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# EU LAW IN NON-EU COUNTRIES: REFLECTIONS ON UKRAINIAN SUPREME COURT'S JURISPRUDENCE ON ENERGY MATTERS

*Following its accession to the Energy Community Treaty and the conclusion of the association agreement with the EU, Ukraine implemented key EU acquis in energy by way of adoption of primary laws. They incorporate "instruments of EU legal integration," i.e. provisions not required in the EU but included to ensure that the EU law is correctly transposed and applied in Ukraine. The Ukrainian Supreme Court in its recent jurisprudence made conclusions on legal aspects of their application, namely: on the place of EU case-law in the Ukrainian legal system, the value of opinions of the Energy Community Secretariat (ECS) as well as the obligation to conduct consultations with the European Commission and the ECS. While the acceptance of guidance from European institutions on application of EU acquis is commendable, there seems to be room for improvement in the way the Supreme Court applies principles of EU law, in particular related to the functioning of energy markets.*

**Keywords:** Supreme Court, European Union, Energy Community, EU integration, energy markets.

## 1. Introduction

Ukraine is one of the countries which, not being in the European Union (EU), has formally committed to implement EU energy law. Since 01 February 2011,[1] Ukraine joined the Energy Community where it undertook to implement designated EU *acquis* in the field of energy, environmental protection, renewables, competition, statistics, and other fields as adapted by the organs of this organization.

The Ukraine-EU Association Agreement (UA-EU AA)[2] fully effective since 01 September 2017 confirms in Article 278 the obligations under the Energy Community Treaty and provides for self-standing obligations to implement EU energy *acquis* as specified in its annex XXVII. This annex was lastly updated in 2019 by an Association Council Decision,[3] and through this adaptation additional procedural obligations were imposed on Ukraine to guarantee the alignment of its legislation with the EU law. In particular, mandatory prior consultations with the European Commission were envisaged for "*any legislative proposal in the areas to be approximated to the EU legal acts*" as listed in that Annex. This type of provision established an *ex ante* procedural control over the conformity of future Ukrainian legislation with international obligations under UA-EU AA and the EU law from which they emanate. Herein I term this and similar constructs described below as "instruments of EU legal integration."

Several instruments of EU legal integration have been embedded in primary acts which transpose the EU *acquis* in energy in Ukraine. They present an interesting topic for analysis, being intrinsically exogenous to the Ukrainian legal system not yet part of the EU legal space. The examination of their interpretations by domestic courts at the intersection with other rules of the Ukrainian law would allow establishing their "real" normative content and significance in comparison with rules of similar order. Here, it should be noted that the EU legal order dedicates a major role in observing compliance with the EU law to national courts,[4] and if Ukraine is to realize its ambition to accede to the EU, its

[1] Protocol of accession to Ukraine to the Treaty establishing the Energy Community, https://zakon.rada.gov.ua/laws/show/994_a27#Text.

[2] Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02014A0529%2801%29-20211122.

[3] Decision No 1/2019 of the EU-Ukraine Association Council of 8 July 2019 as regards the amendment of Annex XXVII to the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A22019D1599.

[4] Monica Claes, *The National Court's Mandate in the European Constitution* (Oxford: Hart Publishing, 2006), https://doi.org/10.5040/9781472563613.

judiciary must be open to embrace a wider set of norms and work out a convincing way to apply them into the fabrics of real-life cases. While other aspects of Ukraine-EU integration in energy have been covered by the academia, no scholarly interest has been dedicated to this particular topic.

This article seeks to demonstrate how selected instruments of EU legal integration in energy are interpreted and applied by the highest judicial authority in Ukraine, i.e. Supreme Court (SC). It firstly presents these instruments as they are set out in the primary energy laws looking at provisions where a role for the EU law or for the EU or Energy Community bodies is provided. Based on the analysis of almost 150 available SC judgements, several cases are selected where judicial review focuses on the application of the said legal instruments and important conclusions are made in this connection. The article gives a basic overview of their plot and court reasoning. It ends with expert reflections on the impact of these judgements on the practical cause of EU integration at the level of energy markets.

## 2. Instruments of EU Legal Integration in Primary Law of Ukraine

At the primary law level, the adherence to EU integration in the energy sector was highlighted in a special provision included both in the Gas Market Law (Article 2(2))[5] and in the later adopted Electricity Market Law (Article 2(11)):[6]

*Public authorities as well as courts in applying norms of this Law shall take into account the practice of law application of the Energy Community and the European Union, including decisions of the Court of the European Union (European Court, General Court), practice of the European Commission and the Energy Community Secretariat as regards application of acts of the European Union listed in this article.* (NB: EU legal acts mentioned in these articles mostly come from the EU's Third Energy Package.)

These primary laws contain other provisions destined to cement EU legal integration. Firstly, they transpose key EU legal principles such as non-discrimination, proportionality, and transparency. Secondly, they earmark the role of the Energy Community Secretariat (ECS) in further law application going beyond regular functions copied from the EU (such as participation in the transmission system operator (TSO) certification and new infrastructure exemption procedures). Under the primary laws, the ECS must be consulted by public authorities before adopting important secondary acts:

in the gas market – public service obligation (PSO) resolutions, Licensing Conditions for all types of licensed activity, Rules of Natural Gas Supply (key document governing relations between suppliers and consumers), Standard Contract for Supply by the Last-Resort Supplier;

in the electricity market – PSO resolutions, Methodology for formation of connection fee to transmission and distribution systems, Methodology for determination of total transfer capacity of electricity interconnectors, Standard Contract for sale of electricity under the "green" tariff.

Thirdly, according to Article 2(6) of the Electricity Market Law, the Transmission System Code should comply with the Energy Community *acquis*.

Finally, public authorities must report information to the ECS, and market participants have the obligation to satisfy ECS information requests.

## 3. Selected Supreme Court Cases

The Ukrainian SC's jurisprudence on the above-mentioned primary laws is ample, but only few decisions test the instruments of EU legal integration specifically. Most prominently they were interpreted in two streams of SC's cases: i) a case No 826/9665/16 concerning the PSO Resolution in gas (the Gas PSO Case); ii) a complex case consisting of several lawsuits by several plaintiffs concerning tariffs on electricity exports (the Electricity Tariff Case).

Judgments in these cases, *inter alia*, demonstrate how supreme justices view the place of the EU case-law in the Ukrainian legal system, the value of the ECS opinions and the content of the obligation to conduct consultations with the European Commission and the ECS.

### 3.1. Brief Summary of Cases

#### *a) Gas PSO Case*

This case illustrates a long-standing struggle of Ukraine to bring its gas prices to a market level. When the Gas Market Law came into effect in October 2015, the Government adopted a PSO Resolution to protect households from a rapid price increase. It imposed PSOs throughout the supply chain from state-control gas producing companies to suppliers of gas to households and district heating companies. No spike of energy costs thus took place.

[5] Verkhovna Rada of Ukraine, "On the Natural Gas Market", Law of Ukraine 329-VIII, adopted on 09 April 2015, https://zakon.rada.gov.ua/laws/show/329-19#Text.

[6] Verkhovna Rada of Ukraine, "On the Electricity Market", Law of Ukraine 2019-VIII, adopted on 13 April 2017, https://zakon.rada.gov.ua/laws/show/2019-19#Text.

Later, pursuant to the International Monetary Fund support conditions and the needed reforms agenda, amendments to this resolution were passed in April 2016 (the amended PSO Resolution) which resulted in higher gas costs for households, religious organizations, and district heating companies. In addition, the amended PSO Resolution incorporated the import-parity-based formula for calculation of such prices.

The amended PSO Resolution was challenged in court by several claimants, allegedly representing consumers. In their lawsuit, claimants alleged, *inter alia*, that gas prices specified in the amended PSO Resolution were not economically justified as they did not reflect the costs of production and sales of locally produced gas, including the reasonable rate of return (as opposed to the mix of locally produced and imported gas which was actually supplied), and that setting gas prices at an import-parity level should be thus ruled out.

The legal battle lasted for 5 years (from 2016 till late 2021). While lower courts sided with claimants and invalidated the amended PSO Resolution, the case ended with a supreme court (Cassation Administrative Court) ruling[7] and two lower court judgements adopted on its basis. As a result, the claimants' case was dismissed, and the validity of the amended PSO Resolution (by then already expired) was confirmed.

***b) Electricity Tariff Case***

In this complex case, major exporters of electricity from Ukraine, the DTEK Group and the ERU Group, challenged amendments to the Electricity Transmission Code which expanded the scope of market participants required to pay transmission and dispatch tariffs – two fees charged by the Ukrainian TSO, Ukrenergo. Following these amendments, such tariffs started to apply to exporters of electricity from Ukraine (such as DTEK and ERU). In court claimants complained, *inter alia*, that the adopted changes violated Energy Community and EU laws in contradiction to Article 2 of the Electricity Market Law (as cited above). The challenge also concerned the procedure of adoption of the said changes: no consultations with the European Commission allegedly took place thus contravening the above-mentioned Association Council Decision and the Ukrainian law implementing that Decision.

This complex case involved two sets of judgements giving divergent views on the matter. In one of them, the SC's Cassation Administrative Court by its decision of 08 September 2021[8] dismissed all claims and confirmed the validity of the amendments, thus supporting the position of the Regulator and Ukrenergo. In another one, the SC's Cassation Commercial Court in its decisions of 04 February 2021[9] and 08 June 2021[10] upheld the lawsuits and ordered that Ukrenergo was not entitled to charge the tariffs to the complaining exporters. This obvious clash of positions was acknowledged by the SC's Cassation Commercial Court which by a decision of 22 September 2021[11] relayed the matter to the SC's Grand Chamber. In particular, it noted that the two courts came to opposite conclusions as to the need to apply decisions of the Court of Justice of the EU (CJEU) as well as the legal status of statements contained in the ECS letters and their mandatory nature.

By decision of 03 August 2022[12] the Grand Chamber resolved the latter case in favour of the claimants; however, the previously adopted SC's Cassation Administrative Court decided in a different case was left intact.

**3.2. Supreme Court Conclusions on EU Law**

In the Electricity Tariff Case, the SC's Cassation Administrative Court discovered that the procedure of mandatory prior consultations prescribed in the above-mentioned Association Council Decision for "*any legislative proposal in the areas to be approximated to the EU legal acts listed in Annex XXVII-B*" does not apply to draft acts of the Regulator. This conclusion was based on the "*guidelines for implementation of Annex XXVII.*" However, the author of this article could not locate this document in public access.

In the same case, the SC's Grand Chamber had to respond to the claimant's reliance on CJEU judgment in *FENS vs Slovak Republic*,[13] where it was found that a charge on electricity exports to other Member States or third countries constituted a measure having equivalent effect to quantitative restrictions. The Grand Chamber noted that the Cassation Administrative Court, when refusing to

[7] Supreme Court of Ukraine (Cassation Administrative Court), Case 826/9665/16, 25 June 2020, https://reyestr.court.gov.ua/Review/90073627.

[8] Supreme Court of Ukraine (Cassation Administrative Court), Case 640/3041/20, 08 September 2021, https://reyestr.court.gov.ua/Review/99459130.

[9] Supreme Court of Ukraine (Cassation Commercial Court), Case 914/935/20, 04 February 2021, https://reyestr.court.gov.ua/Review/94696499.

[10] Supreme Court of Ukraine (Cassation Commercial Court), Case 910/8044/20, 08 June 2021, https://reyestr.court.gov.ua/Review/97559466.

[11] Supreme Court of Ukraine (Cassation Commercial Court), Case 910/9627/20, 22 September 2021, https://reyestr.court.gov.ua/Review/99860467.

[12] Supreme Court of Ukraine (Grand Chamber), Case 910/9627/20, 03 August 2022, https://reyestr.court.gov.ua/Review/105852859.

[13] *FENS spol. s r.o. v Slovenská republika*, Case C-305/17 (CJEU, 6 December 2018).

consider conclusions in this CJEU case applied a narrower reading of sources of law that a Ukrainian court may apply. Relying on the above-cited Article 2 of the Electricity Market Law, the Grand Chamber concluded that CJEU case-law must be read to establish the content of EU *acquis* which this law seeks to implement. Therefore, similar to the way decisions of the European Court of Human Rights are read, courts must consider principles which flow from the CJEU jurisprudence on similar matters even where they directly concern other countries.

**3.3. Supreme Court Conclusions on ECS Powers**

In the Gas PSO case, the Supreme Court was asked to comment if the amended PSO Resolution was properly adopted when no consultations with the ECS had taken place. It first noted that consultations did not equal approval. It then directed lower courts to analyze the ECS powers based on the Energy Community Treaty and relevant Ukrainian laws in order to determine the legal force and consequences of these consultations, the form they should take, the scope of questions to be covered etc. Based on this instruction, the lower court[14] found no exact mechanism (order, procedure) for consultations with the ECS. It further could not determine the requisite form of such consultations, questions to be discussed and the character of their outcome (advisory, informative or mandatory). For these reasons, the lower court did not find sufficient grounds to annul the amended PSO Resolution even where no ECS consultations had taken place. It is worth noting that this SC position is consistently upheld, and in the most recent case the SC again refused to accept the invalidity of an alleged PSO act without the lower court first concluding on the legal effect of ECS consultations.[15]

In the Electricity Tariff case, the claimant relied on findings made by the ECS in its Compliance Note based on the same factual circumstances as those in the case before the Ukrainian court.[16] The SC's Grand Chamber found that under the Energy Community Treaty the ECS monitored compliance of the Parties with their treaty obligations. Thus, the ECS's official conclusions on this matter were important to determine the content of EU *acquis*, even where such findings were not part of the annual report mentioned in the Energy Community Treaty.

**4. Concluding remarks**

Instruments of EU legal integration are important drivers of Ukraine's practical accession to the EU legal system. This jurisprudence sheds some light on how the Ukrainian SC reads them and views the EU energy law overall. In the latest decision of 3 August 2022, it made ground-breaking conclusions on the usefulness of the EU case-law and of the ECS opinions to interpret the EU *acquis* on which domestic energy regulation is based. In this way, the dedicated article of the Gas Market Law and the Electricity Market Law finally took effect, thus unleashing a major potential for EU legal integration in energy.

The SC's conclusions on the use of CJEU judgements may be helpful in overcoming the unfortunate situation where legal provisions of EU *acquis* were transposed into Ukraine's primary laws with errors. One example could be Article 24 of the Electricity Market Law which transposes Article 17 of Regulation 714/2009:[17] While the EU law under certain specific conditions allows exempting new electricity interconnectors and their operators from the legal regime of capacity allocation, tariff setting, the use of congestion revenues and unbundling, such an exemption under the Ukrainian law is limited to capacity allocation only. This seemingly small inconsistency is very serious in practice as it undermines the whole purpose of this legal provision which is to promote high-risk but necessary transboundary investment projects and ensure a uniform legal regime in all jurisdictions along the construction route.

There are, however, points of discontent and criticism which may be advanced in connection with the SC's decisions. For instance, the decision by the SC's Cassation Administrative Court has effectively eliminated the need to conduct consultations with the ECS where they are mentioned in the primary energy laws. The SC decided not to rule on the matter and only provided guidance to lower courts which then opined that the primary laws were not sufficiently clear as to the scope and formalities of such consultations to make them a separate ground for annulment of secondary acts. It is now for the Government and the ECS to design a document which would render the primary law provisions effective again. It is however unclear whether this conclusion will stand in the future in face of the Grand Chamber judgement which seemingly endorsed quite broad powers for the ECS.

[14] Sixth Appeals Administrative Court, Case 826/9665/16, 08 December 2021, https://reyestr.court.gov.ua/Review/101773110.

[15] Supreme Court of Ukraine (Cassation Administrative Court), Case 640/5884/19, 20 January 2022, https://reyestr.court.gov.ua/Review/103029226.

[16] Energy Community Secretariat. Compliance Note. 'Ukraine – electricity transmission and dispatch tariff with respect to the tariffs for export and import'. CN 01/2020. 28 May 2020.

[17] Regulation (EC) No 714/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003.

Another comment directed at the Government would concern the procedure of mandatory consultations with the European Commission. It is unfortunate that draft Regulator's decisions fall outside of this procedure. When adopted, these documents have immediate and substantial effect on the market. The blank expulsion of such acts from mandatory consultations does not seem justified. Plus, it is worrisome that guidelines on which the SC relies are nowhere to be found in public access.

While the enabling effect of giving way to the discussed instruments of EU legal integration must be welcome, it is also important to ensure that reliance on EU case-law or ECS opinions is not blunt and divorced from the economic reality which the EU law seeks to build. For instance, in the Electricity Tariff Case the Grand Chamber seems to have applied only isolated conclusions from the relevant CJEU judgment and the ECS Compliance Note. In particular, the court fully disregarded the fact recognized by the ECS that Ukrenergo is not part of the inter-transmission system operator compensation mechanism governed by Regulation 838/2010[18] which would allow the Ukrainian TSO to recover costs for hosting cross-border flows. According to the ECS, while "*charging import and export with tariff components which are associated to internal activities and policies … is not in line with Article 41 of the Energy Community Treaty*" as was confirmed in the *FENS* case, Ukrenergo is entitled *"to be compensated for the costs of hosting cross-border flows."* When this cannot be achieved through the said compensation mechanism, the recovery of TSO costs associated with import/export could be done by the Regulator through "*a specific access fee on scheduled import and export.*" Thus, the ECS in principle did not object to the application of an export/import fee but rather to the way in which it was determined. This means that the ECS effectively disallowed the portion of the fee which could not be attributed to costs related to cross-border flows, i.e. the portion which the TSO was by law required to collect as part of its tariffs to compensate other market participants for performance of PSOs in support of green energy generation. The SC's Grand Chamber instead ruled that the complaining exporter from the DTEK Group did not need to pay any part of the fee charged, thus leaving Ukrenergo without a dedicated income stream for hosting cross-border flows. One important thing which the ECS did not seem to have considered is that under the Electricity Market Law no separate fee on scheduled import and export is envisaged, so unless changes to the law are made, the Regulator cannot single-handedly approve any such separate fees. The Grand Chamber noted the publication of a draft law to that effect on the Regulator's website in October 2020 but did not consider that this draft was never adopted.

What seems missing from the said Grand Chamber judgement is the application of the principles and objectives of the Energy Community Treaty (which mirror the EU fundamentals) and the search for a result in regulation which is directed at achieving those objectives. One illustrative case in this connection could be the CJEU judgement in *Baltic Cable* case[19] where the Court of Justice *de facto* guided the Swedish court to rule *contra legem* (i.e. in formal contradiction to the EU regulation) but in furtherance of the principle of non-discrimination and the fundamental rule that energy undertakings must be working under such financial conditions as to gain profits. This contrasts with the SC's judgement where EU case-law and the ECS opinion were read in such a way as to actually deprive the electricity TSO of proceeds from the activity that it was actually performing.

The root cause of this judicial attitude could be attributed to the limited understanding of the real value of EU legal integration for the country, its economy, markets and consumers. Ukraine here is definitely not a unique case. It is thus essential to step up joint efforts to educate Ukrainian judges on matters of EU and Energy Community law and to convince them that markets expect them to apply national laws in the spirit of EU integration.

[18] Commission Regulation (EU) No 838/2010 of 23 September 2010 on laying down guidelines relating to the inter-transmission system operator compensation mechanism and a common regulatory approach to transmission charging.

[19] *Baltic Cable AB v Energimarknadsinspektionen*, Case C-454/18 (CJEU, 11 March 2020).

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## ПРАВО ЄС У КРАЇНАХ ПОЗА ЄС: РОЗДУМИ ПРО СУДОВУ ПРАКТИКУ ВЕРХОВНОГО СУДУ У СФЕРІ ЕНЕРГЕТИКИ

Після того, як Україна приєдналася до Енергетичного Співтовариства та уклала Угоду про асоціацію з ЄС, було прийнято необхідні закони для імплементації актів енергетичного права ЄС в Україні, а саме закони України «Про ринок природного газу» та «Про ринок електричної енергії». У цих законах передбачено положення, які можна назвати інструментами правової інтеграції з ЄС. Ідеться про норми, які не вимагаються актами ЄС, проте спрямовані на забезпечення коректного впровадження права ЄС в Україні. Такими інструментами є, наприклад, вимога про врахування рішень Суду ЄС і правозастосовної практики Європейської Комісії та Секретаріату Енергетичного Співтовариства під час застосування цих законів органами державної влади (зокрема судами), вимога про проведення консультацій з Секретаріатом Енергетичного Співтовариства тощо. Особливість цих положень полягає в тому, що вони передбачають взаємодію зі сторонніми для української правової системи елементами. Верховний Суд у нещодавніх рішеннях у справах щодо оскарження положення про покладення спеціальних обов'язків для забезпечення загальносуспільних інтересів у процесі функціонування ринку природного газу та застосування тарифів на передачу та диспетчерське (оперативно-технологічне) управління до експортерів електричної енергії навів правові позиції щодо застосування цих положень. Зокрема, він визнав обов'язок судів враховувати висновки, наведені в рішеннях Суду ЄС та в офіційних позиціях Секретаріату Енергетичного Співтовариства щодо тлумачення змісту норм права ЄС, які впроваджені зазначеними законами. Загалом цю практику можна оцінити як позитивну. Проте деякі аспекти рішень Верховного Суду, зокрема в частині недостатнього врахування принципів права ЄС, а саме тих, що є основою функціонування енергетичних ринків, викликають критику. Відповідне судове рішення фактично позбавило оператора системи передачі можливості для стягнення коштів на покриття витрат, реально понесених на забезпечення транскордонної передачі електричної енергії, що загалом не узгоджується з принципом окупності діяльності операторів інфраструктури на енергетичних ринках ЄС. Крім того, у результаті застосування правової позиції Верховного Суду суди нижчих інстанцій не визнали окремою підставою для скасування акта Уряду відсутність консультацій щодо нього з Секретаріатом Енергетичного Співтовариства, яких вимагає закон.

**Ключові слова:** Верховний Суд, Європейський Союз, Енергетичне Співтовариство, євроінтеграція, енергетичні ринки.

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