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Ukraine's attempts at legal approximation to the EU's energy *acquis* and changes in its gas importation practices¹

Introduction

From the time that Ukraine gained its independence from the Soviet Union in 1991 Ukraine has, in general, pursued a policy of European integration.² This orientation has strengthened and intensified since the Euromaidan Revolution of 2014 which saw the coming to power of a unambiguously pro-Western government intent on European and Euroatlantic integration, which has led to policy changes and reforms in various areas. This is particularly noticable in the realm of energy. Here there shall be an examination of Ukraine's legal obligations arising from its membership of the Energy Community, specifically the need to approximate to the EU's energy *acquis*, as well as the degree to which these have been successfully fulfilled. Additionally, there shall also be a survey of the changes the country has made with regards to its gas importation practices, which have come about as a result of the quest to seek and utilize alternative sources of gas. In relation to Ukraine's attempts to approximate to EU norms and standards, it shall be shown that there have been successes, though overall its approach to implementation may be described as being „fragmented”.³ As to Ukraine's gas importation regime, it shall be seen that there have been real and definite changes, though this development has not been without complications and problematic aspects, in particular relating to questions of law with regards to reverse flows of gas.

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² Another analysis of the topic from the author was published in the conference book of the III. Fiatalok Európában Konferencia, Pécs, 2016. November 04-05, under the title *Changes in Ukraine's Energy Policy*.

³ Popovych Maksym. 2016.5.22. - Energy regulator in Ukraine is another fight for independence. Kyiv Post. Accessed: 2016. September 01 (<http://www.kyivpost.com/article/opinion/op-ed/max-popovych-energy-regulator-in-ukraine-is-another-fight-for-independence-414294.html>)

The European Union's Energy Acquis

The latest addition to the legislation relating to the European Union's energy market is the Third Energy Package, which is composed of two directives and three regulations.⁴ These include Directive 2009/72/EC concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC and Directive 2009/73/EC concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC. The latter are Regulation (EC) No 714/2009 on conditions for access to the network of cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003, Regulation (EC) No 715/2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005, and Regulation (EC) No 713/2009 establishing an Agency for the Cooperation of Energy Regulators.

The self-professed aim and essence of the Third Energy Package is the improvement of the internal energy market's functioning and the resolution of unresolved structural problems.⁵ This involves the unbundling of the energy sector, which refers to the separation of energy generation and supply from network operators.⁶ The logic behind this is that without unbundling, single companies which both generate and sell energy, while also operating transmission networks, may have reason to obstruct competition, thus preventing fair competition, and thus being disadvantageous for consumers due to the possibility of increased prices.⁷ In addition, the Package seeks to strengthen and safeguard the independent status and nature of energy regulators.⁸ Behind the Commission's campaign is the belief that a fully interconnected and competitive energy market would help to ensure energy security through making emergency supplies more easily transferable throughout the EU, and would help to deal with the issue of climate change through the maximalization of efficient energy use and the minimalization of emissions.⁹

Beyond the Member States of the European Union, these norms and regulations have also become binding upon third party states, who have become signatories to the Energy Community Treaty. Thus, these countries are bound to implement the EU's energy *acquis*, among which is Ukraine.

⁴ European Commission, *Market Legislation* <https://ec.europa.eu/energy/en/topics/markets-and-consumers/market-legislation>. Another analysis of the topic by the author will be published on the MTA-DE's Public Service Group blog publicgoods.eu under the title *Exporting the Acquis: A Brief Introduction to the Energy Community*.

⁵ European Commission: *Market Legislation*. Accessed: 2016. September 1: (<https://ec.europa.eu/energy/en/topics/markets-and-consumers/market-legislation>).

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Ibid.*

⁹ BUCHAN DAVID (2015): *Energy Policy: Sharp Challenges and Rising Ambitions*. In Wallace Helen, Pollack Mark A., and Young Alasdair R. (eds.): *Policy-Making in the European Union*. Seventh Edition. Oxford University Press. Oxford. p. 349.

The Energy Community

The major mechanism which the European Union has in order to extend its energy regime beyond its borders is the Energy Community. The European Commission itself has stated that „The Energy Community Treaty is the reference point for the majority of the EU's neighbours willing to be a part of the European energy system.”¹⁰ The two essential driving forces behind its establishment are the energy security of the European Union and the desire to export its norms and rules relating to energy to neighbouring countries.¹¹ In the words of the Energy Community's Secretariat, “The Energy Community's mission is to extend the EU internal energy market to South East Europe and beyond on the basis of a legally binding framework. The principal instrument to achieve this aim is the adoption of the EU's legislation, the so-called “*acquis communautaire*”, in energy and related areas.”¹²

As to the establishment of a common European energy policy, it was not until the late 1980s that real, substantial progress began to be made in this area.¹³ This is somewhat surprising if we consider the vital status of energy to modern economies, the consequences of the increases of the price of oil in the 1970s, the existence of the Euratom and ESCS Treaties, and the fact that the Commission itself had stated for years that the integration of the energy market would be highly beneficial and lead to large savings.¹⁴ The major obstacle to development in this area were the Member States themselves, who, due to their differing circumstances and peculiarities, tended to prefer national solutions.¹⁵

One major aim of the development of a coherent, independent and united European energy policy is in order to alleviate pressures arising due to over dependence upon any particular particular energy producer.¹⁶ The EU relies on non-Member States to meet almost half of its energy needs, and in the case of oil the level of dependence reaches as high as 70 per cent.¹⁷ Specifically, it has been Eastern and Central European states which have been particularly concerned with this matter, and the 2004 and 2007 enlargements had the impact of making this issue of even more vital importance.¹⁸ In addition, the repeated interruptions in the delivery of Russian energy along the Ukrainian and Belarussian transit routes (in particular in 2006 and 2009), as well as the present conflict

¹⁰ Communication from the Commission, *On security of energy supply and international cooperation – „The EU Energy Policy: Engaging with Partners beyond Our Borders”*, 7 September 2011, COM (2011), 6.

¹¹ TALUS, KIM, *EU Energy Law and Policy: A Critical Account*, Oxford, Oxford University Press, 2013, p. 245.

¹² Energy Community, *What We Do*, https://www.energy-community.org/portal/page/portal/ENC_HOME/ENERGY_COMMUNITY/What_we_do.

¹³ NUGENT, NEIL, *The Government and Politics of The European Union*, 7th edition, Basingstoke, Palgrave Macmillan, p. 343.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ BUCHAN, DAVID, *Energy Policy: Sharp Challenges and Rising Ambitions*. In: Wallace, Helen, Pollack, Mark A., and Young, Alasdair R., *Policy-Making in the European Union*, 7th Edition, Oxford, Oxford University Press, 2015, 345.

¹⁷ NUGENT, p. 343.

¹⁸ BUCHAN, p. 345.

taking place in Ukraine, have provided a strong impetus for the EU to seek alternative energy sources.¹⁹

In this context, the extension of the internal energy market to neighbouring countries was a natural step in the development of the European Union's energy policy. On 1 July 2006 the Energy Community Treaty came into force, it being initially limited to the European Community and the countries of the West Balkans, the signatories being Albania, Bulgaria, Bosnia-Herzegovina, Croatia, the Former Yugoslav Republic of Macedonia, Montenegro, Romania, Serbia, and Kosovo.²⁰ Its main underlying thrust was that the EU would strengthen its supply security while the Balkan states involved would experience the benefits of a coherent policy in the energy area.²¹ The Energy Community Treaty explicitly seeks to emulate the European Coal and Steel Community, for in the same way that the latter arose in a region that had just emerged from war and conflict, so the Energy Community is the first time that all the West Balkan states signed a legally binding treaty, which arose in the aftermath of the Balkan wars of the 1990s.²² Former European Council President Herman Van Rompuy had said, "Europe was built as a community for coal and steel. Sixty-four years later, and in new circumstances, it is clear we need to be moving towards an energy union."²³

Eventually, the European Commission called for the ECT to move beyond the Balkans and to also cover European Neighbourhood Policy states,²⁴ and so Moldova joined in 2010, and Ukraine in 2011.²⁵ More recently, in October 2016 Georgia also signed the accession protocol in order to join the Energy Community, and is expected to become a member sometime this year.²⁶ The common interests of all parties with this action were described by the then European Commissioner for Energy, Günther Oettinger that „Ukraine will have access to a pan-European energy market, based on the principles of solidarity and transparency. For the Community, Ukraine is an important new member and security of supply further improved.”²⁷ This statement reiterates the fact that the Energy Community facilitates the extending of the legal boundary of the EU beyond its

¹⁹ Ibid. See also SLOBODIAN, NATALIJA, *Russia, Ukraine and European energy security*, New Eastern Europe, May 26 2016, <http://www.neweasterneurope.eu/interviews/2007-russia-ukraine-and-europe-s-energy-security>.

²⁰ VAN DER LOO, GUILLAUME, *The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area: A New Legal Instrument for EU Integration without Membership*, Leiden and Boston, Brill Nijhoff, 2016, p. 348.

²¹ MARHOLD, ANNA, *EU Regulatory Private Law in the Energy Community: The Synergy between the CEER and the ECRB in Facilitating Customer Protection*. In CREMONA, Marise, and MICKLITZ, Hans W, *Private Law in the External Relations of the EU*, Oxford, Oxford University Press, 2016, p. 262.

²² European Commission Press Release, *The EU and South East Europe sign a historic treaty to boost energy integration*, Brussels, 25 October 2005, IP/05/1346.

²³ ELLIS, VICKY, *EU countries agree to scrap reliance on Russian gas*, Energy Live News, March 21 2014, <https://www.energylivenews.com/2014/03/21/eu-countries-agree-to-ditch-reliance-on-russia-gas/>

²⁴ Communication from the Commission, *On Strengthening the European Neighbourhood Policy*, Brussels, 4 December 2006, COM (2006) 726, 8, 3.4.

²⁵ Energy Community, *About Us: Parties*, https://www.energy-community.org/portal/page/portal/ENC_HOME/ENERGY_COMMUNITY/Stakeholders/Parties.

²⁶ Energy Community, *Ministerial Council Approves Georgia's Accession to the Energy Community, Adopts New Environmental Legislation*, October 14 2016, https://www.energy-community.org/portal/page/portal/ENC_HOME/NEWS/News_Details?p_new_id=13463.

²⁷ European Commission Press Release, *Commission welcomes Ukraine in Energy Community*, Brussels 24 September 2010, IP/10/1173.

political-institutional boundary with the aim of ensuring its security and stability, while third countries are also able to benefit from integrating into the the European Union's energy system and order.

The Energy Community Treaty²⁸ states in its preamble that it seeks "to establish among the Parties an integrated market in natural gas and electricity, based on common interest and solidarity." According to Title 1 Article 2 of the Treaty, its aims are to:

- (a) create a stable regulatory and market framework capable of attracting investment in gas networks, power generation, and transmission and distribution networks, so that all Parties have access to the stable and continuous energy supply that is essential for economic development and social stability,
- (b) create a single regulatory space for trade in Network Energy that is necessary to match the geographic extent of the concerned product markets,
- (c) enhance the security of supply of the single regulatory space by providing a stable investment climate in which connections to Caspian, North African and Middle East gas reserves can be developed, and indigenous sources of energy such as natural gas, coal and hydropower can be exploited,
- (d) improve the environmental situation in relation to Network Energy and related energy efficiency, foster the use of renewable energy, and set out the conditions for energy trade in the single regulatory space,
- (e) develop Network Energy market competition on a broader geographic scale and exploit economies of scale.

The Energy Community places a strong onus upon signatory countries, which can be seen in Article 6 of the ECT, which states that „The Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty. The Parties shall facilitate the achievement of the Energy Community's tasks. The Parties shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.”

In terms of the Energy Community's institutional structure, the Treaty establishes the Ministerial Council, the Regulatory Board, the Permanent High Level Group, the Energy Community Secretariat, and the Fora. The Ministerial Council aims to ensure that the Treaty's objectives are attained, provides policy guidelines, takes various measures and adopts appropriate Procedural Acts.²⁹ The Ministerial Council consists of two representatives of the European Union and one from each Contracting Party.³⁰ The Permanent High Level Group work includes preparing the Ministerial Council's work and reporting to it with regards to the progress made towards the fulfilment of the Treaty's objectives.³¹ It consists of two European Union representatives and one from each Contracting Party.³² The Regulatory Board consists of one representative of each Contracting Party's energy regulator, and advises both the

²⁸ Officially: Treaty Establishing the Energy Community, signed on 25 October 2005, came into force on 1 July 2006.

²⁹ Treaty Establishing the Energy Community, Article 47.

³⁰ Ibid, Article 48.

³¹ Ibid, Article 53, (a) and (c).

³² Article 54.

Ministerial Council and Permanent High Level Group in relation to rules, and makes recommendations with regards to cross-border disputes.³³ The Secretariat, which is based in Vienna, is the only institution acting on a permanent basis.³⁴ It is headed by a Director, and its responsibility is to administer the Energy Community's daily activities,³⁵ which include providing the Ministerial Council, the Permanent High Level Group, the Regulatory Board and the Fora with administrative support, and reviewing the implementation of Treaty obligations by its various signatories.³⁶ The Fora has the role of advising the Energy Community, and is composed of representatives from the various interested stakeholders, which includes regulators, industry and industry related groups, and consumers.³⁷

The Energy Community is an example of EU external governance policy, that is, an attempt to expand and move the legal boundary of the Union while not simultaneously moving the political boundary of the Union through official enlargement.³⁸ This is connected to the concept of the EU as a "normative power", which aims at exporting and promoting its norms and ideals.³⁹ Such an approach includes third countries applying the EU's 'sectoral *acquis*', which allows them greater access and integration into the Internal Market of the EU.⁴⁰

There have been major criticisms of the Energy Community, among which has been that implementation of the energy *acquis* varies between different contracting states, thus providing a very "mixed picture" in terms of successful implementation.⁴¹ This problem is coupled with problems relating to enforcement mechanisms, with the claim being made that existing ones are weak, and that so far no financial sanctions or binding penalties having been imposed for the breach of obligations.⁴² In general, however, the Energy Community has been hailed as a success of EU external relations policy.⁴³ This, at least to a certain extent, may be admitted as it has managed to integrate states that are not full members of the European Union into a vital part of its legal order.

Below there shall be a survey and evaluation of Ukraine's attempt to conform its energy regime in line with its obligations as a signatory of the Energy Community. This

³³ Article 58, (a) and (b).

³⁴ Energy Community, *Secretariat*, https://www.energy-community.org/portal/page/portal/ENC_HOME/ENERGY_COMMUNITY/Institutions/Secretariat.

³⁵ *Ibid.*

³⁶ Treaty Establishing the Energy Community, Article 67 (a) and (b)

³⁷ *Ibid.*, Article 63.

³⁸ LAVENEX, SANDRA, *EU external governance in 'wider Europe*, *Journal of European Public Policy*, Vol. 11, No. 4, August 2004, p. 683.

³⁹ MANNERS, IAN, *Normative Power Europe: A Contradiction in Terms?*, *Journal of Common Market Studies*, Vol.40, No. 2, 2002.

⁴⁰ PETROV, ROMAN, *Applying the European Union's 'energy acquis' in eastern neighbouring countries: the cases of Ukraine and Moldova*, *Oil, Gas and Energy Law Intelligence*, Vol. 12, Issue 2, April 2014, 1.

⁴¹ European Parliament, *Energy Community: Prospects and challenges*, European Parliamentary Research Service, Briefing October 2015, 5.

⁴² *Ibid.*, 8.

⁴³ SCHWARZ, OLIVER, *Exploring the Impact of the Energy Community: A True Pan-European Single Market or Difference Worlds of Compliance*, ECPR General Conference Université de Montréal, Montreal, 26-29 August 2015, <https://ecpr.eu/Events/PaperDetails.aspx?PaperID=25993&EventID=94>.

shall focus on three major areas: gas, electricity and the creation of an independent regulatory.⁴⁴

Gas

In relation to the area of gas and the objectives of the EU in this area Directive 2009/73/EC states that „The internal market in natural gas, ..., aims to deliver real choice for all consumers of the European Union, be they citizens or businesses, new business opportunities and more cross-border trade, so as to achieve efficiency gains, competitive prices, and higher standards of service, and to contribute to security of supply and sustainability.”⁴⁵

Ukraine is considered to be effectively reforming its gas sector in line with its Energy Community obligations, through the implementation of its Gas Sector Reform Implementation Plan, having been hailed as the first Contracting Party of the Energy Community to have developed a significant natural gas market regulatory framework.⁴⁶ It is also argued that this reform of the gas sector has the potential to increase Central and Eastern Europe's energy security, and thus Ukraine's domestic reforms in this area have an influence and importance beyond its own borders.⁴⁷

In April 2015 the Ukrainian Parliament passed the Law of Ukraine on the Natural Gas Market. The law was drafted by the Ukrainian government in close consultation with the Energy Community Secretariat, and Naftogaz, the Ukrainian state gas and oil company.⁴⁸ The legislation states that „In pursuance of Ukraine's obligations under the Treaty establishing the Energy Community and the [Ukraine-EU Association Agreement] the present law is directed at implementation of the Energy Community *acquis* on energy, in particular: Directive 2009/73/EC concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC; Regulation (EC) 715/2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) 1775/2005; as well as Directive 2004/67/EC on measures to safeguard security of natural gas supply.”⁴⁹

It begins with, „This Law defines legal fundamentals of the functioning of the natural gas market in Ukraine founded on principles of free competition, due protection of consumers and security of supply as well as capable of integration with natural gas markets of the states parties of the Energy Community, including by means of creation of regional natural gas markets.”

⁴⁴ Another analysis of the topic by the author will be published on the MTA-DE's Public Service Group blog publicgoods.eu under the title *Ukraine's Implementation of the European Union's Energy Acquis*.

⁴⁵ Preamble (1).

⁴⁶ Energy Community (2016): Energy Community Country Brief: Spotlight on Ukraine. Energy Community Country Brief. 9 March 2016 Issue 3. Page 1.

⁴⁷ Dixigroup (2016): Ukraine's Gas Sector Reform: A Future Win-Win for Ukraine and Europe. Ukrainian Think Tank Development Initiative. Page 1.

⁴⁸ Radchenko Vitaliy. 2016. 07.07 - Ukraine: Naftogaz Unbundling Plan Adopted. Lexology. Accessed: 2016. September 10 July 7 2016. (<http://www.lexology.com/library/detail.aspx?g=230892a7-d324-4d08-89df-0055bef81b84>).

⁴⁹ Article 2.1.

According to Article 23 Ukraine's Gas Law, entitled „General requirements of unbundling and independence of a gas transmission system operator (unbundling mode OU), paragraph 1:

„The gas transmission system operator shall be a separate legal person which is not part of a vertically integrated undertaking and carries out its commercial activities independent from activities independent from activities of production, distribution, supply of natural gas, activities of wholesale sellers. The gas transmission system operator may not carry out activities of production, distribution or supply of natural gas.”

This legislation was praised by the Director of the Energy Community Secretariat, who said that „Ukraine is well advanced in gas sector reform, having adopted the EU Third Energy Package compliant Law on Natural Gas Market which entered into force in October 2015.”⁵⁰ In general, its adoption was seen as a success which can act a model and be emulated in other attempts at approximation to EU law.⁵¹ The adoption of this law was followed by the creation of secondary legislation, with the assistance of the Energy Community Secretariat.⁵² However, all of the secondary legal regulations were not entirely adopted, and in the case of some of those that were, some of their provisions did not wholly comply with the Gas Market Law.⁵³

A bill was approved on July 1 2016 by the Cabinet of Ministers of Ukraine which will split Naftogaz⁵⁴ of Ukraine according to the requirements of the EU's Third Energy Package,⁵⁵ as specified in the Ukrainian „On the Natural Gas Market” law.⁵⁶ The resolution, named „On unbundling of operations for transportation and storage (injection, withdrawal) of natural gas”⁵⁷ was drafted by the Ukrainian government in conjunction with the Energy Community Secretariat.⁵⁸ The plan includes provision for the creation of two new entities: JSC „Main Gas Pipelines of Ukraine” (MGU) and JSC „Underground Has Storage Facilities of Ukraine” (UGSF).⁵⁹ These will both take over the assets of the Ukrainian transmission system operator (TSO), Ukrtransgaz.⁶⁰

⁵⁰ Interfax-Ukraine News Agency 2016.05.24 - Energy Community Secretariat hopes Ukraine's energy regulator will correct gas market regulations. Accessed 2016. September 20. (<http://en.interfax.com.ua/news/economic/345478.html>)

⁵¹ Popovych Maksym. 2016.04.09. - Ukraine's Gas Market: A thorny way to liberalisation. New Eastern Europe. Accessed: 2016. September 28 (<http://www.neweasterneuropa.eu/articles-and-commentary/1562-ukraine-s-gas-market-a-thorny-way-to-liberalisation>).

⁵² Energy Community. i.m. Page 1.

⁵³ Interfax-Ukraine. Energy Community Secretariat hopes.

⁵⁴ In Ukraine it is Naftogaz, along with its subsidiaries, which carries out such tasks as gas production, storage, supply and transmission. See Radchenko. Ukraine: Naftogaz Unbundling Plan Adopted.

⁵⁵ Haight Brent. 2016.07.05. - Ukraine Government Authorizes Naftogaz Split, Gas Compression. Accessed: October 2. (<http://gascompressionmagazine.com/2016/07/05/ukraine-government-authorizes-naftogaz-split/>).

⁵⁶ Radchenko. Ukraine.

⁵⁷ Naftogaz. 2016.07.04. Ukraine's government approves Naftogaz unbundling plan. Accessed: 2016. September 9. (<http://www.naftogaz.com/www/3/nakweben.nsf/0/471E4A2222A20B92C2257FE6003174D0?OpenDocument&year=2016&month=07&nt=News&>).

⁵⁸ Radchenko. Ukraine.

⁵⁹ Naftogaz. i.m.

⁶⁰ Ibid.

However, reform of the gas sector has not been wholly unproblematic. One notable example occurred in September 2016 when the Ukrainian government announced that the economy ministry would take over control of Ukrtransgaz, the subsidiary gas transportation operator of Naftogaz.⁶¹ This decision would have placed both the generator/supplier and transmitter of gas under the control of the same ministry. The Secretariat of the Energy Community stated in response that “this unilateral move is not in line with the Resolution on Unbundling adopted by the government on July 1, nor was it consulted with the Secretariat.”⁶² Furthermore, it said that „control by the same public body – the ministry of economic development and trade – over both transmission system operator and Naftogaz' gas production and supply activities violates the unbundling provisions applicable under Energy Community law.”⁶³ There was also a threat of a possible action to enforce Energy Community rules.⁶⁴ In addition, the country's creditors warned that the move could put in jeopardy the disbursement of money connected to the country's IMF bailout package.⁶⁵ After a meeting between the Ukrainian Prime Minister, U.S. Ambassador, and representatives from the World Bank, European Bank of Reconstruction and Development, as well officials of Naftogaz and Ukrtransgaz, the Ukrainian government quickly cancelled its planned take over.⁶⁶

Electricity

Upon obtaining independence in 1991, Ukraine inherited a highly developed electricity sector as well as high energy consumption levels from the USSR.⁶⁷ In the mid-1990s Ukraine was the first country that had been part of the Soviet Union that underwent extensive reforms in the electricity sector.⁶⁸

A key priority of the European Commission in relation to energy reform in Ukraine has been the introduction of a new model for the electricity market.⁶⁹ In particular, this means the reorganizing and dismantling of Ukrenergo, the country's state transmission

⁶¹ Olearchyk Roman. 2016. 09.18. - Ukraine under fire over gas group revamp. Financial Times. Accessed 2016. September 18. (<https://www.ft.com/content/89a349a4-7da2-11e6-8e50-8ec15fb462f4>).

⁶² Zhuk Alyona. 2016. 09. 19. - Economy Ministry puts seizing control over Ukrtransgaz on hold. Kyiv Post. Accessed: 2016. September 20. (<https://www.kyivpost.com/article/content/business/economy-ministry-puts-seizing-control-over-ukrtransgaz-on-hold-423225.html>).

⁶³ Powell William. 2016. 08.17. - Bank, EC Condemn Ukraine Economy Ministry. Natural Gas World. Accessed: 2016. October 5. (<http://www.naturalgaseurope.com/bank-ec-condemn-ukraine-economy-ministry-31655>).

⁶⁴ EurActiv. 2016.09.26. - After striking murky gas deal, Ukraine bows to West. Accessed: 2016. October 15. (<https://www.euractiv.com/section/europe-s-east/news/after-striking-murky-gas-deal-ukraine-bows-to-west/>).

⁶⁵ OLEARCHYK, i.m.

⁶⁶ Verbyany Volodymr. 2016. 09.19. - Ukraine Cancels Gas Pipeline Takeover After Lender Criticism. Bloomberg. Accessed: 2016. October 3. (<https://www.bloomberg.com/news/articles/2016-09-19/ukraine-suspends-gas-pipeline-takeover-after-lender-criticism>).

⁶⁷ LOVEI LASLO (1998): *Electricity Reform in Ukraine: The impact of weak governance and budget crises*. Public Policy for the Private Sector. December 1998, Note No. 168. p. 2.

⁶⁸ Pittman Russell. 2016.02.07. - Restructuring Ukraine's Electricity Sector: What Are We Trying to Accomplish. VoxUkraine. Accessed: 2016. October 3. (<http://voxukraine.org/2015/02/07/restructuring-ukraines-electricity-sector-what-are-we-trying-to-accomplish/>).

⁶⁹ Interfax-Ukraine. 2016.06.03. European Commission hopes Ukraine reforms energy market soon. Accessed: 2016. September 30. (<http://en.interfax.com.ua/news/economic/347862.html>).

company.⁷⁰ On 31 March 2016 the Ukrainian Parliament's energy committee recommended the approval of the Electricity Market Law draft.⁷¹ The provisions conform to the requirements of the Energy Community Treaty and the European Union's Third Energy Package, with its overarching goal being the progressive liberalisation of Ukraine's electricity market.⁷²

The full adoption of this law had been delayed for around two and a half years, even though by this time the secondary legislation necessary for the practical implementation of the law was already prepared.⁷³ The Energy Community had often criticized this lack of progress, specifically the delay in the unbundling of Ukrenergo and distribution network operators, and has stated categorically that present Ukrainian legislation is not in compliance with the EU's Third Energy Package.⁷⁴ The vacillating in the passing of the necessary legislation in order to reform the electricity market even provoked the intervention of the United States Ambassador to Ukraine, *Geoffrey Pyatt*, who stated that his government insisted that the electricity law should be adopted in the Autumn of 2016.⁷⁵

In response, Ukrainian Prime Minister *Volodymyr Groysman* sought to reassure interested parties that passing legislation in conformity with EU standards was a major aim of the government and that the process was moving forward, stating on June 30 2016 at the Ukrainian Energy Conference in Kyiv that work was underway with the various parties and factions of the Ukrainian parliament in order to bring this about, and that he was confident that the legislation will be approved.⁷⁶ Finally, on 13 April 2017, the Ukrainian Parliament approved the law.

Independent Regulator

A major issue in Ukraine's complying with Energy Community standards relates to passing legislation establishing an independent energy regulator.⁷⁷ After much delay and criticism, on September 22 2016 the Ukrainian parliament passed the law to create an

⁷⁰ EU Today. 2016. 05. 25. - Ukraine Reforms in the Electricity Sector. Accessed: 2016. September 30. (<http://eutoday.net/news/ukraine-reforms-in-the-electricity-sector>).

⁷¹ Energy Community. Ukraine Electricity. Accessed 2016. September 2. (https://www.energy-community.org/portal/page/portal/ENC_HOME/AREAS_OF_WORK/Implementation/Ukraine/Electricity)

⁷² Radchenko, Vitaliy, Ukraine: Electricity Market liberalised to meet the EU 3rd Energy Package requirements, *Lexology*, April 18 2017, <http://www.lexology.com/library/detail.aspx?g=8b4291f1-d65d-4f42-baa7-d6d187123b27>.

⁷³ Interfax-Ukraine. 2016-05.25. - Director of Energy Community: „In the area of energy efficiency Ukraine did almost nothing“. Accessed: 2016. October 15. (<http://en.interfax.com.ua/news/interview/345602.html>).

⁷⁴ Energy Community.

⁷⁵ Ukrinform. 2016.06.30. - U.S expects Ukraine to adopt legislation on electricity market next fall – Ambassador Pyatt. Accessed: 2016. October 16. (<http://www.ukrinform.net/rubric-economics/2042404-us-expects-ukraine-to-adopt-legislation-on-electricity-market-next-fall-ambassador-pyatt.html>).

⁷⁶ Kyiv Post. 2016. 06. 02. Ukraine Energy Conference assures private investors ahead of planned privatization of energy companies. Accessed: 2016. October 16. (<http://www.kyivpost.com/article/content/ukraine-politics/ukraine-energy-conference-assures-private-investors-ahead-of-planned-privatization-of-energy-companies-417659.html>).

⁷⁷ Interfax-Ukraine. Director of Energy Community.

independent energy market regulator.⁷⁸ The legislation is titled Draft Law No 2966-d “*On the National Commission for State Regulation of Energy and Public Utilities Sector*”⁷⁹ and was written in consultation with the Energy Community Secretariat.⁸⁰ This was signed into law by President *Petro Poroshenko* on November 23 2016.⁸¹ This independent commission will have the responsibility of setting power tariffs,⁸² and shall be composed of two members nominated by the President, two members nominated by the Parliament, and one nominated by the Cabinet of Ministers.⁸³ It is hoped that the adoption of this legislation and it being successfully implemented will create a truly independent regulatory authority in line with European standards.⁸⁴ The passing of this legislation was critical for Ukraine, as the European Union directly tied it to receiving a 600-million-euro loan to the reforming of this area.⁸⁵

Changes in the Gas Importation Practices of Ukraine

The Ukrainian and Russian relationship in the realm of gas has often had problematic dimensions,⁸⁶ going back to the 1990s, which then related in particular to issues of payment and subsequent reduction in Russian supplies, in addition to Russian complaints of gas being diverted to other European countries.⁸⁷ A serious dispute arose in 2006, when Russia stopped gas supplies to Ukraine after the latter rejected a rise in gas prices.⁸⁸ The dispute led to the disruption in supply to several other countries in Europe.⁸⁹ Later, on January 1 2009 Russia cut its gas supplies to Ukraine, which completely came to a halt on January 7, the ultimate cause of the dispute being that by the end of 2008 the two

⁷⁸ Zhuk Alyona. 2016. 09. 22. Parliament passes long-awaited law on energy market regulator. Kyiv Post. Accessed: 2016. September 23. (<http://www.kyivpost.com/article/content/ukraine-politics/parliament-passes-long-awaited-law-on-energy-market-regulator-423486.html>).

⁷⁹ Radchenko Vitaliy. 2016. 10. 2016. Law on Energy Regulator Finally Adopted. Lexology. Accessed: 2016. October 8. (<http://www.lexology.com/library/detail.aspx?g=d22ccbe5-3634-4d4c-94da-871a123ecdc4>).

⁸⁰ Kuchynska Olena (2016): New law in Ukraine establishes independent national energy regulator. Kinstellar. November 2016. (<http://www.kinstellar.com/insights/detail/425/new-law-in-ukraine-establishes-independent-national-energy-regulator>).

⁸¹ Ibid.

⁸² Zinets Natalia and Kalymkov Alexei. 2016. 09. 22. - Passing energy bills, Ukrainian MPs clear path for new EU loan. Reuters. Accessed: 2016. September 25. (<http://www.reuters.com/article/ukraine-energy-idUSL8N1BY2K3>).

⁸³ Zhuk Alyona. 2016. 09.23. - A Week in the Rada: What was done on Sept. 20-23. Kyiv Post. Accessed: 2016. September 26. (<https://www.kyivpost.com/article/content/ukraine-politics/a-week-in-the-rada-what-was-done-on-sept-20-23-423602.html>).

⁸⁴ Davydenko, Igor, Rabij, Myron B., and Sysoiev, Maksym. 2016. 11. 29. - Law on Regulator entered into force. Lexology. Accessed: 2016. 12. 3. (<http://www.lexology.com/library/detail.aspx?g=6a4d1ee3-ee98-4c27-af7d-8b8c899c527b>).

⁸⁵ Zinets and Kalymkov

⁸⁶ Another analysis of the topic by the author will be published on the MTA-DE's Public Service Group blog publicgoods.eu under the title *Seeking Alternatives: Changes in Ukraine's Gas Importation Regime*.

⁸⁷ STERN JONATHAN (2006): *The Russian-Ukrainian gas crisis of January 2006*. Oxford Institute for Energy Studies. January 16 2006. p. 2.

⁸⁸ BBC News. 2006. 01.04. Ukraine and Russia reach gas deal. Accessed: 2016. December 15. (<http://news.bbc.co.uk/2/hi/europe/4579648.stm>).

⁸⁹ Ibid.

countries were unable to agree to the rate that Ukraine should pay for the upcoming year and as to how much Ukraine would be paid by Russia in terms of gas transit fees.⁹⁰ This dispute led to a over two weeks of gas shortages in Central and Eastern Europe.⁹¹

In 2014 the Maidan Revolution took place in Ukraine, which led to a spiralling of events and a subsequent escalation in tensions between Ukraine and Russia. As a result of this, changes have taken place in the nature of Ukraine's gas importation regime. Ukraine has always been greatly dependent on Russian gas, and the conflict that has ensued from 2014 has led Ukraine to seek alternative sources as a way of safeguarding its energy security. This should also be seen in conjunction with efforts within the European Union to decrease energy dependence. In March 2014 the then President of the European Council, *Herman Van Rompuy*, made the statement that „Today we sent a clear signal that Europe is stepping up a gear to reduce energy dependency, especially with Russia: by reducing our energy demand, with more energy efficiency; by diversifying our supply routes to and within Europe and expanding energy sources, in particular renewables; by energy security on our border and security of supply for our neighbours.”⁹² Ukraine, though not an EU Member State, can be said to be identified with these stated goals of the European Union through its membership of the Energy Community, which seeks to integrate third countries in Eastern Europe and the West Balkans into the EU's energy system and structure. Indeed, Ukrainian Prime Minister *Volodymyr Groysman* and the EU energy commissioner *Maros Sefcovic* expressed their joint aim of gradually weaning Ukraine away from Russian gas.⁹³ It should also be noted that the United States has particularly supported this goal.⁹⁴

In 2013 Ukraine received 95% of its gas imports from Russia, and in 2014 the figure stood at around 75%.⁹⁵ During the presidency of *Viktor Yanukovch* Ukraine received a discount on the gas that it purchased.⁹⁶ However, amidst the tensions that ensued between Ukraine and Russia, Gazprom in early 2014 raised the gas price for Ukraine by 44%, from \$268.50 per 1, 000 cubic meters to \$385.50, which amounted to a rise of 44 per cent.⁹⁷ This development increased the financial pressure felt by the Ukrainian government, which

⁹⁰ BBC News. 2009.01.20. Q & A: Russia-Ukraine gas row. Accessed: 2016. December 15. (<http://news.bbc.co.uk/2/hi/europe/7240462.stm>).

⁹¹ Ibid.

⁹² Ellis Vicky. 2014. 03. 21. - EU countries agree to scrap reliance on Russian gas. Energy Live News. Accessed: 2016. October 10. (<https://www.energylivenews.com/2014/03/21/eu-countries-agree-to-ditch-reliance-on-russia-gas/>).

⁹³ Rettman Andrew. 2016. 09.02. - EU to help Ukraine cut gas Russia dependence. Euobserver. Accessed: 2016. December 5. (<https://euobserver.com/energy/134892>).

⁹⁴ Vargas Luke. 2016. 08. 16. - Ukraine, while you were out. Talk Media News. Accessed: 2016. September 20. (<http://www.talkmedianews.com/world-news/2016/08/16/ukraine-while-you-were-out/>).

⁹⁵ Socor Vladimir. 2015. 04. 08. Ukraine Rapidly Dismantling Gazprom's Supply Monopoly. The Jamestown Foundation. Accessed: 2016. October 3. (<https://jamestown.org/program/ukraine-rapidly-dismantling-gazproms-supply-monopoly/>).

⁹⁶ Titcomb James. 2014. 04. 01. Gazprom heaps pressure on Ukraine with gas price rise. The Telegraph. Accessed: 2016. October 17. (<http://www.telegraph.co.uk/finance/newsbysector/energy/oilandgas/10736145/gazprom-gas-ukraine.html>).

⁹⁷ Mazneva Elena. 2014. 04. 01. - Gazprom Raises Gas Export Price as Ukraine Looks for Cash. Bloomberg. Accessed: 2014. April 1. (<https://www.bloomberg.com/news/articles/2014-04-01/gazprom-raises-gas-export-price-as-ukraine-looks-for-cash>).

at the time was negotiating the terms of international bailout deals.⁹⁸ Gazprom said that this increase was necessary as Ukraine owed \$1.7 billion for gas purchases since the beginning of 2013.⁹⁹ Furthermore, from June through to October 2014 Russia completely stopped delivering gas to Ukraine.¹⁰⁰

In this context Ukraine sought to lessen its dependence on Russian gas imports, and so an agreement was signed in April 2014 with Slovakia allowing for the the delivery of gas from EU states via Slovakia.¹⁰¹ In order to achieve this, Slovakia made the necessary adjustments to an old pipeline that was unused.¹⁰² The gas delivered to Ukraine from Slovakia has been Russian in origin, having been originally delivered there via the Ukrainian pipeline.¹⁰³ This deal with Slovakia has been hailed as having aided Ukraine in getting „rid of gas dependence on Russia.“¹⁰⁴ From the second half of July 2016 the amount of gas being transported from Slovakia to Ukraine via reverse flow increased significantly.¹⁰⁵ As of late July, the daily volume of gas via reverse flow from Slovakia increased by 25%, totalling to 30 million cubic meters, and in the case of Poland, there was an increase by 48% to 4.2 million cubic metres.¹⁰⁶ This involved an increased demand for natural gas to 38 million cubic metres.¹⁰⁷ In September 2016 the Slovak Prime Minister *Robert Fico* made the commitment that his government was „ready to assist in supplying Ukraine with maximum volumes of gas through reverse flow pipelines.“¹⁰⁸

However, relations between Ukraine the countries from which it has been attempting to obtain reverse flows of gas has had its problematic moments with regards to questions of law. For example, the Ukrainian government protested to the European Union in 2015

⁹⁸ Bloomberg. 2014. 04. 01. Gazprom hikes up gas price by 44%. Energy Voice. Accessed: 2016. 10. 04. (<https://www.energyvoice.com/marketinfo/56559/gazprom-hikes-ukraine-gas-price-44/>).

⁹⁹ Ibid.

¹⁰⁰ Socor.

¹⁰¹ Harrison Colin and Princova Zuzana. 2015. 10. 29. A quiet gas revolution in Central and Eastern Europe. Energy Post. Accessed: October 1 2016. (<http://www.energypost.eu/quiet-revolution-central-eastern-european-gas-market/>).

¹⁰² Reuters. 2014. 05. 19.- Slovak gas pipeline seen ready to supply Ukraine from September. Accessed: 2016. December 1. (<http://af.reuters.com/article/idAFL6N0O53Y320140519>).

¹⁰³ Bershidsky Leonid. 2016. 01.12. - How Ukraine Weaned Itself Off Russian Gas. Bloomberg. Accessed: 2016. November 29. (<https://www.bloomberg.com/view/articles/2016-01-12/how-ukraine-weaned-itself-off-russian-gas>).

¹⁰⁴ Ukraine Today. 2016. 07. 11 - Slovakia helps Ukraine to get rid of gas dependence on Russia – expert. Accessed: 2016. September 18. (<http://uatoday.tv/business/slovakia-helps-ukraine-to-get-rid-of-gas-dependence-on-russia-expert-693322.html>).

¹⁰⁵ The Slovak Spectator. 2016. 08. 05. Volume of transported gas from Slovakia to Ukraine begins to grow. Accessed: 2016. September 18. (<http://spectator.sme.sk/c/20232149/volume-of-transported-gas-from-slovakia-to-ukraine-begins-to-grow.html>).

¹⁰⁶ Ukrinform. 2016. 07. 29. Ukraine increases volume of reverse gas flow from Poland, Slovakia. Accessed: 2016 October 1. (<http://www.ukrinform.net/rubric-economics/2058545-ukraine-increases-volume-of-reverse-gas-flow-from-poland-slovakia.html>). It should also be noted that in addition to receiving reverse flows of gas from Slovakia and Poland, Ukraine has also received gas in this way from Hungary. See Stratfor. 2015. 02. 06. Hungary Continues Courting Russia and Europe. Accessed 2017. January 27. (<https://www.stratfor.com/analysis/hungary-continues-courting-russia-and-europe>).

¹⁰⁷ Ukraine Today. 2016. 08. 01. Ukraine maximises gas import from Slovakia. Accessed: 2016. October 2. (<http://uatoday.tv/business/ukraine-maximises-gas-import-from-slovakia-707901.html>).

¹⁰⁸ Ukraine Today. 2016. 09. 07. Slovakia wants to increase reverse gas supplies to Ukraine. Accessed: 2016. October 1. (<http://uatoday.tv/business/slovakia-wants-to-increase-reverse-gas-supplies-to-ukraine-741925.html>).

due to an agreement between Gazprom and Eustream which allows the former to inhibit reverse flows through one of the major pipelines that carries gas to European countries through Ukraine, specifically the one located at the Uzhgorod-Velke Kapusany transit points.¹⁰⁹ Ukraine claimed that the arrangement preventing the reverse flow is in violation of EU law,¹¹⁰ in particular the anti-monopoly law and the 3rd Energy Package.¹¹¹ Prime Minister *Arseny Yatsenyuk* said that the agreement was obstructing Ukraine's efforts at lessening its dependence on Russian gas, and that with a full reverse flow from Slovakia Ukraine would eventually be able to obtain all of its gas imports from the EU.¹¹² Furthermore, there have been questions as to the legality of the reverse flows themselves, raised by the Russian state gas company Gazprom.¹¹³ The company claimed that any such reverse flows would require its approval.¹¹⁴ This also relates to reverse flows from Slovakia which would go through any one of the four pipelines that transport Russian gas via Ukraine to Slovakia.¹¹⁵ In response, the European Commission has supported the practice, with a spokesperson for the European Commissioner for Energy stating that the reverse flows in this case were „legal perfectly sound.”¹¹⁶

Up until the time of writing, since November 2015 Ukraine has not directly purchased gas from Russia.¹¹⁷ However, despite the very real changes which have occurred in terms of structure of Ukraine's gas imports, the reality remains that 90% of Slovakia's gas, plus around 45% of Poland and Hungary's gas is Russian in origin.¹¹⁸

Conclusion

The above analysis has shown that indeed there have been serious changes and developments in the area of Ukraine's energy policy, structure and practices. In the area of Ukraine's attempt to approximate to the EU's energy acquis, it has been seen that gas reform has been hailed as a great success, and the creation of an independent regulator, after a lack of progress and a great deal of criticism, has moved ahead, while the electricity sector's reform continues to be delayed. In addition, the stopping of direct imports of gas

¹⁰⁹ Liptakova Jana. 2015. 06. 25. - Ukraine complains to EU over Eustream. The Slovak Spectator. Accessed: 2016. September 26. (<http://spectator.sme.sk/c/20058396/ukraine-complains-to-eu-over-eustream.html>).

¹¹⁰ Reuters. 2015.06.04. Slovakia rejects Ukraine complaint over gas flows. Accessed: 2016. September 20. (<http://af.reuters.com/article/energyOilNews/idAFL8N0ZA2CU20150624?pageNumber=1&virtualBrandChannel=>)

¹¹¹ BADIDA, Jozef, *Interview Andriy Kobolev, CEO Naftogaz* : „Gazprom breaches EU law by blocking reverse flow to Ukraine, March 4 2015, <http://energypost.eu/interview-andriy-kobolev-ceo-naftogaz-gazprom-breaching-eu-law-blocking-reverse-flow-ukraine/>

¹¹² Liptakova

¹¹³ Reuters, *Gazprom says “reverse flow” gas for Ukraine raises legal questions*, April 5 2014, <http://www.reuters.com/article/ukraine-crisis-gazprom-idUSL5N0MX04O20140405>

¹¹⁴ Reuters, *Plans for EU gas flows to Ukraine could be blocked by Russia*, April 7 2014, <http://www.reuters.com/article/ukraine-crisis-gas-idUSL6N0MZ29U20140407>

¹¹⁵ Ibid.

¹¹⁶ EU Business, *Alternative gas flow to Ukraine ‘perfectly legal’ says EU*, 17 June 2014, <http://www.eubusiness.com/news-eu/ukraine-russia-gas.woc>

¹¹⁷ Polityuk Pavel. 2016. 10. 03. Ukraine cut gas consumption by 11 pct so far 2016. Reuters. Accessed: 2016. December 5. (<http://uk.reuters.com/article/ukraine-gas-consumption-idUKL5N1C91M8>).

¹¹⁸ Rettman. i.m.

from Russia for Ukraine's domestic consumption and the utilization of reverse flows from other neighbouring countries can be considered to be a significant change in Ukraine's energy culture, in spite of the legal issues that have been raised as a consequence.

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UKRAJNA REFORMKÍSÉRLETEI AZ UNIÓS ENERGIAÜGYI
VÍVMÁNYOKKAL VALÓ JOGHARMONIZÁCIÓ ÉRDEKÉBEN ÉS
VÁLTOZÁSOK FÖLDGÁZ-IMPORTJA TERÉN

(Összefoglalás)

A tanulmány célja, hogy feltára és elemezze azon reformkísérleteket, amelyeket Ukrajna a utóbbi néhány évben tett meg annak érdekében, hogy energia-szabályozását az uniós jogi normákhoz és sztenderdekhez közelítse. Ennek során bemutatjuk az uniós energiaügyi vívmányokat, amelyek átvételére Ukrajna is kötelezettséget vállalt, valamint kötelezettségek teljesítése érdekében elfogadott belső jogi szabályozást is. Az írás mindezek közül is elsősorban a gáz és a villamosenergia reformját, valamint a független szabályozó hatóság létrehozására tett kísérletet vizsgálja. A szerző bemutatja a gáz mint energiaforrás diverzifikálására tett kísérleteket is, különös tekintettel az uniós tagállamok irányából jövő, ellenirányú gázáramlás hasznosítása érdekében megtett lépésekre.