and civil networks respectively) – which would suggest that these forms may have a more difficult fit with the institutional environment of their parent organisation (i.e government and a civil network organisation respectively), but would fit with a hybrid setting if indeed this has its own regime as regards instituted and consequential rules (perhaps elaborate – as in regulated markets, perhaps lapidary in others).
In this respect (of daughters from parents) we also need to consider that over time legal persons may morph from one type of legal persons into another. An example outside of the energy field is that of the change of universities in the Netherlands from being public communities (i.e. association type), with students and lecturers as members with considerable strategic say, being changed into quangos (i.e. foundation type), with students and lecturers as consumer and employer stakeholders respectively, with considerably more limited say in strategic choice. Whether this change in legal personality type corresponds with a shift in governance (to a hybrid area) is hard to answer in general: public hierarchy perhaps does not necessitate intense political control, or perhaps the change in form does indeed lead into a trial hybridity of stakeholders from other (pure) environments gaining a say in the priorities of higher education and scientific research. Within the energy field one can imagine a process whereby a community of people form an energy association, kicking-off with voluntary energy-efficiency measures, to then move to establishing a smart grid and changing form into a co-operative, to upon overproduction of energy, change again to form a corporation involved in selling (some of) its energy production to others – aside from the possibility of the co-operative branching out as a corporation (i.e. the corporation as sole/majority) shareholder). This latter option is currently unavailable to associations in the Dutch experimental projects, but is otherwise (at least theoretically) possible. The Dutch example does show that certain changes in legal form are required as a matter of alignment with the intended, albeit experimental, institutional setting, and will also be resilient to misrepresentation – for example by remaining silent on outside corporate support (in cash or in kind).

In the final analysis of the alignment of a legal person with its environment or, oppositely, the resilience of an institutional environment with respect to irregular legal persons, may be a matter of hard or soft institutive and consequential rules on the one hand and specific characteristics of legal personality. The latter will be crucial to a legal person’s effectiveness, efficiency and legitimacy of achieving its particular outcomes. Three institutional characteristics relevant to all types of legal persons will be especially important. These are listed in the below, with a hint of the most proper fit with ideal-type institutional environments (i.e. public hierarchy, civil society, market) (De Ridder, 2010).

1. **Mission** – legal entities come with a particular task, an objective or a leading strategy that explains an entity’s interest in certain states of affairs:
   a. a *public task* organization (to a government environment; e.g. of a private foundation or a public office);
   b. a *private profit* organization (to a market environment; e.g. a business corporation);
   c. a *community-service* organization (to a civil network environment – voluntary or professional; e.g. housing corporations, schools, trade unions).

2. **Control** – operations of legal entities will depend on which agents determine its course of action from within:
   a. *public authority* – in a government environment;
   b. *investors* – in a market environment;
   c. *(expert) professionals* – in a network environment.
3. **Response** – similarly operations will also depend on exogenous incentives, as opportunities arising from events or states of affairs to which it will particularly respond (given the organization’s mission and related interests):
   a. *public good* (i.e. politico-legal) incentives – in a government environment;
   b. *competitive* (advantage/efficiency) incentives – in a market environment;
   c. *member’s/community* incentives – in a network environment.

The below table (no. 7) presents the main theoretical distinctions concerning characteristics of legal persons/entities, with a hint of the by default probable best fit.

<table>
<thead>
<tr>
<th>Legal person –</th>
<th>Association</th>
<th>Foundation</th>
<th>Corporation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gov’ce mode –</td>
<td>Public hierarchy</td>
<td>Civil network</td>
<td>Competitive market</td>
</tr>
<tr>
<td>L.Pers charact.</td>
<td>Mission of .... (raison d’être)</td>
<td>Public task</td>
<td>Community service</td>
</tr>
<tr>
<td>Control by .... (internal)</td>
<td>Public authority</td>
<td>Volunteers / professionals</td>
<td>Investors / share-holders</td>
</tr>
<tr>
<td>Response to ... (external)</td>
<td>Public good/interest</td>
<td>Community interest</td>
<td>Competitive advantage</td>
</tr>
</tbody>
</table>

From this it will be clear that both (‘hard’) critical requirements and (‘soft’) persuasive/advised standards can together provide the necessary specifications, useful to clarify if institutional boundaries matter, and how they impact on collective choice. In terms of Ostrom’s IAD-framework hard rules may come with exclusionary effects: certain community initiatives may be framed as such, but not be accepted as such when they do not comply with required characteristics (e.g. because of corporate or government involvement, or because the initiative has developed into a for-profit undertaking). Ultimately, as always, the Devil (or God for that matter – if one insists on being picky) is in the details. As a matter of determining a point of departure as regards deciding on alignment or resilience, the above scheme does provide a starting point, either for design, or for legal fact finding in a particular case. Especially the latter may lead us into territories where rules of law may be underdetermined to distinguish between ‘right or wrong’, or profession versus practice. This is where in the EU sceptics (or cynics) are saying that the EU-government may present itself as a community organisation governing a public hierarchy, but that it is in practice a (bureaucratic) quango-type organisation (with close corporate ties?). So clearly the issue could move into shady areas. In that respect, there is all the more reason why legislators (and executive offices and courts) should be as precise as possible about what the law allows for – or what the law can do to support policy when the policy objective is to indeed attain radical shifts in governance. Practice will then have to follow with proper compliance strategies to perhaps ultimately unmask a legal person’s ‘rules-in-use’ that are not in keeping with an institution’s ‘rules-in-form’.

5.3 – View from the Balcony
This design and evaluation paragraph is still under construction, and concerns the question (as it was phrased in the above): “in what direction is the energy transition moving, is that an intended move, and how do energy policy factors and general political policy factors (market versus civil networks – or a big society) influence each other and (together) impact further development, how does this translate in terms of relevant legal institutions and what is our evaluation of this?” The discussion on this will be brief; with references to table 6. (three types of Shifts in governance) and 5. (experimenting with modes of governance). It is probably to early to tell but it seems that Shift 2 is where we are heading.

6. Conclusions

>> yet to be drawn-up; in the below some components as possible building blocks <<

“This paper discusses the nature of this third response from the viewpoint of the institutional balance between public hierarchy, competitive markets and civil networks. This balance is discussed from a legal governance perspective and addresses the legal characteristics of community energy services as an institutional concept, and how it relates to the current institutional setting of a regulated energy market.”

Three aspects of alignment (LP to IE) or resilience (IE to LP)
- is a community initiative ‘for real’ or merely about ulterior motives (e.g. reducing NIMBY-ism);
- what space is available for legal change of LPs;
- what makes for a happy family – getting the settings right to secure effectiveness, efficiency and legitimacy (the static-free advantageous of institutional alignment and proper resilience against intruders).

A downright way of a legal assessment of institutional alignment or resilience ultimately analysis by legal fact finding: what are the exact requirements for a license to experiment or to get a subsidy.

Resilience is flip-side of alignment; mis-alignment with negative consequences: unlawfulness or invalidity of inactivity or acts performed, or lack of legal effects of (non)activity on abilities or liberties: no powers, no immunities, no claims, no privileges..

6. Literature (to be completed)


- Lammers, Imke, Michiel A. Heldeweg


