

Legal Regulation of Energy Safety in Ukraine and the European Union: Problems and Perspective

By Ievgenii Shulga¹, Volodymyr Kurylo², Inna Gyrenko³, Serhii Savych⁴

Abstract

Nowadays in Ukraine there is no single view on understanding of the strategy of development of energy safety, which profoundly and negatively affected the general state of national safety of the country. The purpose of the article is to analyze the current state of legal security of energy safety in Ukraine, check it for compliance with its obligations under the Association Agreement with the EU and other EU acts that proclaim the standards in the field of energy safety. This paper refers to the experience of the EU energy safety legislation. Furthermore, this study provides analysis of Ukrainian legislation in this field, draws attention to the existing conflicts and gaps, emphasizing the need to optimize legislation of Ukraine's energy safety according to the EU standards.

Keywords: energy safety, energy law, the EU energy safety, energy safety of Ukraine, legislation of energy safety, adaptation of Ukrainian energy legislation to the EU standards.

1. Introduction

Nowadays energy safety is a key factor in the development of the economy of any state, a guarantee of ensuring the normal conditions of citizens' existence. However, the level of Ukraine's energy safety is far from adequate, as evidenced by a steady increase in energy tariffs as compared to a drop in the level of incomes, an increase in cases of loose power outages, monopolization of the energy sector and a significant dependence on energy imports.

For the EU, energy safety is a particularly important factor in safety and economic development, given that it is an importer of energy resources, and therefore needs to ensure a stable supply of hydrocarbons in sufficient and proper quality [12]. And the very idea of the creation of the EU was not necessarily due to the need to provide energy and raw materials, which resulted in the creation of energy associations that laid the foundation for the future of the European Union [27].

This only confirms the thesis that, despite the fact that ensuring energy safety is the task of each individual member state of the EU in view of the sign of their sovereignty [15], the transfer of the above-mentioned summons from local to supranational competence of the EU takes place. Indeed, with the integration of Europe's energy markets, certain

¹Doctor of Law, associate professor of the Department of International Law and Comparative Law of the National University of Life and Environmental Sciences of Ukraine.

²Doctor of Law, professor, head of the Department of Administrative and Financial Law of the National University of Life and Environmental Sciences of Ukraine.

³Doctor of Law, associate professor, professor of the Department of International Law and Comparative Law of the National University of Life and Environmental Sciences of Ukraine.

⁴Ph.D. in Law, director of Lutsk Institute of Human Development of Open International University of Human Development "Ukraine".

geopolitical aspects (storage, transit and substitution) make it difficult to regulate energy safety at the local, state level and put it at the interstate level of the EU. Ukraine has only recently become a market economy country. We have a chance to take advantage of the EU's historical and legal experience in providing energy safety.

2. Problems and Condition of Legal Regulation of Energy Safety in Ukraine

According to the Regulation of the Cabinet of Ministers "On Approval of the Energy Strategy of Ukraine for the Period up to 2030" [18] sets forth the following factors of the existing low level of energy safety in Ukraine: the lack of reforming of energy markets in Ukraine; monopolization of the energy sector of the economy; the lack of integration of the Ukrainian energy sector into the EU energy markets and the overall system of European energy safety; low energy efficiency; a weak system of diversification of sources and routes of power supply; dependence on import of energy resources; lack of conditions for reliable energy supply and transit of energy resources in the territory of Ukraine; protection of the energy infrastructure from the terrorist threat; low level of diversification of sources of energy supplies, reduction of their own production; low energy efficiency; weak implementation of energy and resource-saving technologies. For Ukraine the overcoming of these challenges today is the main task of ensuring national safety.

However, the presence of normatively determined factors is not the only reason for ensuring energy safety in the state. Updates this and signed by the state international obligations aimed at providing a much wider range of interests, including ensuring general environmental safety, etc. Nowadays, Ukraine's direct responsibility (as a global community member) is to ensure the economical use of energy resources, to introduce energy-saving technologies, increase the share of alternative energy sources, reduce CO₂ emissions into the atmosphere, etc. Given this, today it is critically necessary to work out the ways of implementation and adaptation of domestic energy legislation to the requirements of the EU legislation. In the above-mentioned explicitly state and the provisions of the Agreement of the Association of Ukraine with the European Union [1], the rules of which put forward the conditions for adaptation of the Ukrainian energy sector to the standards of the EU in order to join the united energy system in Europe. Today, the integration of Ukraine's energy safety into the EU is not only the safety of Ukraine, but also the safety of the entire European community.

It should be noted that the integration process lasts. In recent years, we have witnessed Ukraine's active pursuit of cooperation with the EU and energy safety issues. The process takes place within the framework of the economic and political sphere. Adaptation of the legal regulations of the studied area is performed fragmentarily, unsystematically, which consequently, to some extent, undermines their overall purpose. This statement is confirmed by a number of normative acts adopted by the Ukrainian parliament, aimed at reforming the energy sector. Thus, the adoption of the Law on the Natural Gas Market (2015) [26] declared the implementation of the requirements of the Third Energy Package of the EU (Directive 2009/73/EC Concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC and EU Regulation 715/2009 On Conditions for Access to the natural gas transmission networks

and repealing Regulation № 1775/2005 within the framework of the Treaty on the Establishment of the Energy Community signed by Ukraine and envisaged the desire to liberalize and reform the natural gas market, eliminate the single large-scale player of the last years of Naftogaz of Ukraine. The aforementioned law introduced the creation of a new model of the natural gas market, aimed at ensuring free competition and effective protection of the rights and interests of all participants in the gas market, regardless of the form of ownership.

Within the framework of the Third Energy Package of the EU, the Ukrainian Parliament adopted the Law "On the Electricity Market" (2017) [24], which, from 2019, introduces the possibility of choosing a supplier of energy services, provides competition and lower prices for the buyer of electricity. However, the execution of the said law is hampered by objective and subjective reasons, including the regulatory unsettled issue of the introduction of parallel markets, generating capacities and the problem of accumulation of debts, a detailed regulatory and technical infrastructure. Taking into account these and other reasons, the Delegation of the European Union and the European Bank for Reconstruction and Development recommended postponing the introduction of a new electricity market in Ukraine [20].

In addition, in pursuance of the above-mentioned laws, the New Energy Strategy of Ukraine for the period up to 2035 "Safety, Energy Efficiency, Competitiveness" (2017) was developed, based on the principles of strengthening the development of renewable energy, in particular, increasing the share of green energy use.

In April 2019, the Ukrainian Parliament adopted a bill "On Amendments to Some Laws of Ukraine on Ensuring Competitive Conditions for the Production of Electricity from Alternative Energy Sources". The provisions of this law restricted citizens to the possibility of using the Green Tariff. The law stipulated the effect of the "green tariff" exclusively for electricity generated by consumers using solar panels "provided they are located on roofs and / or facades of capital buildings, buildings, established for all consumers" [22]. Thus, effectively prohibiting their location on the ground, which made it impossible to increase the amount of electricity used by citizens. At the same time, the bill stipulated tariff auctions in 2020 and only for stations over 20 MW. It is obvious that on roofs of buildings citizens will not be able to produce such amount of electricity that will not allow them to participate in the "green tariff". That is, the effect of the green tariff will be available exclusively to large monopolists in the market of alternate energy sources. These, and many other facts, testify to the ineffectiveness of the state policy of ensuring energy safety in Ukraine.

Also it should be paid attention to the lack of an important course of the state on deregulation of the energy sector, the reduction of state influence on the energy sector of Ukraine. Thus, the adoption of the Law "On the National Commission for State Regulation in the Spheres of Energy and Utilities" (2016) [25] marked the continuation of the course on state governance of the energy sector, which in our opinion does not correlate with European standards. The declared goal of adopting of this act is the elimination of monopolies and the implementation of state regulation of the activities of the participants in the energy market of Ukraine, but it is obvious that the legislator believes that the state should manage the energy sector directly. The law provides for the legal status of a state regulator in the field of energy and utilities, which regulates,

monitors and controls the activities of economic entities in the fields of energy and utilities. The state, using its imperative influence, regulates the energy sector instead of creating the same conditions for all actors in the energy sector and reduces the impact on pricing. The state should create transparent conditions and the same rules for all players of the energy market, thereby reducing its own influence on the market of energy resources.

3. Energy Safety Legislation in the EU

Understanding energy safety as a safety of supply in the energy sector, aimed at ensuring the uninterrupted physical supply of energy carriers to the market at affordable prices for all consumers in the private sector and industry [5], the EU has adopted a number of directives, programs and plans for a common energy market. However, from a scientific point of view, this definition is too narrow, because it reveals it through the prism of the interests of importers of hydrocarbons. As far as exporters are concerned, it is obvious that energy safety will consist in ensuring stable demand for them for extractive resources and an adequate level of their pricing. In our opinion, these characteristics should also be taken into account when determining energy safety.

In the retrospect considering the main sources of legal safety of EU energy safety should point out the importance of the adoption of the founding Treaty establishing the European Coal and Steel Community (1951) and the Treaty establishing the European Atomic Energy Community (1957). The signing of these documents demonstrated the priority of the energy sector for European countries and the need to secure their own energy resources that united the coal, iron ore and steel industry of the 10 European Economic Community (EET) countries and promoted the development and research of nuclear energy, the creation of a common nuclear market fuel, nuclear control and the development of atomic technologies for peaceful purposes within the framework of common safety standards.

However, these acts mainly concerned the cooperation of the states in the energy sector. In the modern sense energy safety began to be used with the adoption of the European Energy Charter (1991) and the Treaty and the Protocol to it (1994) [11]. These documents identified the following main areas of joint action by the EU Member States on energy issues: - the development of energy trade in accordance with major multilateral treaties, such as the General Agreement on Tariffs and Trade and related treaties acts, obligations in the nuclear sphere; - cooperation in the field of energy; - energy efficiency and protection of the environment.

In addition, the Charter proclaimed the liberalization of the energy market, which was the gradual commercialization of the energy sector (competition in the energy market, access to and production of energy on a commercial basis, equal access to intelligence technologies, production and use of energy resources, financial support, etc.); eliminating administrative barriers to energy sales, in order to ensure free access to both the global and local energy markets [16].

Subsequently, the community agreed on the adoption of the First Energy Package, which intensified the development of legislation on EU energy safety. It was based on the following documents: Directive 96/92/EC of the European Parliament and of the

Council of 19 December 1996 concerning common rules for the internal market in electricity [9] and Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas [10].

They consolidated the following measures: - increasing transparency of gas and electricity prices; - introduction of different models of access of third parties to transportation and distribution systems; - establishment of rules for the gradual opening of markets; - introduction of rules for the separation of vertically integrated enterprises through separate accounting accounts for network and production activities; - regulation of the procedure for building new capacities in the electricity sector; - consolidation of obligations to ensure effective regulation of the gas and electricity sectors [6].

However, a number of court decisions [3] of the European Court became a barrier to the implementation of the First Energy Package. New secondary legislation on energy safety was adopted within the Second Power Package. The second package included four acts of secondary legislation and envisaged a greater variety of legal and institutional measures for the EU energy policy with regard to common rules for the internal market for natural gas (Directive 2003/55/EC [8]), electricity (Directive 2003/54/EC [7]), etc.

The second energy package created a fundamentally new regulatory environment for the EU energy sector. In particular, the innovations of the Second Energy Package were:

- strengthening consumer rights protection;
- simplification of procedure for construction of new capacities in the energy sector;
- more stringent requirements for the separation of vertically integrated companies through the introduction of rules of legal and functional separation;
- the establishment of a regulated access regime for third parties to the transport infrastructure;
- full legal opening of markets since June 1, 2007;
- creation of regulatory authorities;
- consolidation of the mechanism of compensatory payments to operators of transportation systems in relation to cross-border supply of electricity;
- Increasing attention to ensuring the reliability of gas and electricity supply [6].

The development of the external direction of the EU energy safety policy was expressed in the Treaty establishing the Energy Community of November 25, 2005 [19]. Active legal and institutional construction in accordance with the objectives and objectives of the EU energy safety policy led to the transformation of the quantitative characteristics of the integration processes into qualitative characteristics expressed in moving to a new level of solidarity and integration in the energy sector. The legalization of such transition to a new level took place with the signing of the Lisbon Treaty to the Treaty on the Functioning of the European Union [28]. According to the art. 194 of the Treaty on the Functioning of the European Union provisions on a common EU energy policy were introduced. This Agreement, together with the Third Energy Package adopted in 2009, constitute the modern legal basis of the EU energy policy and EU energy safety policy.

The emphasis on energy safety in EU law has shifted towards renewable sources. The "soft law" acts were developed, aimed at outlining the problem and outlining promising ways of its solution based on the development of a common strategy. Such acts were White and Green books. So, in 1997, the European Community has developed a White Paper on "Renewable Energy: A Strategy and Community Action Plan." [5]. The main

task of the White Paper was to achieve the minimum amount of energy received from renewable sources at 12% by 2010. This was aimed at overall promotion of job creation in the EU, reduction of dependence on energy imports and improvement of the state of emissions of CO₂.

European countries are constantly focusing on energy safety issues. In 2005-2006, the European Commission has developed a Green Paper on energy safety issues [14]. It formulates the problem of a significant reduction in the use of hydrocarbons, the introduction of energy saving technologies, expansion of geography of supply, free market energy resources, etc.

The current state of energy safety in the EU is not fully realized. The North Stream 2 project does not allow to diversificate energy supplies, as the supply remains the same, and is a kind of monopoly.

4. Cooperation and Perspectives of Ensuring Energy Safety of Ukraine and the EU

Given that Ukraine is a geographic part of Europe, it must, for objective reasons, be energetically and economically integrated into the European Union with further membership in this organization. This thesis is reinforced by the fact that close relations between Ukraine and the EU are established in the political, economic and energy spheres. Ukraine is a key energy transitor, it transits almost half of the natural gas from the Russian Federation to the EU, which accounts for about 20% of the share of total natural gas imports to the EU. It can be concluded that the EU is interested in the stable development of Ukraine as a transit state of energy resources.

For Ukraine, energy cooperation with the EU has a key place in terms of investment and technological capabilities. Since the signing of the Association Agreement with the EU, the formation of the legal regulation of cooperation between Ukraine and the EU on energy has become an integral part of the process of European integration of Ukraine. Its dynamics is conditioned by general integration processes, as well as economic and political factors of the development of the European energy market.

In the end, as the states are mainly influenced by energy impacts, Ukraine and the EU have the same goals, ensure uninterrupted supply of energy resources in sufficient quantities for normal operation of the economy, at a reasonable price, ensuring competition in the energy market and deregulation by the state.

However, it should be noted that the state of cooperation between Ukraine and the EU on energy issues has been influenced for a long time by the specificity of Ukrainian-Russian relations, taking into account that the Russian Federation is considered to be a resource state for the EU member states and Ukraine is a transit state [13].

The intensification of cooperation took part in the energy sphere between Ukraine and the EU during the so-called energy wars, namely the disruptions in the supply of natural gas from Russia in 2005-2006, 2008-2009, 2014. From that time issue of natural gas transit through the Ukrainian Gas transportation system become one of the priority directions of the EU energy security policy, and their solution is addressed in two aspects: diversification of supply sources and ensuring stability of the Ukrainian energy sector.

It can be argued that the latest stage of cooperation between Ukraine and the EU in the field of electric power industry began with the signing and ratification of the Energy Charter Treaty [23] and the Partnership and Cooperation Agreement between Ukraine and the EU. The indicated documents fixed the basic principles of energy cooperation between Ukraine and the EU in accordance with the principles of the market economy and the European Energy Charter. The Partnership and Cooperation Agreement between Ukraine has defined the following areas of cooperation:

- enhancing the quality and safety of energy supply in an economically viable and naturally safe way, including diversification of suppliers;
- the introduction of a series of institutional, legal, financial and other prerequisites for promoting trade in energy and investment;
- promotion of energy saving and its efficient use;
- modernization, development and diversification of energy infrastructure, etc.

Nowadays, Ukraine is not only a transit energy supplier, but it is also a supplier of electricity to Poland, Slovakia and Romania. Electricity deliveries to the last two countries show growth dynamics. In the last year amount of delivery increased by almost 30% [21].

In pursuance of tasks, Ukraine and the EU are pursuing legal and political efforts, in particular, the EU introduce the latest energy saving technologies, expand the range of alternative energy sources and diversify energy supplies. Within the framework of diversification of energy supplies. The EU purchases liquefied natural gas from the USA and builds a North Project 2 project with Russia. Ukraine provides reverse supplies from Slovakia, while coal is imported under the Rotterdam + scheme, which in the vast majority comes from the temporarily occupied territories of Ukraine, while increasing its value [2]. It should be noted that Ukraine and the EU still face a lot of challenges on the road to energy safety. The need to further cooperate in these matters, taking into account territorial affiliation and common democratic goals and aspirations, should be noted.

Conclusions

Characterizing the development of EU energy security policy, it should be noted its double role in shaping the European community itself. On the one hand, the need to solve a number of energy problems was a cornerstone of European integration processes, and, on the other hand, the formation of a common energy policy has become one of the elements of the final design of the modern European Union. The path of legal security of energy security was long and complicated for the EU, which began with the need to secure economic interests at an affordable price for energy resources, which has been transformed into a category of energy safety, which includes environmental safety, energy saving technologies, alternative energy sources, etc.

After analyzing the legal framework for energy safety policy in Ukraine and the EU, it should be pointed out that it is gradual and determines the most important directions of development. The key prerogative of the achievement of energy safety of the states should be the achievement of key areas, namely: diversification of energy supplies, enhancement of the role of energy-saving technologies and the spread of the use of alternative energy sources. Development of legal support of the policy in the field of

energy safety of Ukraine, in addition to the indicated directions, should also include: demonopolization of the market of energy resources; deregulation of the market by the state; reducing the level of corruption and the influence of the political will of the ruling elites on the energy market of Ukraine.

It is concluded that the domestic state policy in the field of energy safety has a significant number of positive decisions, in accordance with the mutual obligations that were dictated by the Association Agreement with the EU. At the same time, it should be noted that there is a wide range of problems that today impede the achievement of the goals of energy safety and the integration of Ukrainian energy systems into a single European space. Among them should be taken into account the lack of deregulation policy in the energy sector, the lack of optimization and systematization of energy legislation, its conflict and tolerance to the monopoly position of energy market participants. Ukraine should establish closer relationship with the EU on the integration of its energy systems into the EU energy systems, initiate the creation of international, public law institutions to strengthen cooperation on all key energy safety issues, which will be not only advisory, but also the possibility of direct influence on the process of Ukraine's entry into a uniform EU energy system.

References

- Association Agreement between Ukraine, on the one hand, and the European Union, the European Atomic Energy Community and their Member States, on the other hand (2014, September 16). Available at: https://zakon.rada.gov.ua/laws/show/984_011201
- Brovynskaya M., Golovatjyk Y, Nekraschuk O and others (2017). Schemes against independence. Project of Liga.net. Available at: https://project.liga.net/projects/corruption_schemes/.
- Commission of the European Communities, United Kingdom of Great Britain and Northern Ireland v French Republic, Ireland, 23/10/1997/CURIA, Case Law, Available at: <http://curia.europa.eu/>.
- Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. *Second Strategic Energy Review An EU Energy Safety and Solidarity Action Plan* (2008). Available at: <http://eur-lex.europa.eu>
- Communication from the Commission. Energy for the Future: Renewable sources of energy. *White Paper for a Community Strategy and Action Plan*, 1997, 26/11. Available at: http://ec.europa.eu/energy/library/599fi_en.pdf.
- Degtyaryov K. O. (2012) Legal regulation of liberalization of gas and electricity markets in the European Union: author's abstract of the PhD thesis, Moscow, 26.
- Directive 2003/54 / EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92 / EC - Statements made in relation to decommissioning and waste management activities. *Official Journal*, L 176, 15.7.2003, 37-56.
- Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30 / EC. *Official Journal*, L 176, 15.7.2003, 57-78.
- Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity. *Official Journal*. L 027, 30.01.1997, P. 0020-0029.
- Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 on common rules for the internal market in natural gas. *Official Journal*. L 204. 21.07.1998, P. 0001-0012.
- Document of the Hague Conference on the European Energy Charter, signed at The Hague on 17 December 1991 (2004) *The Energy Charter Treaty and Related Documents. A Legal Framework for International Energy Cooperation*. Brussels: Energy Charter Secretariat, 223..

- EU imports of energy products - recent developments. *Statistics Explained Source: Statistics Explained*, 2019. Available at: <https://ec.europa.eu/eurostat/statistics-explained/pdfscache/46126.pdf>.
- Grabovich T.A. (2016) Legal Basis for EU Energy Safety Policy. Thesis for the PhD. degree, Odessa, 197.
- Green Paper - A European Strategy for Sustainable, Competitive and Secure Energy (SEC (2006) 317), COM (2006) 105 final, 8.3. Available at: http://europa.eu/documents/comm/green_papers/pdf/com2006_105_en.pdf
- Lipkova, L. a kol (2011). *Europska unia*. Bratislava: Sprint dva.
- Merezhko AA (2002) *Transnational Commercial Law (lex mercatoria)*, 464.
- Partnership and Cooperation Agreement between Ukraine and the European Communities and their member states of 14 June 1994. *Official Bulletin of Ukraine*, 2006, №. 24, Art. 1794.
- Regulation of the Cabinet of Ministers of Ukraine "On Approval of the Energy Strategy of Ukraine for the period up to 2030". *Verkhovna Rada of Ukraine*. 2013. № 1071. Available at: http://zakon3.rada.gov.ua/laws/show/n0002120_13.
- The Energy Community Treaty. *Official Journal*, 20.7.2006, L 198. Available at: <http://www.energy-community.org>
- The EU recommends that Ukraine postpone the introduction of a new electricity market. *Ukrainian Pravda*, 2019, 24 of May. Available at: <https://www.epravda.com.ua/news/2019/05/24/648125/>.
- The information agency "Interfax-Ukraine" (2017) Available at: <https://ua.interfax.com.ua/news/economic/480343.html>
- The Law of Ukraine: On Amendments to Some Laws of Ukraine on Provision of Competitive Conditions for the Production of Electric Energy from Alternative Energy Sources (2019) *Information from the Verkhovna Rada*. Available at: <https://zakon.rada.gov.ua/laws/show/2712-19>.
- The Law of Ukraine: On Ratification of the Energy Charter Treaty and the Energy Charter Protocol on Energy Efficiency and Related Environmental Aspects, *Bulletin of the Verkhovna Rada of Ukraine*, 1998, № 26, 150.
- The Law of Ukraine: On the Electricity Market, *Information of the Verkhovna Rada*. 2017, № 27-28. Available at: <https://zakon.rada.gov.ua/laws/show/2019-19>.
- The Law of Ukraine: On the National Commission, which carries out state regulation in the spheres of energy and utilities, *Vedomosti of the Verkhovna Rada*, 2016, № 51 Available at: <https://zakon.rada.gov.ua/laws/show/1540-19>.
- The Law of Ukraine: On the Natural Gas Market, *Information from the Verkhovna Rada*. 2015, 27. Available at: <http://zakon3.rada.gov.ua/laws/show/n0002120>.
- Treaty establishing the European Coal and Steel Community (Paris, 18 April 1951) Available at: <http://www.cvce.eu>.
- Treaty on the Functioning of the European Union, Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (2010 / C83 / 01) Available at: <http://www.minjust.gov.ua/file/23491.PDF>.