



Local energy systems, peer-to-peer trading and consumer protection

S.T. (Sjoerd) Kalisvaart, LL.M.

PhD-student in consumer protection and the energy transition



Renewables self-consumers / Active customer





Final customers





Yet we remain connected to a system...





Diverse local energy systems

- > Electricity to be sourced from:
 - Decentralized production by active customers
 - Centralized production
- > Result: different contractual arrangements required to facilitate energy flows
 - Alternating consumer / producer roles
 - Alternating horizontality and verticality of contractual arrangements
 - Alternating rights and obligations under energy and consumer law
- > **Can (should?) the active customer truly replace the ‘traditional’ supplier?**



Retail energy contracting in a nutshell

Final customer negotiates a supply agreement for their entire electricity demand



Supplier matches supply and demand
(balancing responsibility;
 article 5 Reg. 2019/942)



Supplier either negotiates a balancing agreement with a balancing responsible party (BRP) or becomes a BRP themselves



Enforcement and/or termination of the agreement by the final customer

Consumer law
 +
 energy law

Energy law

Consumer law
 +
 energy law



Two intertwined legal systems

- > **Energy law:**
 - Free supplier choice & switching, universal supply and balancing responsibilities
 - ‘Sectorial consumer law’: permits, UCPD/UCTD-type rules, transparency
 - Applied regardless of ‘consumer’ status (final customers connected to the grid)

- > **Consumer law:**
 - UCPD, UCTD, CRD
 - Applied in B2C-relations (*ex officio*)

- > ‘Basic’ sectorial contractual rights are seen as a “necessary” addition to “strong basis” of cross-sectorial norms (cons. 30 EMD)



‘Peer-to-peer trading’ of renewable energy

> Article 2(18) Dir. 2018/2001:

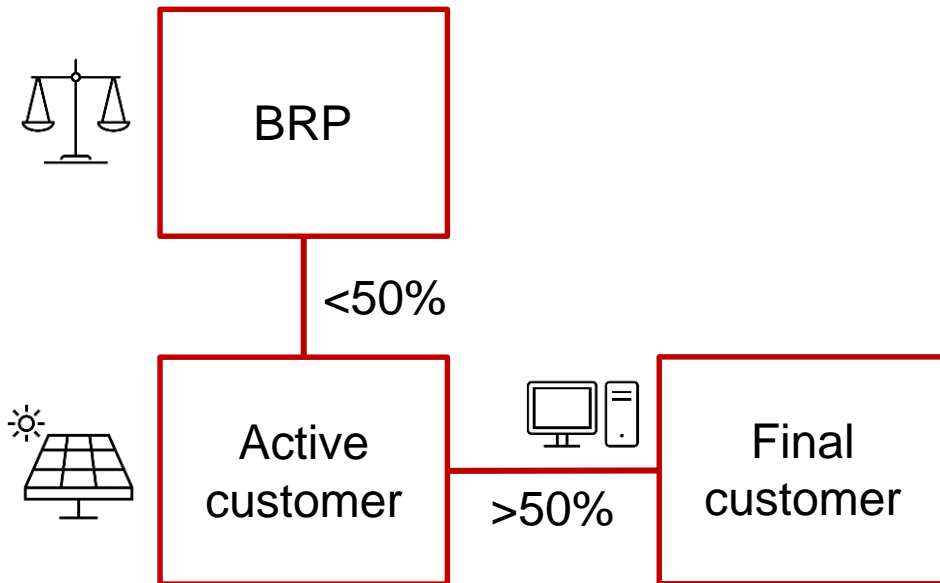
*“the sale of **renewable energy** between market participants by means of a contract with **pre-determined conditions** governing the **automated execution and settlement** of the transaction, either **directly** between market participants or **indirectly** through a certified third-party market participant, such as an aggregator. The right to conduct peer-to-peer trading shall be **without prejudice** to the rights and obligations of the parties involved as final customers, producers, suppliers or aggregators;”*

> Subcategory of ‘supply’ (article 2(12) and (18) Dir. 2019/944)

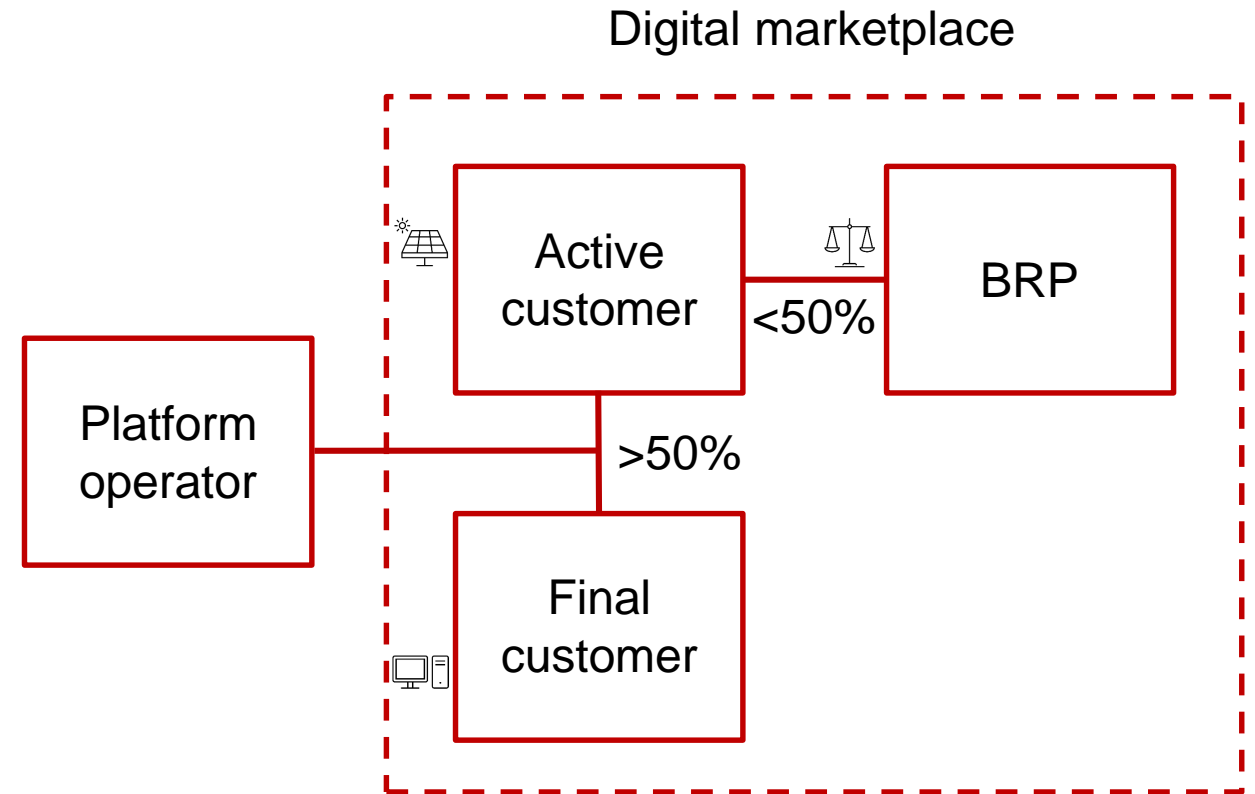
- ‘Active customer’-seller = supplier
- Universal supply + balancing
- Electricity = ‘good’ under EU law (cf. CJEU Case C-6/64 (*Costa/E.N.E.L.*))
- ‘Sale of a good’ → VAT applies (CJEU Case C-219/12 (*Fuchs*))



Direct P2P-trading



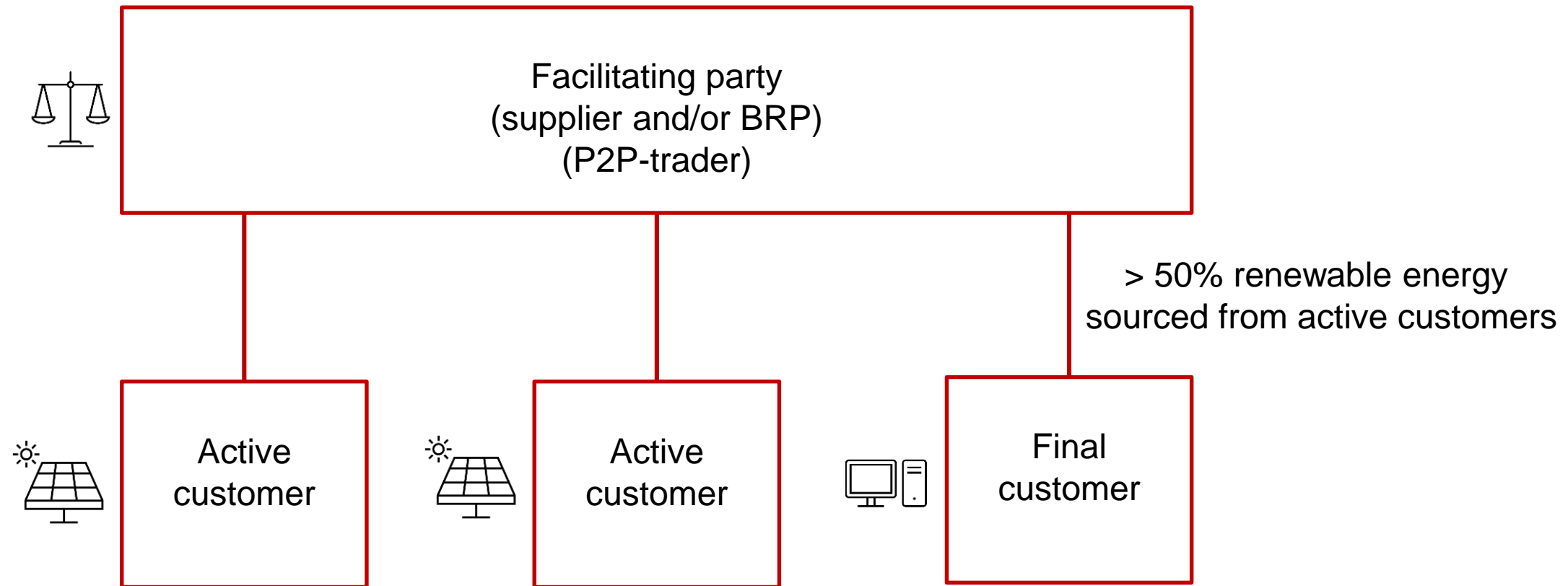
Direct P2P-trading



Platform-based direct P2P-trading

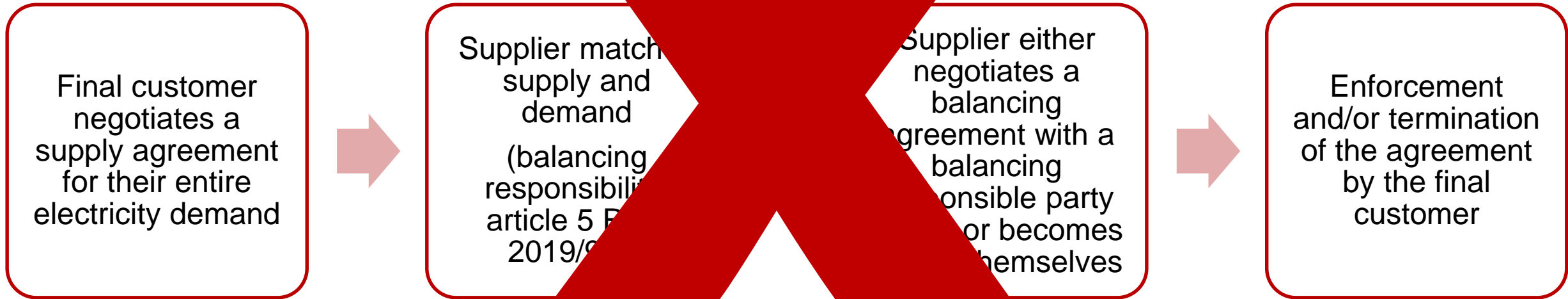


Facilitated P2P-trading





Retail energy contracting a nutshell



Consumer law
+
energy law

Energy law

Consumer law
+
energy law



‘Consumer’ vs ‘trader’ (I)

- > Active customer ‘replaces’ the supplier
 - CJEU Case C-105/17 (*Kamenova*):
 - Case-by-case approach in relation to diametrically opposed concept of consumer (para. 33, 37)
 - (...) whether the sale (...) was carried out in an **organised manner**, whether that sale was intended to **generate profit**, whether the seller had **technical information and expertise** relating to the products (...) which the consumer did not necessarily have, with the result that she was placed in a more advantageous position than the consumer, whether the seller had a legal status (...), whether the seller was subject to **VAT**, (...) whether the goods for sale were all of the same type or of the same value, and, in particular, whether the offer was concentrated **on a small number of goods** (para. 38)



‘Consumer’ vs ‘trader’ (II)

- › Aim of consumer law: bridging gap in bargaining power
 - Final customer: C2C (no protection) or B2C (mismatch?)
 - BRP: B2B (no protection) or B2C (protection)
- › Energy law applies regardless
 - Far-reaching ‘consumer law’-type rules
 - Limited carve-outs (NL: supply permit)
- › Article 2(18) RED: “(...) *The right to conduct peer-to-peer trading shall be without prejudice to the rights and obligations of the parties involved as final customers, producers, suppliers or aggregators → ?*



Facilitator vs platform operator (I)

- > Article 2(18) RED: “(...) or indirectly through a **certified third-party market participant**, such as an aggregator.”
 - Margin of appreciation for MS
- > NL: “market participant who manages the automatic execution and clearing of the transaction” (article 1.1 Energy Act Proposal)
 - Facilitating P2P-trading = aggregation
 - E.g. “A platform that links active customers and final customers and facilitates the transaction”



Facilitator vs platform operator (II)

- › Issue of ‘information society services’ (cf. article 3(a) Reg. 2022/2065)
 - E.g. digital services such as ‘messaging boards’, ‘apps’, etc.
 - E-commerce = limitation on request of a prior license
- › Conflict of services: CJEU Case C-434/15 (*Uber Systems Spain*)
 - Establish the overriding service
- › Conflict of services and goods: CJEU Case C-275/92 (*Schindler*)
 - Establish interdependency between the services and goods



Two distinct possibilities

The 'P2P-trader' model

- > 'Facilitating' the automatic execution and settlement of the transaction is overriding
- > No actual contractual arrangement 'between peers'
- > Cf. CJEU Case C-158/94 (*Commission/Italy*): transfer of electricity is overriding (§ 17)

The 'platform operator' model

- > Peers conclude agreements via the platform's messaging system
 - Direct P2P-trading
 - Information society service
- > CJEU Case C-536/20 (*Tiketa*)
- > NL: rules on double-sided mediation



Wrap-up

- > Energy prosumers are not superhumans
 - ...but the law seems to disagree
- > Cherry picking appears to be possible due to mismatch between energy law and e-commerce legislation
- > Different aims and goals of legal frameworks must be aligned