Energy Community as a promoter of the European Union's "energy acquis"

to its Neighbourhood

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The Treaty of Lisbon paved the way for legal formalization of new European Union policies and significantly enhanced external dimension of the European Union Internal Market. The newly emerged European Union energy policy is a good example of it. External objectives of the European Union energy policy are being fulfilled through the Energy Community which embraces not only European Union Member States and candidate countries but also third countries without any prospect of membership in the EU. The Energy Community is designed as a perfect example of the "integration without membership" model which gives a stake in the European Union Internal Market for third countries and promotes the European Union's sectoral acquis beyond the EU borders. The article focuses on challenges of the process of Europeanisation on the EU's eastern neighbouring countries through the application of the EU "energy acquis".

1. Introduction

The entry into force of the Treaty of Lisbon (TEU) on 1st December 2009 considerably enhanced the role of the EU as a global actor which aspires to promote its own democratic, economic and legal values beyond its borders. The objective of this process is twofold. On the one hand, it is to enhance the position of the EU as a global player worldwide. On the other hand, it is to ensure the functioning of friendly and secure neighbourhood around the EU's borders.

These processes have received vivid interest and attention among experts and academics. Contemporary academic research on the subject focuses on the political and legal implications of the EU's enhanced international capacity which leads to promotion of European democratic and market economy values to third countries, Europeanization of third countries institutional and legal structures and creation of European Legal Space.[1] These processes are being exercised via sectoral multilateralism and differentiated integration within the EU. Sectoral multilateralism presumes closer legal cooperation between the EU and third countries, beyond

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[1] M. Cremona, "The Union as a global actor: Roles, models and identity", 41 Common Market Law Review, (2004) 553–573. A. Bendiek and H. Kramer, "The EU as a 'Strategic' International Actor: Substantial and Analytical Ambiguities", 15 European Foreign Affairs Review, (2010) 453–474. P. Leino and R. Petrov, "Between 'Common Values' and Competing Universals; The Promotion of the EU's Common Values through the European Neighbourhood Policy", 15 European Law Journal, (2009) 654-671.

traditional approximation of laws, for instance, by voluntary application of the EU sectoral acquis by a third country. Usually, sectoral multilateralism is achieved with help of sectoral bilateral agreements between the EU and third countries, like the European Economic Area Agreement (EEA) and EU bilateral agreements with Switzerland. There is no unified opinion on what motives push third countries to pursue voluntary multilateral integration with the EU.[2] However, one may argue about the evident positive impact of the multilateralism phenomena on the process of democratization in the countries of Central and Eastern Europe.[3] Nevertheless, these trends cannot be viewed as exclusive but as complementary, therefore, it could be said that the creation of the European Legal Space is not possible without successful Europeanization of third countries.[4] One of the means of successful Europeanization of third countries is their gradual access to the EU Internal Market and, as a consequence, adoption of the EU "sectoral acquis".[5] One of the best Europeanisation's examples is accession of third countries to the Energy Community (EnC). After acquiring membership in the EnC, third countries undertake commitments to implement and effectively apply the EU "sectoral acquis" without being a full member of the EU.[6]

This article does not deal with the multi-dimensional and complex phenomenon of Europeanization in its whole scope, but endeavours to clarify only one aspect, the Europeanization of the eastern neighbouring countries through their participation in the EnC and application of its rules and standards. The simple acknowledgment of the EU's role as a global player and a promoter of the Europeanization beyond its borders tell us little about its use and interrelationship with other more practical issues. One of these issues is acceptance of the EU's "sectoral acquis" by third countries – addressees of the EU's global influence. In other words, it is important to look at the practical application of EU law beyond its borders. The conceptual focus of this contribution will be upon the linkage of an EU's external policies and actual application of the EU "energy acquis" by third countries which do not have immediate perspective of joining the EU in the future – countries of the Eastern Partnership. This contribution's scope will be clustered around three themes. First, how does the EU use its energy policy to achieve objectives of own external action? Second, what scope of the EU "energy acquis" is being promoted via the EnC framework? Third, is the EU "energy acquis" fully applicable in legal orders of the neighbouring countries? Fourth, what lessons could and must

[2] For example, see H. Prange-Gstöhl, "Enlarging the EU's internal energy market: Why would third countries accept EU rule export?", 39 Energy Policy, (2009) 5296, 5297. The author identifies three motives for countries with no or only a vague membership perspective to agree to deeper energy integration with the EU ("identification motive", "independence motive", and "economic motive").

[3] L. Morlino, W. Sadurski (eds.) *Democratization and the European Union,* (Routledge Press, 2010).

[4] For more on Europeanization see J. Olsen, "The Many Faces of Europeanisation", 40(5) Journal of Common Market Studies, (2002) 921-952. C. Radaelli, "Europeanisation: Solution or Problem?", 8(16) (2004) EIoP, available at <http://www.eiop.or.at/eiop/pdf/2004-016.pdf>, last visited 25 May 2012.

[5] Henceforth we apply the notion 'EU *acquis*' instead of 'EU law' to emphasize the comprehensive and complex nature of the EU legal heritage. More on the scope of the EU *acquis* see R. Petrov, "Exporting the acquis communautaire into the legal systems of third countries", 13 European Foreign Affairs Review (2008) 33-52.

[6] S. Padgett, "Energy Co-operation in the Wider Europe: Institutionalizing Interdependence" 49 Journal of Common Market Studies, (2011) 1065-1087. R. Karova, "Rationale Behind the Establishment of the Energy Community" (2010) 2010/14 EUI LAW Working Papers, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1699146>, last visited 25 May 2012.

be learned from the EnC with regard to promotion of other types of the EU "sectoral acquis" to the legal systems of third countries?

2. The external dimension of the EU's energy policy

The Treaty of Lisbon emphasized the prominence of the energy sector among other EU policies by introducing a new legal base and outlining security of supply, competitiveness, and sustainability as major objectives of the EU energy policy.[7] These objectives were further elaborated in the Europe 2020 Strategy[8] which sets out ambitious plans for the EU to become a smart, sustainable and inclusive economy by 2020. The target of ensuring the functionality of a sustainable economy presumes that the EU builds up a more competitive low-carbon economy, makes efficient and sustainable use of resources, protects the environment, reduces emissions, and develops new green technologies and productions. Energy targets of the Europe 2020 Strategy were further articulated by the EU Energy Strategy "Energy 2020: A Strategy for competitive, sustainable and secure energy".[9] The Europe 2020 Strategy calls for the EU and its Member States to acquire "the objective of the new strategy for smart, sustainable and inclusive growth in support of a strong, diversified and competitive industrial base" and identifies five leading priorities: 1) achieving an energy efficient Europe (20% energy savings by 2020); 2) building a truly pan-European integrated energy market (dismantling anti-competitive practices in the energy sector and adopting a 20% renewable energy target by 2020); 3) empowering consumers and achieving the highest level of safety and security (making energy more consumer-friendly); 4) extending Europe's leadership in energy technology and innovation (the EU's energy technological competitiveness, reflected more in detail in the EU Energy Roadmap 2050); and 5) strengthening the external dimension of the EU energy market (new energy supply sources and routes for the EU by 2020, integrating energy markets and regulatory frameworks with the EU's neighbours).

The external dimension of the EU energy policy found its further detalization in the European Commission's Communication "The EU Energy Policy: Engaging with Partners beyond Our Borders" (the Communication)[10] and in the Council Conclusions on strengthening the external dimension of the EU energy policy on 24 November 2011 (the Council Conclusions). The former (the Communication) calls upon the EU and its Member States to build up an integrated energy market with all neighbouring countries based on regulatory convergence which is to be done taking as a reference the EnC framework. The Communication states that the EnC's "regulatory scope should be progressively extended and combined with more effective implementation and enforcement, as well as concrete assistance to reform [the neighbouring countries] markets." Setting up free trade areas between the EU and third

[7] Article 194 TFEU.

[8] Adopted by the European Council on 17 June 2010.

9 Communication of the European Commission "Energy 2020: A Strategy for competitive, sustainable and secure energy" (COM(2010) 639 final).

10 Communication of the European Commission "On Security of Energy Supply and international cooperation – "The EU Energy Policy: Engaging with Partners beyond Our Borders"" (COM(2011) 539 final).

countries is linked to membership of the latter in the EnC and their ability to implement relevant EU energy acquis. The latter (the Council Conclusions) emphasizes that "regulatory cooperation and convergence with our neighbours has a key role to play in order to build a wide energy market while ensuring a level playing field. Such regulatory cooperation should take into account the diversity of EU's neighbours and their own energy policy objectives". One of the top priorities of the Council Conclusions is "encouraging full and timely implementation and enforcement of the acquis, as well as the removal of technical barriers, aiming at the creation of an Energy Community-wide energy market".

Thus, the above documents recognise the EnC as a key pillar of the external dimension of the EU energy policy. From a legal point of view, the EnC represents a unique product which sets up a quasi supranational legal system modeled on the EEA with some elements of legal homogeneity between the contracting parties. The EnC framework represents a unique chance to implement and apply dynamic sectoral EU acquis within third countries' legal systems. The Treaty establishing the Energy Community (TEnC) was signed in Athens, Greece, on 25 October 2005, and entered into force on 1 July 2006. From the outset the EnC's objective was to establish a common regulatory framework between the EU and the participating third countries and to promote the EU's "energy acquis" (electricity, natural gas and petroleum products) beyond the EU borders. The relevant acquis to be adopted by the contracting parties also cover some elements of the EU acquis in areas of environment and competition. The EnC embraces the EU (according to the TEnC any EU Member State can be represented in the EnC institutions]Ministerial Council, the Permanent High Level Group and the Regulatory Board]; hitherto, only 17 EU Member States used this privilege)[11] and 9 third countries (Albania, Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia, Moldova, Ukraine, and the United Nations Interim Administration Mission in Kosovo). Most of these countries are either EU candidate countries (Croatia, Macedonia, Montenegro and Serbia) or EU potential candidates (Albania and Bosnia and Herzegovina). Ukraine and Moldova are participants of the European Neighbourhood Policy (ENP) and Eastern Partnership (EaP).[12] These countries strive to set up

[11] Austria, Bulgaria, Cyprus, Czech Republic, France, Germany, Greece, Hungary, Italy, Romania, Slovenia, Slovakia, Poland, the Netherlands, Hungary, and the UK.

[12] The ENP (Communication from the Commission to the Council and the European Parliament "Wider Europe – Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours". (COM (2003) 104 final). European Commission, *Communication European Neighbourhood Strategy Paper,* COM(2004) 373 final, 12 May 2004) offers the neighbouring countries a privileged relationship with the EU that is based on a mutual commitment to European common values (democracy and human rights, rule of law, good governance, market economy principles and sustainable development). Ultimate objectives of the ENP are: political association and deeper economic integration; increased mobility and more people-to-people contacts; and access to the EU Internal Market. However, the achievement of the above objectives depends on the extent to which the European common values are shared by the neighbouring countries. Today, the ENP framework embraces 16 of the EU's closest geographical and "political" neighbours – Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, Moldova, Morocco, Occupied Palestinian Territory, Syria, Tunisia and Ukraine. The EaP is the EU's policy towards the countries of Eastern Europe and Southern Caucasus. The EaP is a specific Eastern dimension of the ENP. Launched in May 2009 at the Prague Summit, the EaP fosters the necessary conditions to accelerate political association and further economic integration between the EU and Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine (Communication from the Commission and the European Parliament to the Council "Eastern Partnership" (COM (2008) 823 final).

closer political and economic relations with the EU through concluding association agreements and setting up free trade areas. There is also a group of observer countries (Armenia, Georgia, Norway and Turkey) with the right to attend the meetings of the EnC institutions without taking part in discussions and voting. While Turkey is a long-standing EU candidate country, Armenia and Georgia are participants of the ENP and EaP. Thus, in the meantime, the EnC is the only regional organization that covers the countries which are full members of the EU, candidate countries, associate countries and the neighbouring countries.

The EnC institutional framework is comprised of a Ministerial Council, the Permanent High Level Group, the Regulatory Board and the Secretariat. It resembles the institutional structure of the EEA but, unfortunately, on a much lesser scale. The major decision making and judicial body of the EnC is the Ministerial Council which is comprised of representatives of the contracting parties. The Ministerial Council takes measures, provides general policy guidelines, and adopts procedural acts. The Permanent High Level Group (PHLG) assists the Ministerial Council with its work (prepares the work, reports, take measures if empowered by the Ministerial Council, follows dynamic acquis and recommends adoption of new acquis). The Regulatory Board advises the Ministerial Council and PHLG on details of statutory, technical and regulatory rules and makes recommendations in the case of cross-border disputes between regulators. The Secretariat provides administrative support to the Ministerial Council and PHLG and is responsible for reviewing implementation of the EU energy acquis and submits regular progress reports to the Ministerial Council.

A dispute settlement mechanism in the EnC[13] bears certain resemblance to the EU's infringement procedure. However, it does not envisage a permanently functioning court, as is the case in the EEA. Under the TEnC, any "concerned" party, the Regulatory Board and the Secretariat (upon complaint of a contracting/concerned party or on its own motion) may bring a case of non-compliance by an EnC Member State with the EU "energy acquis" to the attention of the Ministerial Council. In case of breach the Ministerial Council may issue a binding decision and, at the last resort, (in cases of serious and persistent breaches) may suspend certain rights of a party to the TEnC.

The Commission's Communication "The EU Energy Policy: Engaging with Partners beyond Our Borders" unequivocally states 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" and a prerequisite for concluding a Free Trade Agreement with the EU. Therefore, it can be suggested that any further rapprochement of third countries with the EU and closer integration with the EU Internal Market is conditional on successful regulatory convergence within the EU "sectoral acquis". For this purpose, the EU has either already engaged most of its neighbouring countries to join the EnC or encouraged others to participate in the EnC's activities as observers.[14] Joining the EnC implies gradual integration of the neighbouring countries' energy sector to the EU energy market, fulfillment of the membership commitments in the EnC, and,

[13] Articles 90-93 TEnC.

[14] Hitherto, only two neighbouring countries have obtained the full membership in the EnC (Moldova (from 2010) and Ukraine (from 2011)), Armenia (from 2011) and Georgia (from 2007) have the observer's status.

consequently, implementation and application of the EU "energy acquis" within the neighbouring countries' legal systems.

3. Scope of the EU "energy acquis" to be implemented via the EnC framework

The eastern neighbouring countries are some of the key energy partners of the EU. For instance, transit networks of Ukraine provide about 20% of the EU's gas supply and, therefore, play a prominent role in the overall EU's energy security. Azerbaijan plays the key role of an alternative energy supplier for the EU from the Caspian area. Armenia and Georgia are important transit countries for oil and gas from the Caspian basins to the EU. Oil and gas pipelines connecting the Caspian basin with Turkey, thus bypassing Russia and Iran, will increasingly become a strategic alternative energy corridor for the EU. Currently Armenia and Georgia experience political and economical vulnerability *vis-à-vis* their big neighbour because of increasing dependence on imports of energy from Russia. Thus enhancement of energy security through further progress in energy sector reform and regulatory development, as well as progress in the development of energy efficiency and renewable energy should help these countries in acquiring energy independence.

As it follows from the Communication the major focus of the energy cooperation between the EU and its eastern neighbouring countries is the participation of the latter in the EnC.[15] The first eastern neighbouring country to join the EnC was Moldova. It completed its accession negotiations on 29 April 2009 and acceded to the EnC on 17 March 2010.[16] Long going negotiations on accession of Ukraine to the EnC had been completed on 7 October 2009. The Protocol of Ukraine's accession to the Treaty on the Energy Community (TEnC) (Protocol on accession) was signed on 24 September 2010, and, consequently, ratified by the Parliament (Verkhovna Rada) of Ukraine on 15 December 2010.[17] Thus, as of 2011, Moldova and Ukraine had obtained full membership in the EnC which implies that these eastern neighbouring countries are under a legal obligation to implement the EU "energy acquis" in the areas of gas, electricity, nuclear energy, oil and renewable energy. The eastern neighbouring countries with observer status (Georgia and Armenia) are under soft commitments to ensure regulatory convergence within the EU "energy acquis".

3.1) Scope of the EU "energy acquis" to be implemented and applied by the eastern neighbouring countries

[15] The Energy Community is an international organization established between the EU and third countries for the purpose of extending the EU Energy Market beyond its borders. The Treaty establishing the Energy Community was signed in Athens, Greece on 25 October, and entered into force on 1 July 2006. More information is available at <http://www.energy-community.org>, last visited 25 May 2012.

[16] The Parliament of Moldova ratified the Protocol on Accession to the EnC on 31 March 2010.

[17] Law of Ukraine No. 2787-VI of 15 December 2010.

The Protocols on Accession impose legally binding obligations on Moldova and Ukraine to implement specific scope of the EU "energy acquis" by four waves for Moldova[18] and five waves of deadlines for Ukraine.[19] Furthermore, Ukraine undertook legal commitments: 1) to abide to principles of the EU "competition acquis";[20] 2) to follow generally applicable standards of the European Community on operating energy network systems;[21] 3) to adopt "security of supply statements describing diversity of supply, technological security, and geographic origin of imported fuels".[22]

However, commitments of the eastern neighbourhood countries under the TEnC are not limited solely to the timely implementation of the static EU "energy acquis" into their legal systems that is defined at the moment of signing the Protocol of Accession. The TEnC offers unique and unprecedented opportunities and challenges for the eastern neighbouring countries' legal system to follow and apply the EU "fundamental acquis" and the EU "dynamic

[18] 1) Directive 2003/55/EC concerning common rules for the internal market in natural gas; Directive 2003/54/EC concerning common rules for the internal market in electricity are to be implemented by 31 December 2009. 2) Regulation 1775/2005 on conditions for access to the natural gas transmission networks; Directive 2004/67/EC concerning measures to safeguard security of natural gas supply; Regulation 1228/2003 on conditions for access to the network for cross-border exchanges in electricity; Commission Decision 2006/770/EC amending the Annex to Regulation 1228/2003 on conditions for access to the network for cross-border exchanges in electricity; Directive 2005/89/EC concerning measures to safeguard security of electricity supply and infrastructure investment; Directive 79/409/EC, Article 4(2), on the conservation of wild birds; Plan for the implementation of Directive 2001/77/EEC on the promotion of electricity produced from renewable energy sources in the internal electricity market and Plan for the implementation of Directive 2003/30/EC on the promotion of the use of biofuels or other renewable fuels for transport are to be implemented by 31 December 2010. 3) Directive 1999/32/EC relating to a reduction in the sulphur content of certain liquid fuels is to be implemented by 31 December 2014. 4) Directive 2001/80/EC on the limitation of emissions of certain pollutants into the air from large combustion plants is to be implemented by 31 December 2017.

[19] 1) Plan for the implementation of Directive 2001/77/EEC on the promotion of electricity produced from renewable energy sources in the internal electricity market and Plan for the implementation of Directive 2003/30/EC on the promotion of the use of biofuels or other renewable fuels for transport are to be implemented by 1 July 2011. 2) Directive 2003/55/EC concerning common rules for the internal market in natural gas; Regulation 1775/2005 on conditions for access to the natural gas transmission networks; Directive 2004/67/EC concerning measures to safeguard security of natural gas supply; Directive 2003/54/EC concerning common rules for the internal market in electricity; Regulation 1228/2003 on conditions for access to the network for cross-border exchanges in electricity; Commission Decision 2006/770/EC amending the Annex to Regulation 1228/2003 on conditions for access to the network for cross-border exchanges in electricity; Directive 2005/89/EC concerning measures to safeguard security of electricity supply and infrastructure investment; Directive 1999/32/EC relating to a reduction in the sulphur content of certain liquid fuels are to be implemented by 1 January 2012. 3) Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 97/11/EC and Directive 2003/35/EC are to be implemented by 1 of January 2013. 4) Directive 79/409/EC, Article 4(2), on the conservation of wild birds is to be implemented by 1 of January 2015. 5) Directive 2001/80/EC on the limitation of emissions of certain pollutants into the air from large combustion plants. From 1 of January 2012 Directives 2003/54/EC and 2003/55/EC should relate to non-household customers and from 1 January 2015 to all customers in Ukraine. Furthermore, Article 15 of the TEnC states that "the construction and operation of new generating plants shall comply with the acquis communautaire on environment" will concern Ukraine on 1 February 2013 are to be implemented by 1 of January 2018).

[20] Article 19 TEnC, Articles 101, 102, 106, 107 TFEU.

[21] Article 22 TEnC.

[22] Article 29 TEnC.

acquis". Below we shall briefly look at various types of the EU acquis to be adopted by Moldova and Ukraine.

3.2) Application of fundamental principles of EU Law by the eastern neighbouring countries

The TEnC imposes legal obligation on the contracting parties to follow the principles of sincere cooperation and non-discrimination. Article 6 TEnC provides that "The Parties shall take all appropriate measures, whether general or particular, to ensure fulfillment 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 jeopardize the attainment of the objectives of this Treaty." This provision resembles an almost identical provision of Article 4(3) TEU on the principle of sincere cooperation which is considered by the European Court of Justice (ECJ) as a fundamental principle of EU law.[23] According to EU law the principle of sincere cooperation means that EU Member States shall take all appropriate measures to ensure the fulfilment of the obligations arising from the EU founding Treaties and resulting from action taken by the institutions of the EU.

The principle of non – discrimination is enshrined in Article 7 TEnC and prohibits "any discrimination" in relations between the parties. This provision resembles Articles 3(3) TEU and Article 10 TFEU which prohibit all discrimination on grounds of nationality, sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation in the EU.[24] It does not imply that the scope of the principle of sincere cooperation and non-discrimination should be understood as identical to the scope of these principles in the EU founding treaties. The exact clarification of the scope of these principles is yet to be done by the EnC's institutions and dispute settlement authorities. However one may presume that the interpretation and application of the fundamental principles of the EnC's legal order will take place in line with reception of the EU fundamental principles under the legal framework of the European Economic Area and the EU – Swiss sectoral cooperation.[25]

3.3) Obligation of the eastern neighbouring countries to follow the EU "dynamic energy acquis"

The EU "acquis" reflects the dynamic, or, *sui generis*, nature of the EU legal order. In this respect, the dynamism of the EU legal order entails its never-ending evolution, under the pressure of various internal and external factors, such as the need for closer economic development inside the EU, and the enhancement of security and political stability along EU borders. The dynamism of the EU legal order is based on acquired common rules, practices and values, which are embraced by the complex notion "*acquis communautaire*". The same approach could be applied to the EU dynamic nature of the EU "sectoral acquis".

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[23] Joint Cases C-36-37/97 *Hilmar Kellinghusen v. Amt für Land-und Wasserwirtschaft Kiel and Ernst-Detlef Ketelsen v. Amt für Land-und Wasserwirtschaft Husum* [1998] ECR I-6337. Case C-213/89, *R v. Secretary of State for Transport, ex parte Factortame* [1990] ECR I-2433.

[24] Case 5/67 *Beus v. Hauptzollamt München* [1968] ECR 83.

[25] R. Petrov, "Exporting the Acquis Communautaire into the Legal Systems of Third Countries", 13 European Foreign Affairs Review, (2008) 33-52, and the same author "The dynamic nature of the acquis communautaire in EU external relations", 18(2) European Review of Public Law, (2006) 741-771.

The TEnC envisages the binding and soft commitments of the EnC and its contracting parties to ensure the implementation and application of the EU "energy acquis". The TEnC deals with two types of the EU "energy acquis". The first type is the "pre-signature" EU "energy acquis" specified in the text of the TEnC and its annexes at the time of signature of the TEnC. The second type is the EU "dynamic energy acquis" which appeared after the TEnC entered into force. With regard to the former case, Article 5 TEnC provides that the EnC "shall follow the acquis communautaire (described in Title II (sectoral acquis)) adapted to both the institutional framework of this Treaty and the specific situation of each of the Contracting Parties, with a view to ensuring high levels of investment security and optimal investments". In our opinion it implies that not only the EnC common institutions but also the contracting parties of the EnC are under obligation to follow the "pre-signature" EU "energy acquis" in their legal orders (provided that the EnC common institutions issued binding decision in accordance with Article 89 TEnC). However, this obligation is balanced by a considerable discretion which allows the implementation of the "pre-signature" EU "energy acquis" to be done "taking into account both the institutional framework of this Treaty and the specific situation of each of the Contracting Parties".[26] It means that the binding obligation to implement and apply the "pre-signature" EU "energy acquis" could be hindered (revised, delayed or postponed) due to some inter-institutional arrangements within the EnC or problems of either political or economic or legal nature in the EnC's contracting parties.

With regard to the latter case, Chapter VII TEnC "The Adaptation and Evolution of the Acquis" sets up a right but not an obligation of the EnC to follow the EU "dynamic energy acquis": "The Energy Community *may* [RP] take Measures to implement amendments to the acquis communautaire described in this Title, in line with the evolution of European Community law."[27] To fulfill this objective the Permanent High Level Group shall "discuss the development of the acquis communautaire described in Title II on the basis of a report that the European Commission shall submit on a regular basis".[28] Furthermore, the EnC's common institutions "*shall* [RP] interpret any term or other concept used in this Treaty that is derived from EC Law in conformity with the case law of the ECJ and General Court. When no interpretation from those Courts is available, the Ministerial Council *shall* [RP] give guidance in interpreting this Treaty. It may delegate that task to the PHLG. Such guidance shall not prejudge any interpretation of the acquis communautaire by the ECJ or General Court at a later stage".[29]

In our opinion the soft character of the obligation of the EnC to follow the EU "dynamic energy acquis" does not downgrade its importance for the EnC legal order. Indeed, the provisions of the TEnC on adoption of the EU "dynamic energy acquis" do not have the same binding effect as relevant provisions on homogeneity in the EEA.[30] However, the provisions of the TEnC on adoption of the EU "dynamic energy acquis" are much stronger then, for instance, corresponding provisions in the bilateral agreements between the EU and Switzerland. Notwithstanding the lack of any legal requirements and binding obligations in the EU-Swiss

[26] Article 24 TEnC.
[27] Article 25 TEnC.
[28] Article 53(f) TEnC.
[29] Article 94 TEnC.
[30] S. Breitenmoser, "Sectoral Agreements between the EC and Switzerland: Contents and Context", 40 Common Market Law Review, (2003) 1137-1186.

sectoral agreements, Switzerland achieved impressive results in adopting EU "dynamic acquis" in areas of bilateral sectoral cooperation.[31] Therefore, we argue that far reaching general objectives of the TEnC (for example, objectives "to establish among the Parties and integrated market in natural gas and electricity….to create a stable regulatory and market framework…and single regulatory space") and the fact that majority of the EnC's contracting parties have already followed the EU "dynamic energy acquis" implies a paramount importance for the EnC to ensure timely and efficient implementation and application of the EU "dynamic energy acquis" within its legal order and legal orders of its contracting parties.

In accordance with the principle of sincere cooperation enshrined in Article 6 TEnC the EnC's contracting parties are bound to follow the EU "dynamic energy acquis" through decisions and guidance of the EnC common institutions as well as interpretations of the EnC dispute settlement decisions.[32] In other words if the EnC's common institutions issue binding decisions aimed at implementation of the EU "dynamic energy acquis" the EnC's contracting parties bear a legal obligation to do so or to face the possibility of sanctions provided by the TEnC.[33] One of the recent examples of the need to implement the EU "dynamic energy acquis" is the so called "Third Package" of the EU "energy acquis".[34] Adoption of the EU new legislative package in the field of energy in 2009 required reactions by the EnC institutions. On 24 September 2009, the Ministerial Council adopted Recommendation 2010/02/MC-EnC, suggesting the voluntary implementation of the "Third Package" by the EnC's contracting parties. A legally binding Decision on the implementation of the "Third Package" EU "energy acquis" was adopted on 6 October 2011,[35] and, thereby, the EnC's contracting parties, including Moldova and Ukraine, will be under a legal obligation to implement and apply the "Third Package" EU "energy acquis" in their national legal orders.[36]

3.4) Obligation of the eastern neighbouring countries to follow decisions of the EnC's institutions and dispute settlement

The EnC institutional framework is empowered with many tools to ensure the extension of the EU "energy acquis" to the legal system of the contracting parties. In particular, Moldova and Ukraine are bound by legally binding decisions and non-binding recommendations of the EnC's institutions and must do its best to ensure their effective application.[37] Legally binding decisions of the EnC's institutions must be implemented within the specified period of time; failure to do so may lead to determination by the Ministerial Council of a serious and persistent

[31] F. Maiani, "Legal Europeanization as Legal Transformation: Some Insights from Swiss "Outer Europe"", EUI Working Papers MWP 2008/32, R. Schwok, *Switzerland-European Union. An Impossible Membership?*, (P.I.E. Peter Lang Publisher 2009).
[32] Article 89 TEnC.
[33] Articles 89-93 TEnC.
[34] This is a legislative package adopted by the EU in 2009. It envisages further liberalization of the internal gas and electricity market in the EU and which substitutes Directive 2003/54/EC and Regulation 1228/2003 with new Directive 2009/73/EC, Regulations 715/2009 and 713/2009.
[35] Decision of the Ministerial Council of the Energy Community (Mc/06/10/2011).
[36] Article 89 TEnC.
[37] Article 76 TEnC.

breach of a Party's obligations and to suspend certain rights of this party, including the suspension of voting rights and exclusion from meetings or mechanisms in the TEnC.[38]

The procedure for dispute settlement in the EnC resembles the dispute settlement in the EU. According to Articles 90-93 TEnC the Secretariat or Regulatory Board may bring a case of non-compliance before the Ministerial Council. Even private bodies may approach the Secretariat with complaints about non-compliance by the contracting parties. The Ministerial Council considers the case and may suspend voting rights, exclude from meetings and mechanisms a guilty party. The Ministerial Council creates an Advisory Committee comprised of three lawyers who bear functions similar to Advocates General at the ECJ (deliver opinions on cases of non-compliance). In accordance with the TEnC "dispute settlement proceedings constitute the means to clear away key obstacles to full implementation of the acquis and to actively support the emerging of competitive markets based on the application of harmonized rules" and "the existence of a workable dispute settlement procedure constitutes and important element in providing the legal certainty needed to attract investment to the Energy Community Contracting Parties".

The EnC's dispute settlement procedure, especially, the right of private bodies to complain to the EnC's institutions about non-compliance of the contracting parties, brings forward considerable challenges for the Moldovan and Ukrainian legal systems. First, the EnC Secretariat may initiate non-compliance procedures against Moldova and Ukraine for failure of their governments to fulfill their obligations under the TEnC. Second, the Moldovan and Ukrainian judiciary will be faced with the necessity of not only applying the relevant EU "dynamic energy acquis" but ensuring the compliance of Ukrainian and Moldova laws within its own judgments.[39]

4. Implementation of the EU "energy acquis" into the legal system of eastern neighbouring countries

The question for our consideration is the EU "energy acquis" fully applicable in legal orders of the neighbouring countries? What are restraints of a legal and political nature may prevent the neighbouring countries from applying the EU "energy acquis"? We argue that the correct implementation and effective application of the EU "sectoral acquis" depends on two aspects, the constitutional law of the eastern neighbouring countries and positive reception of general principles of EU law and the EU "energy acquis" by executives and judiciaries in the eastern neighbouring countries.

[38] Article 89 TEnC.

[39] The EnC's Report on Dispute Settlement in 2010/11 shows that the Secretariat put forward motions and initiated non-compliance procedures on the following grounds: failure of the Parties to fulfill their own obligations under the TEnC; failure to adoption national legislation required by the TEnC; and not fulfilling decisions of the Ministerial Council. On complaints from private parties the following reasons were considered by the EnC's institutions: the request of an importer to cancel national register fees levied on electricity imports by authorities of Bosnia and Herzegovina as in violation of Article 41 TEnC on free movement of goods; denial of third party access, as well as an alleged discrimination in price regulation by the regulatory authority in the Former Yugoslav Republic of Macedonia; and a complaint from the operator of the electricity transmission system from Kosovo on unlawful practices of state owned Serbian transmission system operator EMS.

4.1) Constitutional foundations of application of the EU "energy acquis" in Ukraine and Moldova

Implementation and application of the EU "energy acquis" within the legal systems of Ukraine and Moldova is governed by their national constitutional laws. The TEnC is an international treaty which was duly ratified by the Parliaments of Ukraine (Verkhovna Rada) (on 15 December 2010) and Moldova (on 31 March 2010), and, therefore, became part of national legislation of these countries.[40] According to the Protocols on accession, Ukraine and Moldova are "entitled to all rights granted to the Contracting Parties and is subject to all obligations imposed on the Contracting Parties by the Treaty and by all Decisions and Procedural Acts adopted in application of the Treaty since its entry into force".[41] The national constitutions of Ukraine and Moldova provide that in case of conflict of the TEnC provisions with their national legislation (excluding national Constitutions), the former prevails.

However, commentators emphasize certain difficulties in applying international law within the legal systems of eastern neighbouring countries. The major obstacle is the reluctance of the judiciary in the eastern neighbouring countries to apply and effectively implement international law sources in own judgments.[42] For example, the Ukrainian courts refer mainly to international agreements which are duly signed and ratified by the Verkhovna Rada and which are self-executing within the Ukrainian legal system. Even in these cases, the correct application of international agreements is not guaranteed. It happens because one of the most important impediments for the application of international law by the Ukrainian judiciary is the correct understanding of these international conventions by national judges.

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[40] Article 9 of the Ukrainian Constitution of 1996 provides that: "International treaties that are in force, agreed to be binding by the Verkhovna Rada [Ukrainian Parliament] of Ukraine, are part of the national legislation of Ukraine. The conclusion of international treaties that contravene the Constitution of Ukraine is possible only after introducing relevant amendments to the Constitution of Ukraine". Full text in English is available at <http://gska2.rada.gov.ua/site/const_eng/constitution_eng.htm>, last visited 25 May 2012. Article 8 of the Moldovan Constitution of 1994 provides that: "The Republic of Moldova pledges to respect the Charter of the United Nations and the treaties to which she is a party , to observe in her relations with other states the unanimously recognized principles and norms of international law. The coming into force of an international treaty containing provisions contrary to the Constitution shall be preceded by a revision of the latter". Full text in English is available at <http://confinder.richmond.edu/admin/docs/moldova3.pdf>, last visited 25 May 2012.

[41] Article 1(2) of the TEnC.

42 R. Petrov and P. Kalinichenko, "The Europeanization of Third Country Judiciaries through the Application of the EU Acquis: The Cases of Russia and Ukraine", 60 International & Comparative Law Quarterly, (2011) 325-353. This happens mainly due to: 1) the belief that international case law is not relevant to civil law systems; 2) the translation of case law and jurisprudence; 3) lack of translation of case law into Ukrainian to help judges adapt their decisions to best European standards. Furthermore, the Verkhovna Rada of Ukraine is not always expedient in solving conflicts between ratified international agreements and national legislation. See D. Wilkinson, "Interpreting Ukrainian legislation in light of international law and jurisprudence", available at <http://www.library.ukma.kiev.ua/e-lib/NZ/NZV22_2003_suspil/11_vilkinson_d.pdf>, last visited 25 May 2012. Also see G. Burd, 'High Commercial Court tramples international agreements', available at <http://www.kyivpost.com/opinion/op_ed/28483>, last visited 25 May 2012.

The TEnC and relevant elements of the EU "energy acquis" are relatively new to the Ukrainian and Moldovan legal systems. Undoubtedly, the TEnC is a duly ratified international agreement which is part of the Ukrainian and Moldovan legal systems and prevails over conflicting national legislation but not the Constitutions of Ukraine and Moldova. However, either additional national law or ruling of the respective Constitutional Courts are required to ensure duly application of legally binding decisions of the EnC's institutions in order to avoid possible conflicts with the Constitutions of Ukraine and Moldova. Furthermore, the Ukrainian and Moldovan judges must be well aware about the scope and legal nature of the TEnC and the EU "energy acquis" and their legal implications for the national legal systems in order to apply it correctly in own judgments. At the time of writing, practice on application of the TEnC and relevant EU "energy acquis" by judiciaries in Ukraine and Moldova was quite scarce. One of the first references to the EU "energy acquis" can be found in judgment of the Ukrainian Regional Appeal Administrative Court in *Shidenergo v. State Tax Authority*[43] case. Therein the Regional Appeal Administrative Court recognized the TEnC as part of the legal system of Ukraine and acknowledged the commitment of Ukraine to implement Directive 2001/80 as a mitigating circumstance before the state tax authority.

Scarce practice on application and references to the TEnC and the EU "energy acquis" could be explained by some factors of socio-legal nature. Among them are limited familiarity of the judiciaries in Ukraine and Moldova with the TEnC and the EnC's legal order as well as the absence of claims on behalf of Ukrainian and Moldovan nationals based on provisions of the TEnC and the EU "energy acquis". However one may deduce general trends of possible future application of the TEnC and the EU "energy acquis" from existing practice of applying EU acquis in Ukraine and Moldova. Below we cast our look at recent and future implementation and application of the EU "energy acquis" by judiciaries, governments and administrative agencies in Ukraine and Moldova.

4.2) Application of the EU "energy acquis" by the Ukrainian and Moldovan judiciaries

The EU "energy acquis" can be applied by the Ukrainian and Moldovan judiciary as part of the EU "sectoral acquis" Several legal and political grounds for this could be emphasised. First, soft legal obligations to apply the EU "sectoral acquis" flows from the Ukraine's and Moldova's commitments under the EU-Ukraine Partnership and Cooperation Agreement (PCA).[44] By signing and subsequently ratifying the PCA, Ukraine and Moldova accepted its soft commitment to "*endeavour to ensure* [RP] that its legislation be gradually made compatible with that of the Community".[45] However, this clause does not cover the field of energy. Instead, the PCA contains provision on cooperation in the field of energy, environment and civil nuclear sector in line with the principles of market economy and the European Energy Charter.[46] Unfortunately,

[43] Judgment of the Appeal Administrative Court of the city of Donetsk on 01 November 2011, No. 2a/0570.
[44] EC-Ukraine PCA (O.J. 1998, L 49), entered in force 1 March 1998. EC-Moldova PCA (O.J. 1998, L 181), entered in force 1 July 1999.
[45] Article 50 of the EC-Moldova PCA and Article 51 of the EC-Ukraine PCA.
46 Articles 61 - 63 EC-Ukraine PCA and Articles 61 - 62 EC-Moldova PCA.

such provision of the PCAs does not have any legal binding effect and, therefore, does not give any legal obligation to the Ukrainian and Moldovan judiciaries to apply the EU "energy acquis".

Second, there are external and internal political factors of legal and political nature that encourage the Ukrainian and Moldovan judiciary to apply voluntary the EU "sectoral acquis". Externally, the Ukrainian and Moldovan judiciaries acknowledge Ukraine's and Moldova's active engagement into the European Neighbourhood Policy (ENP) and Eastern Partnership, which both require Ukraine and Moldova to align their legislation with EU law. Internally, the Ukrainian and Moldovan judiciaries take into account national legislation on the gradual approximation of national legislation to the EU "acquis". For instance, the Ukrainian law "On the All State Programme on the adaptation of Ukrainian legislation to EU laws"[47] envisages the export of the whole "accession acquis" into Ukraine's legal system, since the objective of this law is the "alignment of the Ukrainian legislation with the acquis communautaire, taking into consideration criteria specified by the EU towards countries willing to join the EU". In other words, Ukraine readily agreed to implement the "accession acquis" on a voluntary basis, without any prospect of full EU membership. It should be noted that the EU never indicated that voluntary harmonization would lead to the immediate recognition of Ukraine's desire to join the EU. Nevertheless, in many official documents and public statements the Ukrainian government considers the voluntary harmonization of national legislation to EU law and gradual adoption of the EU "acquis" as an essential factor in accelerating Ukraine's integration into the EU. The Decision of the Government of Moldova "On the Approximation of Legislation of the Republic of Moldova with Community Legislation"[48] does not pursue such ambitious aims as the Ukrainian law "On the All State Programme on the adaptation of Ukrainian legislation to EU laws". It does not mention the "acquis communautaire" as an ultimate objective of the approximation and provides that "the approximation of national legislation with Community legislation is a continuous process aimed at ensuring the compatibility of internal legal acts with Community legislation by modifying, complementing or developing of national legal acts and harmonizing them with the requirements of Community legislation, thus becoming a part of the national law."

External factors, which encourage the Ukrainian and Moldovan judges to apply the EU "acquis", imply various internal factors of socio-legal nature. One of these factors is the fact that the PCA (it relates to the TEnC too) is being perceived by some national judges as not only a binding international agreement, but as something more essential for the Ukrainian and Moldovan legal systems. For instance, some Ukrainian judges believe that the voluntary application of the EU "acquis" is a key prerequisite for democratic transformation of the Ukrainian society in line with best international and European practices. In case of a conflict between PCA provisions and national law, Ukrainian courts recognize the primacy and direct

47 Law of the Verkhovna Rada of Ukraine "About the All State Programme of adaptation of Ukrainian legislation to that of the EU", 18 March 2004, No. 1629-IV.

[48] Decision of the Government of Moldova "On the Approximation of Legislation of the Republic of Moldova with Community Legislation", 24 November 2006, No. 1345.

effect of the latter.[49] The importance of Ukraine's soft approximation commitments and their far-reaching consequences for the legal system of Ukraine was emphasized by the Ukrainian courts too.[50] For example, in cases related to state liability before the individual, Ukrainian administrative courts have developed the concept, previously unknown to the Ukrainian legal system, of legal certainty. For example, in the *Person v. Kiev City centre for social assistance* case,[51] the Administrative Court of the Kiev District imported the principle of legal certainty from the ECJ case law.

Notwithstanding the positive trends in the Europeanization of the Ukrainian and Moldovan judiciary one should be aware about problems regarding the effective application of the EU "acquis" in Ukraine and Moldova. The majority of judges in the eastern neighbouring countries remain often ill-informed about the substantive and procedural means of the correct application of international law in cases that conflict with national law. Not all Ukrainian and Moldovan judges possess a correct understanding of the ECJ case law. However, these difficulties can be gradually solved as long as the results-oriented EU technical and expert assistance continues flowing to Ukraine and Moldova.

4.3) Application and implementation of the EU "energy acquis" by the Ukrainian and Moldovan governments and administrative agencies

Effective implementation of the EU "energy acquis" is an important prerequisite for further integration into the EU energy market and securing association between the EU and the eastern neighbouring countries. Soon after joining the EnC, the Ukrainian and Moldovan governments issued the Action Plans on timely implementation of the EU "energy acquis" wherein the whole scope EU "energy acquis" is duly replicated.[52] The Action Plans on timely implementation of the EU designated responsible ministries and agencies to complete the implementation of the EU "energy acquis" by the deadlines specified in the Protocol on accession. However, it should be noted that the Action Plans belong to secondary law and call for general actions to be taken on the level of ministries and state agencies and do not specify any legal responsibility of the

49 Judgment of the High Commercial Court of Ukraine on 2 February 2005, No. 12/267. Also Judgment of the High Commercial Court of Ukraine on 25 March 2005 (*Closed Stock Company "Chumak" v. Kherson Custom Office*), No. 7/299. Also Judgment of the High Commercial Court of Ukraine on 22 February 2005 (*"Odek" LTD v. Ryvne Custom Office*), No. 18/303.

50 Judgment of the District Administrative Court of Kiev on 22 May 2008, No. 4/48. Judgment of the District Administrative Court of Kiev on 13 October 2008, No. 4/375. Therein, the Kiev District Administrative Court referred to the Ukrainian law "All State Programme on the adaptation of Ukrainian legislation to EU law", and stated that the aim of adapting Ukrainian legislation requires the alignment of Ukrainian legislation to the *acquis communautaire*, which covers EU primary and secondary law, and to ECJ case law.

51 Judgment of the District Administrative Court of Kiev on 25 November 2008, No. 2/416. Judgment of the District Administrative Court of Kiev on 24 November 2008, No. 5/503. Judgment of the District Administrative Court of Kiev on 1 December 2008, No. 5/451. Judgment of the District Administrative Court of Kiev on 10 November 2008, No. 5/435.

52 Order of the Cabinet of Ministers of Ukraine "Action Plan on fulfilling commitments under the Treaty establishing the Energy Community", issued on 3 August 2011 N 733-p.

Ukrainian and Moldovan governments for failing to complete the timely and effective implementation of the EU "energy acquis" into national legal systems.

Effective steps to implement the EU "energy acquis" have been taken by Ukraine. In 2011 the Verkhovna Rada of Ukraine adopted several laws with the purpose of implementing the mandatory elements of the EU "energy acquis" specified in the Protocol on accession. Hitherto, the implementation of the EU "energy acquis" has taken place in fields of electricity (enhancing legal responsibility for electricity suppliers and consumers in case of disruption of the supply);[53] usage of renewable and alternative energy (establishing a so-called "green tariff");[54] and tax incentives to encourage energy efficiency and alternative energy in Ukraine.

However, in the opinion of experts, foreign investments into Ukraine's energy sector are being delayed because of corruption, complications with receiving useful land plots and underdeveloped energy-related services.[55] The green tariff is cumbersome for potential investors. Ukraine still has much to do to bring a green tariff's terms and conditions in-line with international standards and practices since investors could be granted the tariff at the final stage of their project that constitutes an obvious investment discouragement.

Annual reports of the EnC on the implementation of the acquis under the TEnC contain a comprehensive analysis of the progress of the contracting parties in implementing the EU "energy acquis".[56] Recent reports show that the eastern neighbouring countries have achieved moderate results in timely implementation of the relevant EU "energy acquis". Ukraine and Moldova achieved relative success in implementing the EU acquis in areas of electricity, gas and renewable energy. Much has to be done to implement the EU acquis in the fields of oil, competition, environment and energy efficiency. Possible reasons for such bleak performance of the eastern neighbouring countries in implementing the EU "energy acquis" could be twofold. First, the eastern neighbouring countries are not ready to meet the considerable economic costs of the EU "energy acquis" implementation (especially in fields of renewable energy and energy efficiency). Liberalisation of national markets in electricity, gas and oil leads to political conflicts with Russia - major energy supplier to most of the eastern neighbourhood countries. In most cases, adopting new EU energy standards imposes significant financial burden on the eastern neighbourhood countries. Second, the eastern neighbourhood countries still need to adapt their institutional structures for better and more efficient application of the EU "energy acquis" within national legal systems. Another test to be met by the eastern neighbourhood countries is the ability of their judiciaries and executives to implement decisions

[53] Law of Ukraine "On Electricity", issued on 15 March 2011, N 3134-VI.

[54] The "green tariff" is a special, increased tariff for the power produced based on renewable or other non-traditional energy sources. Its objective is offer tax and import duties incentives that bring attention to Ukraine as a potential haven for alternative energy production (Law of Ukraine "Amending the Law on Electricity", issued on 3 June 2011, N 3486-VI and Law of Ukraine "Amending the Law on Electricity", issued on 6 October 2011, N 3830-VI).

[55] M. Rachkevych, "Powering Up Ukraine", KyivPost, 22 July 2011, available at <http://www.kyivpost.com/news/business/bus_focus/detail/109141/print/>, last access 25 May 2012.

[56] For instance, Annual report of the EnC on the implementation of the acquis under the TEnC in 2011, available at <http://www.energy-community.org/portal/page/portal/ENC_HOME/AREAS_OF_WORK/Implementation>, last access 25 May 2012.

of the EnC common institutions and dispute settlement mechanism and to follow the EU dynamic acquis in the field of energy.

Ukrainian and Moldavan administrative agencies have also been engaged in the process of implementation and application of the EU "energy acquis" through implementation of national Action Plans on timely implementation of the EU "energy acquis" and national Programmes of Integration into the EU. In the former case, the governments of Ukraine and Moldova authorise ministries and administrative agencies to undertake specific steps to ensure timely implementation of the EU "energy acquis" enshrined in the TEnC. In the latter case, the governments of Ukraine and Moldova commit national administrative agencies to fulfill the objectives of national Programmes of Integration to the EU. For instance, the Cabinet of Ministers of Ukraine issues yearly Adaptation Action Plans that set up a precise list of organisational and legislative measures to be enforced and adopted in the course of a calendar year. The Yearly Action Plans pay particular attention to the cooperation with international institutions and enforcing international conventions within the objectives of the national Programme of Integration to the EU. In response to the Cabinet of Ministers Action Plan, all ministries and administrative agencies involved in the process of integration of Ukraine into the EU issue their own yearly Adaptation Action Plans which partly cover the EU "energy acquis". Furthermore, administrative agencies in Ukraine and Moldova are key beneficiaries of technical assistance offered by the EU under the framework of the European Partnership Neighbourhood Instrument. It gives many opportunities to Ukrainian and Moldovan administrative agencies to be constantly involved in training and educational activities on application of the EU sectoral acquis. However there is no evidence of application of elements of the EU "energy acquis" by Ukrainian and Moldovan administrative agencies in relations with their respective governments and nationals. It is not surprising taking into account the relative novelty of the TEnC and the uncertainty of its legal effect in legal systems of Ukraine and Moldova. In our opinion the EU "energy acquis" may find better and more frequent application by governments and administrative agencies in two cases. In the first case, forthcoming practice of national courts on the legal effect of the TEnC and the EU "energy acquis" in legal systems of Ukraine and Moldova may considerably enhance the chances of effective application of the EU "energy acquis". In the second case, claims of Ukrainian and Moldovan nationals to the EnC in line with rules of the EnC's dispute settlement procedure will encourage the respective governments and administrative agencies to pay better attention to the EU "static" and "dynamic" "energy acquis".

4.4) Application and implementation of the EU "energy acquis" in forthcoming association agreements between the EU and Ukraine and the EU and Moldova

Chances for efficient implementation and application of the EU "energy acquis" by the eastern neighbouring countries will be significantly enhanced in case of the establishment of associations between these countries and the EU. Association agreements between the EU and third countries have become one of the most recognisable brands of the EU external policy. In particular, this relates to the countries of the EU's eastern neighbourhood (Ukraine, Moldova, Belarus and the Caucasus countries) which have either already started negotiations on

association agreements with the EU, or are about to do so in the nearest future. The new generation of the EU association agreements with the EU's eastern neighbours will substitute outdated partnership and association agreements which were concluded in 1994-1998. The first eastern neighbourhood country to start negotiations on an association agreement was Ukraine. The negotiations were launched in September 2008 and successfully completed in December 2011. The initializing of the agreement on association (AA) and deep and comprehensive free trade area (DCFTA) between the EU and Ukraine took place on 30 March 2012. However the signing and subsequent ratification of the agreement is being delayed due to the unsatisfactory condition of democratic freedoms (free media and freedom of assembly) and independent judiciary in Ukraine.[57] Negotiations on the EU-Moldova Association Agreement were launched on 12 January 2010 and the parties have made considerable progress towards the initializing of the agreement.

The legal base for concluding association agreements under EU law is Article 217 of the Treaty on the Functioning of the European Union (TFEU). It states that:

> The Union may conclude with one or more third countries or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure.

One of the few explicit guidelines on the scope of an association in EU external relations comes from the ECJ in its *Demirel* judgment, wherein it is stated that an association agreement implies "creating special privileged links with a non-member country which must, at least to a certain extent, take part in the [Union] system".[58] Therefore, we may distinguish several elements which are inherent to association agreements under EU law: 1) reciprocal rights and obligations; 2) common action and special procedure; 3) privileged links between the EU and a third country; 4) the participation of a third country in the EU system. Some features of association agreements make this form of bilateral contractual relations particularly beneficial for a third country. These are: reciprocal rights & obligations, and the prospect of full EU membership. If the former feature constitutes a core of an association between the EU and a third country, the latter feature means that the fact of signing an association agreement does not automatically imply the eventual membership of that third country in the EU. EU law considers entering into association relations with the EU and obtaining full EU Member State status as two different processes, although it is true that most of the EU Member States entered into association with the EU prior to acquiring full EU membership.

In our opinion any future generation of association agreements between the EU and the countries of the Eastern Partnership will pursue specific objectives inherent to the nature of the Eastern Partnership initiative. On the one hand, association agreements with the countries of

[57] See Join Statement of the EU-Ukraine Summit in Kyiv on 19 December 2011, available at <http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/127064.pdf>, last access 25 May 2012.

[58] Case 12/86, *Demirel v Stadt Schwäbisch Güdn* [1987] ECR 3719.

the Eastern Partnership could be distinguished by greatly enhanced objectives which are typical of most EU association agreements (close political and economic co-operation, the establishment of a free trade area, far-reaching approximation of national legislation to that of the EU). On the other hand, association agreements with the countries of the Eastern Partnership will be marked by some specific objectives aimed at ensuring the functioning of a democratic society, establishing a deep and comprehensive free trade area, the possibility of establishing a visa-free regime, cross-border and regional cooperation, and other objectives. The establishment of a deep and comprehensive free trade area would imply approximation of national laws and standards in line with the EU acquis.

Therefore, it could be argued that signing an association agreement with the EU should trigger serious internal reforms in the eastern neighbouring countries. First of all, future association agreements will serve as a template for further political and economic reforms in these countries. The obligation to share the EU's common democratic values will imply regular monitoring by the EU institutions. Thereby this should prevent the eastern neighbouring countries from undemocratic practices. Establishing a deep and comprehensive free-trade area will open new markets for the eastern neighbouring countries' products on the EU's internal market, and will enhance internal competition within the EU neighbourhood. The new joint institutions set up under the framework of association agreements will help to pursue the programme of approximating the laws with the help of its binding decisions. However, it is important that the eastern neighbouring countries take full advantage of the reciprocity under the association agreements with the EU, and ensure their nationals' access to the freedoms of the EU internal market, and the visa-free regime with the EU. Eventually, the principle of reciprocity should lead to the neighbouring countries' informal participation in the EU's decision making process.

The process of effectively implementing the association agreements will constitute the greatest challenge for Ukraine and Moldova. It has to prove their adherence to the EU's common democratic and economic values, and ensure the proper functioning of their deep and comprehensive free trade areas. The latter objective may be achieved only under the condition of establishing truly competitive market economies and the adoption of international and EU legal standards. Similarly to the TEnC Ukraine and Moldova will be bound by decisions of the dispute settlement body established by an association agreement. Following the widely-used practice in the EU's external agreements, any future association agreements with the countries of the Eastern Partnership may contain so-called "evolutionary" and "conditionality" clauses. These are provisions in the EU's external agreements with specific objectives (for instance, granting a visa-free regime, the status of a candidate country to join the EU), the attainment of which is conditional either on certain actions on behalf of a party to an agreement (such as the elimination of trade barriers and uncompetitive practices) or the effective functioning of democratic and market-economy standards (such as free and fair elections and fighting corruption).

For purposes of this article it may be suggested that future association agreements between the EU and the eastern neighbouring countries will offer many incentives for efficient implementation and application of the EU "energy acquis" by the eastern neighbouring

countries. For instance, future "evolutionary" and "conditionality" clauses in the association agreements may envisage an obligation by the eastern neighbouring countries to fulfill commitments under the TEnC (to apply the fundamental principles of EU law and the EU "energy acquis", to follow dynamic EU "energy acquis" and others). Besides, entering into force of the association agreements and their subsequent impact on legal systems of the eastern neighbouring countries may trigger better reception and application of the EU "energy acquis" by judiciaries and executives in Ukraine and Moldova. In other words Ukrainian and Moldovan judges will be more inclined to apply not only "static" EU "energy acquis" but also "dynamic" EU "energy acquis" as well as case law of the ECJ because of political and economic integration oriented objectives of the future association agreements.

5. Conclusions

To conclude, we have set out a number of considerations which lead us to believe that the EU "energy acquis" should and will find frequent application within the legal system of the eastern neighbourhood countries.

Our first consideration is that the growing prominence of the EU energy policy has considerably influenced the EU relations with its eastern neighbours. The external dimension of the EU energy policy accelerates and encourages the eastern neighbouring countries to adopt the EU "energy acquis" and to actively engage into the institutional and legal framework of the EnC. Ukraine and Moldova were among the first eastern neighbouring countries to join the EnC and thereby to bind themselves to the EU "energy acquis" contained in the TEnC. The TEnC offers many legal challenges for the Ukrainian and Moldovan legal systems as for application of the EU "energy acquis". Apart from the legal commitments of implementing the EU "energy acquis" the TEnC makes Ukraine and Moldova abide by fundamental principles of EU law, decisions of the EnC common institutions and the EnC's dispute settlement.

Our second consideration is that the accession of Ukraine and Moldova to the EnC implies far-reaching challenges for legal systems of these countries. Ukrainian and Moldovan judiciaries and executives will face a necessity of implementing and applying not only the EU "energy acquis" defined at the moment of signing of Protocols on accession to the EnC but also fundamental principles of EU law, dynamic EU "energy acquis", and decisions of the EnC's institutions. However such factors as the current novelty of the TEnC for legal systems in Ukraine and Moldova as well as the reserved attitude of judiciaries towards application of international law noticeably inhibit efficient implementation of the EU "energy acquis". Establishment of association relations between the EU and Ukraine and Moldova may considerably enhance the effectiveness of implementation and application of the EU static and dynamic "energy acquis" in these countries.

Our third consideration is that the promotion of the EU "energy acquis" to the eastern neighbouring countries via the EnC offers several lessons for future EU external policies towards the East. The first lesson - the Europeanization of the EU's eastern neighbouring countries depends on many local circumstances. Success of the process of Europeanisation does not apply only to adoption of legal norms and rules by third countries but depends on true sharing

of common democratic values, application of fundamental principles of EU law and dynamic EU acquis. The EU must employ its best internal and external tools and incentives to promote friendly perception and application of European legal standards and common democratic values by judiciaries, governments and administrative agencies in third countries. Nationals in third countries must be well aware of rights offered to them under EU external agreements like association agreements and the TEnC. The second lesson – promotion of the EU "sectoral acquis" via the EnC is a timely and useful exercise towards promotion of the whole scope of the EU "sectoral acquis" beyond the EU's borders. Indeed, experience gained by the EnC may be successfully adopted by other EU external projects like new communities in fields of air and land transport, environment, education and food safety. Issues like direct effect of provisions of founding treaties of such communities, dispute settlement procedure, application of the EU dynamic acquis and interaction with the EU's framework agreements (association, partnership) could be learned from the EnC's case.

We conclude with the suggestion that the newly emerging EnC's legal order offers many challenges of a legal and political nature for the EU and third countries. With no doubt, the EnC will play a role of a laboratory working on better and deeper engagement of third countries into expanding European Legal Space.