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Applying the European Union's 'Energy Acquis' in Eastern Neighbouring Countries: The Cases of Ukraine and Moldova
by R. Petrov

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Applying the European Union's 'energy acquis' in eastern neighbouring countries: the cases of Ukraine and Moldova

Dr. Roman Petrov*

Abstract

The Treaty of Lisbon paved the way for legal formalization of new European Union policies and significantly enhanced the external dimension of the European Union Internal Market. The newly emerged European Union energy policy is a good example of this. 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 perspective of membership in the EU. The Energy Community is designed as a perfect example of the 'integration without membership' model which gives a stake for third countries in the European Union Internal Market and promotes European Union's sectoral acquis beyond the EU borders and plays a role of a laboratory working on better and deeper engagement of third countries into expanding the European Legal Space. This article focuses on challenges of the process of the application of the EU 'energy acquis' in Ukraine and Moldova.

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 a friendly and secure neighbourhood around the EU's borders through the Europeanization of legal systems of the neighbouring countries.

One of the consequences of the application of the EU 'sectoral acquis' by third countries is their gradual access to the EU Internal Market.[1] One of the best

[1] 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

examples of this phenomenon is the application of the EU 'energy acquis' by third countries under the framework of 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.[2]

This paper endeavours to clarify only one aspect of the application of the EU 'sectoral acquis' by third countries that is the application of the EU 'energy acquis' by eastern neighbouring countries through their participation in the EnC. 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.

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.[3] These objectives were further elaborated in the Europe 2020 Strategy[4] which sets out ambitious plans for the EU to become a smart, sustainable and inclusive economy by 2020. One of the most prominent objectives of the Europe 2020 Strategy is to strengthen 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

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communautaire into the legal systems of third countries' (2008) 13 *EFARev (European Foreign Affairs Review)* 33-52.

[2] S. PADGETT, 'Energy Co-operation in the Wider Europe: Institutionalizing Interdependence' (2011) 49 *JCMS (Journal of Common Market Studies)* 1065-1087. R. KAROVA, 'Rationale Behind the Establishment of the Energy Community' (2010) EUI LAW Working Papers 2010/14 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1699146>, accessed 25.12.2013.

[3] Article 194 of the Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) [2010] OJ C 83/47.

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

with Partners beyond Our Borders' (the Communication)[5] 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 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.

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

[5] 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).

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.[6] 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.[7] 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.[8] 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

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 and five waves of deadlines for Ukraine. Furthermore, Ukraine undertook legal commitments: 1) to abide to principles of the EU 'competition acquis';[9] 2) to follow generally applicable standards of the European Community on operating energy network systems;[10] 3) to adopt 'security of supply statements describing

[6] 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> accessed 25.12.2013.
[7] The Parliament of Moldova ratified the Protocol on Accession to the EnC on 31 March 2010.
[8] Law of Ukraine No. 2787-VI of 15 December 2010.
[9] Article 19 of the Energy Community Treaty (TEnC) [2006] OJ L 198/18, Articles 101, 102, 106, 107 TFEU.
[10] Article 22 TEnC.

diversity of supply, technological security, and geographic origin of imported fuels'.[11]

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 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.[12] 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.[13] 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

[11] Article 29 TEnC.
[12] 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.
[13] Case 5/67, *Beus v. Hauptzollamt München* [1968] ECR 83.

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.[14]

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'.

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'.[15] 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

[14] R. PETROV, supra n. 1, p. 33-52. R. PETROV 'The dynamic nature of the acquis communautaire in EU external relations' (2006) 18(2) *ERevPL (European Review of Public Law)* 741-771.
[15] Article 24 TEnC.

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.'[16] 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'.[17] 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'.[18]

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.[19] 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 sectoral agreements, Switzerland achieved impressive results in adopting EU 'dynamic acquis' in areas of bilateral sectoral cooperation.[20] 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

[16] Article 25 TEnC.
[17] Article 53(f) TEnC.
[18] Article 94 TEnC.
[19] S. BREITENMOSER, 'Sectoral Agreements between the EC and Switzerland: Contents and Context' (2003) 40 *CMLRev (Common Market Law Review)* 1137-1186.
[20] F. MAIANI, 'Legal Europeanization as Legal Transformation: Some Insights from Swiss "Outer Europe"' EUI Working Papers 2008/32, R. SCHWOK, *Switzerland-European Union. An Impossible Membership?*, P.I.E. Peter Lang Publisher 2009.

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.[21] 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.[22] 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'.[23] 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,[24] 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.[25]

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.[26] 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 breach of a Party's obligations and to suspend certain rights of this party, including

[21] Article 89 TEnC.
[22] Articles 89-93 TEnC.
[23] 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.
[24] Decision of the Ministerial Council of the Energy Community (Mc/06/10/2011).
[25] Article 89 TEnC.
[26] Article 76 TEnC.

the suspension of voting rights and exclusion from meetings or mechanisms in the TEnC.[27]

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.

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.

[27] Article 89 TEnC.

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.[28] 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'.[29] 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.[30] 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

[28] 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> accessed 25.12.2013. 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> accessed 25.12.2013.

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

30 R. PETROV and P. KALINICHENKO, 'The Europeanization of Third Country Judiciaries through the Application of the EU Acquis: The Cases of Russia and Ukraine' (2011) 60 *ICLQ (International & Comparative Law Quarterly)* 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.

impediments for the application of international law by the Ukrainian judiciary is the correct understanding of these international conventions by national judges.

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*[31] 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.

[31] Judgment of the Appeal Administrative Court of the city of Donetsk on 01 November 2011, No. 2a/0570.

4.2. 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 (AA) 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 signature of the political part of the EU-Ukraine AA[32] took place on 21 March 2014 in Brussels. The rest of the EU-Ukraine AA (including the titles on sectoral cooperation and Deep and Comprehensive Free Trade Area) is expected to be signed in the aftermath of presidential elections in Ukraine on 25 May 2014. The EU-Ukraine is the first of a new generation of AAs to be concluded between the EU and the Eastern Partnership countries (Ukraine, Moldova, Belarus, Armenia, Azerbaijan and Georgia). According to Herman Van Rompuy, President of the European Council, it is 'the most advanced agreement of its kind ever negotiated by the European Union'. The EU-Ukraine AA essentially aims to deepen the political and economic relations between Ukraine and the EU through the establishment of an enhanced institutional framework and innovative provisions on regulatory and legislative approximation.

The AAs between the EU and the Eastern Partnership countries are the most voluminous and ambitious among all EU association agreements with third countries. For example, the EU-Ukraine AA comprises 7 titles, 28 chapters, 486 articles, 43 annexes on about 1000 pages. This is a comprehensive mixed agreement based on Article 217 TFEU. There are many novelties introduced to this agreement. Most prominent of them are strong emphasis on comprehensive

[32] Proposal for a Council Decision on the conclusion of the Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, of 17 May 2013, COM(2013)0290. A. RETTMAN, 'EU and Ukraine sign 2% of association treaty' <http://euobserver.com/foreign/123574> accessed 22.03.2014.

regulatory convergence between the EU and Ukraine and possibility for application of the EU sectoral *acquis* within the Ukrainian legal order.

Of particular significance of the EU-Ukraine AA is the ambition to set up a Deep and Comprehensive Free Trade Area (DCFTA), leading to Ukraine's gradual and partial integration in the EU internal market. Accordingly, the AA belongs to the selected group of 'integration-oriented agreements', i.e. agreements including principles, concepts and provisions which are to be interpreted and applied as if the third State is part of the EU. It will be argued that the EU-Ukraine AA is unique in many respects and, therefore, provides a new model of integration without membership. Two of the Eastern Partnership countries (Moldova and Georgia) have completed the process of negotiation of the AA with the EU and have initialised the texts of these agreements at the Eastern Partnership Summit in Vilnius in November 2013. Final signature of the AAs with Moldova and Georgia is expected in 2014.

In our opinion the signature of 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).

The 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 will 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).[33] Besides, it is hoped that entering into force of the association agreements and their subsequent impact on legal systems of the eastern neighbouring countries will 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. However, the judicial activism in applying the EU 'energy acquis' can hardly be inspired by the state of the implementation of the EU 'energy acquis' by the Ukrainian and Moldovan governments. Annual implementation reports by the EnC Secretariat display evident shortcomings and delays of this process. It is evident that Ukraine and Moldova lag behind their implementation schedules. For example, the Implementation Report 2013 issued by the EnC Secretariat emphasises that Ukraine and Moldova have already missed deadlines on implementation of the key elements of the EU 'energy acquis' in fields of gas and electricity ('Third Package' directives)[34], renewable energy, environment and other sectors. By the time of writing this paper the EnC has initiated dispute settlement procedures against Ukraine for failing to implement EC Directive

[33] Article 278 of the EU-Ukraine AA gives unquestionable priority to the approximation and application of the EU 'energy acquis' in the EnC over conflicting provisions of the EU acquis.

[34] Annual Implementation Report 2013 by the EnC Secretariat states that it happened due to 'interfering election or other political events'. Available at <http://www.energy-community.org/portal/page/portal/ENC_HOME/DOCUMENTS?library.category=758> accessed 25.12.2013.

1999/32 (Sulphur in Fuels and reduction of heavy fuels emissions) and EC Regulation 1228/2003 (on conditions for access to the network for cross-border exchanges in electricity). Hopefully these measures will encourage Ukraine to enhance its record of implementation of the EU 'energy acquis'.

5. Conclusions

To conclude, we have set out a number of considerations which lead us to believe that the EU 'energy acquis' may 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 it is argued that the legal systems in Ukraine and Moldova are not yet ready to absorb all elements of the dynamic EU acquis contained in the TEnC. The reserved attitude of judiciaries in Ukraine and Moldova towards application of international law may inhibit efficient implementation of the EU 'energy acquis' by these countries. It is hoped that the judiciaries in Ukraine and Moldova will show a great degree of legal activism through voluntary application of the EU acquis in their decisions in order to ensure the success of this process. Association agreements with the EU impose binding commitments on Ukraine and Moldova to implement a vast scope of the EU 'sectoral acquis'. Therefore, the 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.

Roman Petrov holds LL.M in EU Law (Durham University, UK, 1998), PhD in Law (National Academy of Science of Ukraine, 2000), PhD in Law (Queen Mary, University of London, UK, 2005) and Doctor of legal science (doctor nauk) (Institute of Legislation of Verkhovna Rada of Ukraine, 2014). He conducted post-doctoral research as Max Weber Fellow at the European University Institute (Italy, 2006-2008) and had visiting research fellowships at the University of Heidelberg (Germany), the University of Oxford (UK) and Ghent University (Belgium). Dr. Petrov is founder and first elected President of the Ukrainian European Studies Association. Currently Dr. Roman Petrov is Jean Monnet Chair in EU Law and Head of the Jean Monnet Centre of Excellence at the National University "Kyiv-Mohyla Academy" in Ukraine. Areas of Dr. Petrov's research and teaching include: EU Law, EU External Relations Law; Approximation and Harmonisation of Legislation in the EU; Rights of Third Country Nationals in the EU, Legal Aspects of Regional Integration in the Post-Soviet Area.