

The Europeanization of Georgian Energy Law: The Legal Harmonization Agenda

1. Introduction

Modernization of an obsolete national energy legislative infrastructure requires a so-called “paradigm shift” in legal thinking as well as a consistent course of reform which to follow. This course of reform is now largely driven by the partnership between the European Union (EU)¹ and the Government of Georgia and impacts the harmonization of Georgia’s energy regulatory framework under the footprint of EU legislation. Transposing EU energy legislation onto Georgia’s domestic legal system is the “remedy” for Georgia to systemize its currently unregulated energy sector. This transposition, however, presents considerable challenges to the country and uncovers substantial legal gaps. The objective of this paper is to address some of these challenges by analyzing the impact of the EU’s external energy policy on municipal law in Georgia.

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¹ Hereinafter the “EU” or the “Union”.

This article thus studies the tendencies of legal harmonization in Georgia's energy sector toward a liberal, competitive and transparent energy market. It also contributes to the practical and theoretical debates about the EU's role as an international actor promoting Europeanization. For this particular purpose, the second and third sections of the paper theorize on key concepts. The fourth section takes a closer look at specific legal tools and applies scrutiny of the EU-Georgia Association Agreement (AA) and the Energy Community Treaty (EnC) as EU-brokered instruments triggering the harmonization of Georgia's national energy law with EU law.

2. EU Energy Diplomacy in Georgia

The study of EU external relations must address the extraterritorial application of EU energy law and policy. Historically lagging behind other aspects of external relations, energy has only recently gained prominence, becoming a central element of today's EU foreign affairs priorities. Concerns over the security of supply² coupled with issues such as import dependability and limited diversification call for the EU to participate in international law making as one of the most important tools to mitigate risks and meet objectives regarding energy. Recognizing that "the price of failure is too high,"³ the EU actively engages in energy diplomacy and takes steps to strengthen its relations with neighbouring countries in the energy sector. This phenomenon can be called the "Europeanization of energy law" when the application of the EU's *acquis communautaire*⁴ (the "acquis") transcends national borders and is transposed onto the domestic energy regulatory regimes of non-EU countries.

² Notably, a significant amount of energy consumed in the EU is produced outside the EU and comes primarily from countries that are politically unstable and characterized by poor human rights and governance records.

³ Communication from the Commission of 10 November 2010 to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, 'Energy 2020 A Strategy for Competitive, Sustainable and Secure energy, COM(2010)639,10/11/2010,' 2.

⁴ The term is used to refer to all real and potential rights and obligations of the EU system, body of EU law and practice. More succinctly, it is legal jargon to refer to the EU's supranational legal and regulatory regime.

It is no longer a question that implementation of the *acquis* can extend beyond the EU member states and be incorporated into the legal obligations of non-EU countries.⁵ The EU, enjoying the capacity to enter into cross-border international relations, often refers to Europeanization as a twinned incentive structure between EU policymakers and external stakeholders.⁶

Georgia offers a typical example of such “stakeholder” participating in the European Neighbourhood Policy (ENP)⁷ and the Eastern Partnership Initiative (EaP),⁸ both political formats for expanding Europeanization, including in the field of energy. The country, re-entering the geopolitical arena following the collapse of the Soviet Union, is strategically located on key East–West transportation routes.⁹ Being an attractive alternative for the EU in transporting oil and gas from Central Asia to European markets,¹⁰ Georgia is characterized as an EU-focused “willing state” endeavouring to create a stable, competitive and market-oriented regulatory framework for energy.

3. Key Terms and Definitions

3.1. Conceptualizing the Europeanization of Energy Law

EU energy law covers the body of laws encapsulating rules governing energy-related matters concerning the union.¹¹ A great deal of energy legisla-

⁵ L. Dietz, L. Stirton, K. Wright, ‘South East Europe’s Electricity Sector: Attractions, Obstacles and Challenges of Europeanisation,’ *Elsevier, Utilities Policy* 17, 2009, 7.

⁶ Ibid.

⁷ For more information, see: The European Union External Action, ‘European Neighbourhood Policy (ENP)’ (<https://eeas.europa.eu>, 21 December 2016) <https://eeas.europa.eu/diplomatic-network/european-neighbourhood-policy-enp/330/european-neighbourhood-policy-enp_en> accessed 22 September 2018.

⁸ For more information, see: The European Union External Action, ‘Eastern Partnership (EaP)’ (<https://eeas.europa.eu>, 19 October 2016) <https://eeas.europa.eu/diplomatic-network/eastern-partnership/419/eastern-partnership_en> accessed 22 September 2018.

⁹ L. Alieva, N. Shapovalova, (eds.), ‘Energy security in the South Caucasus: views from the region,’ *FRIDE working paper*, 2015, 17.

¹⁰ M. Margvelashvili, A. Maghalashvili, T. Kvaratskhelia, L. Ushkhvani, G. Mukhigulashvili, *Georgian Energy Sector in the context of EU Association Agreement*, Tbilisi, 2015, 14.

¹¹ For a more detailed review of energy law and its specificities, see: A. J. Bradbrook, ‘Energy Law as an Academic Discipline,’ Vol. 14 (2), *Journal of Energy and Natural Resources Law*, 1996, 193–217.

tion¹² is now targeted at market liberalization, environmental issues, climate change, antitrust and state aid rules which, inter alia, constitute EU energy law. The body of law has gained momentum in the aftermath of the Lisbon Treaty introducing a new legal basis for energy. Article 194 of the Treaty on Functioning of the European Union spells out the EU key energy policy objectives and enshrines three policy principles in this field: competitiveness; security of supply; and sustainability. Therefore, the Europeanization of Georgia's energy legislation should hypothetically encapsulate these principles and endorse European values. In consideration of that fact, this paper addresses the practical implications and tangible impacts of Europeanization in the energy sector.

Originally, the research on “Europeanization” was concerned almost exclusively with domestic impacts in EU member states. In this context, Europeanization can be understood as a coherent body of rules of a supranational character, whereby EU law is an autonomous source of inspiration. Given this logic, the term “Europeanization” most commonly refers to the domestic impact of the EU driven by the requirements of EU membership. However, in light of the developments of European integration and of its wider impacts, this exclusive research focus no longer appears appropriate.¹³ To date, Europeanization can more broadly be interpreted as the process of adapting to the EU model of governance. In this far-reaching perspective, Europeanization is the recognition of EU law and principles as a major source of law in non-EU countries when such states attempt to transpose EU rules and concepts onto their national legislative and regulatory regimes.¹⁴ In other words, it is a process of “regulatory alignment” whereas the EU enjoys a certain leverage in neighbouring coun-

¹² Introduced gradually through different legislative packages, some of the key secondary legislation (directives, regulations and decisions) include the Electricity Market Directive of 1996 and the Gas Market Directive of 1998 (later superseded by Directive 2003/54/EC and Directive 2009/72/EC), various regulations addressing access to gas and electricity networks and other issues such as security of supply, renewable energy and energy efficiency, *inter alia*.

¹³ F. Schimmelfenning, U. Sadelmeier, ‘Candidate Countries and Conditionality in Europeanization: New Research Agendas’ (ed.) P. Graziano, P. M. Vink, *Palgrave Macmillan*, 2007, 88.

¹⁴ C. Ferreira, ‘The Europeanization of Law’ in J. Oliveira, P. Cardinal (eds.), *One Country, Two Systems, Three Legal Orders – Perspectives of Evolution*, *Springer-Verlag Berlin Heidelberg*, 2009, 171.

tries, including Georgia, and is a catalyst for reform through “third countries” mirroring its own mechanisms.

3.2. Effects of Legal Harmonization in Energy

Legal harmonization is identified as one mechanism of Europeanization which defines the dynamics EU transformative power in third countries. Harmony is a state of affairs in which otherwise disjointed matters come to be conjoined.¹⁵ Legal harmonization amounts to the assimilation of legal standards and norms through the massive diffusion and transposition of foreign norms. It is aimed at the co-existence of different legal systems and the creation of an organically-uniform legal system within the country.¹⁶ Harmonization of specific laws (as opposed to harmonization of whole legal systems) may necessitate the deployment of as little as a single transplant between different legal systems.¹⁷ To this end, Georgia’s energy legislation harmonization must be seen as the adaptation of domestic energy law norms to the EU standards. This is carried out by legislative activities aimed at reducing the legal regulatory variance between the municipal law of Georgia and the EU energy law.

The country’s gas and electricity sector is currently governed by the overarching Law of Georgia on Electricity and Natural Gas. The domestic energy regulatory framework also includes the Law of Georgia on Oil and Gas as well as secondary normative acts and other legislation adopted by the Georgian National Energy and Water Supply Regulatory Commission (GNERC) responsible for licenses and permits.¹⁸ While the Law of Georgia on Electricity and Gas has undergone a number of amendments, energy legislation remains non-compliant with the EU’s Third Energy Package (with regard to the electricity and gas sector) targeted at achieving more competitive mar-

¹⁵ A. E. Platsas, ‘The Harmonization of National Legal Systems Strategic Models and Factors,’ *Elgar Edward Publishing*, 2017, 6.

¹⁶ I. Samkharadze, ‘Harmonization of Legal Systems: EU and Georgia,’ *Journal of Law*, №1, Tbilisi, 2015, 322.

¹⁷ *Ibid*, 704.

¹⁸ GNERC, ‘Legal Acts adopted by the Commission’ (<http://gnerc.org/en/legal/komisiis-miermigebuli-samartlebrivi-aqtebi>) accessed 22 September 2018.

kets, unbundling energy suppliers from network operators, strengthening the independence of regulators, promoting cross-border cooperation between transmission system operators and increasing transparency in the retail market to benefit consumers.¹⁹ Additionally, Georgian energy legislation does not enshrine tangible renewable energy and energy efficiency standards, nor does it establish national sustainable energy targets in line with the EU 2030 strategy.²⁰

Taking that Georgia's current energy legislation and regulatory regime is not aligned with modern regulatory standards, as listed above, energy legal harmonization is an absolute necessity for the country to modernize its energy regulatory framework and to align with the EU's liberal market model.²¹ Georgia's aspiration to approximate its legislation to the EU's core requirements is possible to realize by deploying proper codification and enforcement measures that ensure consistent transformation processes. To facilitate such a transformation, it is of great importance to study the concrete instruments employed by the EU to externalize energy legislation and regulation. These are further explained in the following chapter.

4. EU Instruments for Externalizing Energy Matters

4.1. Rudiments of Georgian Energy Harmonization: The Association Agreement

In pursuit of its external energy policy the EU primarily uses conditional-ity to create a network of legal, political and administrative obligations with

¹⁹ European Commission, 'Market legislation,' <https://ec.europa.eu/energy/en/topics/markets-and-consumers/market-legislation> accessed 22 September 2018.

²⁰ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A policy framework for climate and energy in the period from 2020 to 2030,' Brussels, 22.1.2014 COM(2014) 15 final.

²¹ Liberalization can be thought of as a reformist approach wherein the hierarchical "top-down" mechanism is replaced by market-based relationships.

partner countries.²² Apart from the institutional machinery for political leverage and technical assistance²³ the EU employs various complementary and targeted frameworks ranging from the specific energy provisions of bilateral agreements with third countries (i.e., Free Trade Agreements, Partnership and Cooperation Agreements, Association Agreements) to multilateral treaties such as the Energy Community Treaty and Energy Charter Treaty, which are regional or national scope.²⁴ These regimes are characterized by differentiated legal force varying from soft law to binding law and therefore affect the energy markets of other states to a greater or lesser extent.²⁵ Georgia participates in the Association Agreement process and it has further acceded to the Energy Community Treaty.

Generally speaking, the AAs provide preferential access to EU markets, often with a view to eventual entrance to the EU customs union.²⁶ This characterizes the EU–Georgia Association Agreement of 2014. In its legal nature, the AA is an international treaty binding on Georgia and enjoying supremacy over its national laws as long as it does not contradict the Constitution and the Constitutional Law of Georgia.²⁷

While the AA mandates the harmonization of Georgian legislation with EU law in a number of fields, the energy sector is one crucial aspect. Article 297 of the AA defines the general principles of cooperation between the EU and Georgia as partnership, mutual interest, transparency and predictability, all of which reflect the EU’s endeavour to support the modernization of Georgia’s energy legislation through harmonization. Annex XXV of the AA specifies the concrete EU legal acts (regulations and directives) that must

²² T. Walde, ‘The International Dimension of EU Energy Law and Policy’ in M. Fitzmaurice, M. Szuniewicz (eds), *Exploitation of Natural Resources in the 21st Century*, *Kluwer Law International*, 2003, 17.

²³ The EU has employed various technical assistance programmes such as TACIS, PHARE, SYNERGY, EU4Energy (ongoing) to support partner countries in shaping their domestic policy and strengthening legislative and regulatory frameworks. Although these programs are targeted toward helping recipients obtain expertise, they also provide means for exerting EU influence on the energy policies of “willing states”.

²⁴ V. B. Vooren, A. R. Wessel, *EU external Relations Law, Text, Cases and Materials*, Cambridge University Press, 2014, 451.

²⁵ H. Krüger, *European Energy Law and Policy*, Edward Elgar Publishing, 2016, 216.

²⁶ K. Talus, *EU Energy Law and Policy: A critical Account*, Oxford University Press, 2013, 9.

²⁷ Constitution of Georgia, Article 6 (2).

be implemented in the fields of electricity, natural gas, oil, renewable energy and energy efficiency. The following EU legislative acts, inter alia, are examples of the legal approximation agenda to which Georgia's domestic legislation should be harmonized: Electricity Directive (2009/72/EC); Gas Directive (2009/73/EC); Oil Directive (2009/119/EC); Renewable Energy Directive (2009/28/EC); and three key Energy Efficiency Directives (2006/32/EC, 2010/31/EU, 2010/30/EU). Georgia is committed to the EU association timeline which requires the establishment of national energy regulatory authorities and sector-specific national programs in due course.

4.2. The Multilateral Regime: Energy Community Treaty

The Energy Community Treaty, an example of “sector-based normative multilateralism” (Blockmans, 2012), is another principal instrument for modernizing Georgia's energy sector. The Energy Community's launch represents reinforcement of the EU external energy policy regime and a bold experiment in Europeanization.²⁸ It further can be seen as a proactive effort by the EU to create a pan-European energy network whereas the contracting parties commit to implementing EU energy law in their national energy systems.²⁹

In common with the Association Agreement, the EnC establishes a specific legal harmonization agenda for partner countries to adopt the *acquis* in the areas of electricity, gas, oil, security of supply and infrastructure as well as legislation related to environmental protection, competition and renewables, energy efficiency and energy statistics.³⁰ Article 10 of the Treaty explicitly requires each contracting party to implement the *acquis* with regard to energy.

Georgia's accession to the Treaty regulated by the Accession Protocol³¹ can loosely be considered an “endorsement” of already-assumed legal ob-

²⁸ M. Roggenkamp, C. Redgwell, A. Ronne, L. Guayo, *Energy Law in Europe*, Oxford University Press, 2007, 202.

²⁹ M. Wustenberg, K. Talus, *Risks of Expanding the Geographical of EU Energy Law*, *European Energy and Environmental Law Review*, 2017, 139.

³⁰ S. Blockmans, V. B. Vooren, ‘Revitalizing the European Neighbourhood Economic Community: The Case for Legally Binding Sectoral Multilateralism,’ *Working Paper, Leuven Centre for Global Governance Studies*, No. 91, 2012, 15.

³¹ Protocol Concerning the Accession of Georgia to the Treaty Establishing the Energy Community.

ligations under the Association Agreement and the obvious manifestation of a reliable energy partnership with the EU. Primary and secondary energy legislation in Georgia currently incorporates some aspects of regulation and rules in accordance with EU principles. However, complying with the EnC requirements oblige Georgia to significantly alter its energy legislation and to create a new market framework to achieve security of supply, competitiveness and sustainability goals.³²

The report on compliance with the energy acquis,³³ the first-ever comprehensive document assessing Georgia's progress with respect to EnC requirements, finds the country has demonstrated its willingness to establish itself as a successful energy partner with the EU. Although the country has already implemented a number of reforms to accelerate its transformation from a post-Soviet republic, its energy market framework remains heavily influenced by the Soviet legacy. This is most evident in poor performance in terms of competitiveness and the absence of a regulatory framework to stimulate smart energy solutions.³⁴ In consideration of the difficulty of this process, in some cases Georgia is able to request derogations from its obligations for certain periods of time. This allows the country to implement EU rules sequentially but diligently, without harming public and private energy interests.

5. Conclusion

This article looked at the potential of EU transformative power on the Georgian energy market. Upon measuring the practical impacts of extraterritorial application of EU energy law in Georgia, the article concluded that implementation of the EU-Georgia Association Agreement and Energy Commu-

³² G. Narmania, N. Sumbadze, 'Possible Challenges of Harmonization of Georgian Legislation with the Acquis Communautaire of the European Union in Energy Sector,' *PMC Research Center or Konrad Adenauer Foundation, Policy Paper*, Tbilisi, 2014, 3.

³³ Energy Governance in Georgia, Report on Compliance with the Energy Community Acquis, Energy Community Secretariat, July, 2017.

³⁴ Ibid.

nity Treaty, as mutually reinforcing instruments,³⁵ requires the Government of Georgia to render the sector more transparent and liberal.

A so-called EU “legal external policy”³⁶ ensures, that Georgia’s energy framing process is in line with the energy community acquis. The incoming Law of Georgia on Energy, drafted with the assistance of the EnC secretariat,³⁷ is a giant leap toward implementation of the acquis. Although the draft law, which requires repealing the primary Law on Electricity and Natural Gas, remains under discussion at the ministerial level, the draft law should be seen as instrumental to energy sector reform accommodating the principles of the EU’s Third Energy Package.

To summarize, the Europeanization of Georgia’s energy sector is in progress and the implementation of EU energy norms in Georgia’s domestic legal system is an irreversible process. However, law as a tool for the external energy policy requires the unfailing scrutiny of enforcement measures and diplomatic dialogue.³⁸ The success of Europeanization is largely dependent on the following factors: the EU should be willing to employ more sophisticated mechanisms for strengthening energy governance in Georgia; and that process must be go along with sufficient administrative supervision and capacity-building actions at the municipal level. ■

³⁵ These international treaty mechanisms are interchangeable in terms of their legal purpose. Given the argument for dynamic harmonization, it is recommended to pursue the EnC agenda as it is a relatively new mechanism for Georgia and entails a supportive approach (including financial and technical mechanisms) from the Union. In cases of overlap, Article 218 of the AA applies, which governs the relationship between the Association Agreement and Energy Community Treaty and states that during conflicting situations the provisions of the Energy Community Treaty shall prevail as the more concrete and sector-specific legal instrument.

³⁶ N. Pradel, ‘The EU External Energy Policy and the Law: Does the EU Really Matter?’ L. Squintani, M. Reese, B. Vanheusden, ‘Sustainable Energy United in Diversity – Challenges and Approaches in Energy Transition in the European Union,’ *European Environmental Law Forum Book Series*, Vol. 1, 2014, 245.

³⁷ EU Neighbours East, ‘Georgia close to finalising new Energy Law in line with EU standards’ (www.euneighbours.eu, 1 December 2017) <<https://www.euneighbours.eu/en/east/stay-informed/news/georgia-close-finalising-new-energy-law-line-eu-standards>> accessed 25 September 2018.

³⁸ N. Pradel, ‘The EU External Energy Policy and the Law: Does the EU Really Matter?’ L. Squintani, M. Reese, B. Vanheusden, ‘Sustainable Energy United in Diversity – Challenges and Approaches in Energy Transition in the European Union,’ *European Environmental Law Forum Book Series*, Vol. 1, 2014, 245.