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Towards a Common Gas Market: The Reform and Integration of the Domestic Natural Gas Markets of the Eurasian Economic Union

Shaimerden Chikanayev*

Abstract

This article analyzes the progress made by the Eurasian Economic Union (EAEU) in designing and implementing its common gas market and examines the different attitudes of Russia and Kazakhstan to the reform of their domestic gas markets, and the effect of such reforms on the energy security and energy transition in this region, especially in the context of the global energy crisis of 2022 caused by the war in Ukraine. The author also draws attention to the tensions between the shelving of reforms to the domestic gas market in Russia and the acceleration of the liberalisation of Kazakhstan's domestic gas market. These tensions may prejudice the formation of the EAEU's common gas market and even threaten the future existence of the EAEU itself.

Keywords: *Eurasian economic union, EAEU, common gas market, third party access, unbundling, state regulation of gas prices, tariff regulation of pipelines gas transportation services, energy transition, energy security.*

I. Introduction¹

The war unleashed by Russia in Ukraine in February 2022 led to “the first truly global energy crisis in history”.² In the “new reality”, cardinal and urgent adjustments to the energy strategies and laws of many countries are obviously required, as well as a fundamental rethink of the role of interstate gas markets in the energy transition and energy security, including from the point of view of influencing the legal regulation of national and regional gas markets.

The urgent need to reevaluate the role of interstate gas markets in the energy transition and ensuring energy security is especially urgent for the direct participants in the “gas war” unleashed by Russia: firstly, the European Union (EU) with its single gas market, which is the largest importer of Russian gas; and secondly, Russia, which will have to solve the problem not only in an emergency mode redirection of gas flows from West to East, but also take into account the regulatory aspects of the common gas market to be created within the framework of the Eurasian Economic Union (EAEU)³, which is scheduled to be launched on 1 January 2025. The ongoing gas war between Europe and Russia will inevitably produce a tectonic shift

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² IEA, 2022. Gas Market Report, Q3-2022. Paris: IEA. <https://www.iea.org/reports/gas-market-report-q3-2022>

³ The Eurasian Economic Union (“EAEU” or “EEU”) is a Russian-led economic union between the Republic of Armenia, the Republic of Belarus, the Republic of Kazakhstan, the Kyrgyz Republic and the Russian Federation, which together control a fifth of the world’s gas reserves. See video lecture “Common Gas Market of the EAEU” dated 12 January 2022 and given by Alexander Malets, Deputy Head of the Oil and Gas Policy Department of the Energy Department of the Eurasian Economic Commission. Available at (in Russian): <https://www.youtube.com/watch?v=lggg2Fzry3k>

not only in the global gas market, and will also reduce the prospects for the successful creation of the EAEU's common gas market. It has already become obvious that ensuring energy security will take priority for Russia over its geopolitical aspirations of recreating the Soviet Union by way of the EAEU. Indeed, the launch of the EAEU's common gas market does not provide any economic benefits to Russia and Kazakhstan, as gas exporters that use super-profits from gas exports to cross-subsidise their populations and industry. Russia and Kazakhstan, therefore, have been interested in maintaining the *status quo* in the regulation of their domestic gas markets, because this enables their state-owned vertically integrated gas companies (i.e. Gazprom PJSC ('Gazprom') in Russia and JSC NC QazaqGaz ("QazaqGaz") in Kazakhstan) to continue their practice of cross-subsidising their own local population and local industries at the expense of foreign consumers, as well as their remote regions at the expense of their gas-producing regions.

Nevertheless, the 'new reality' (i.e. the collapse in demand for natural gas from Russia in Europe because of the war in Ukraine) and the imminent official launch of the common gas market of the Eurasian Economic Union in 2025 require urgent and long-overdue reforms of the domestic gas markets in Russia and Kazakhstan. The war in Ukraine has already resulted in a significant drop in imports from Russia of pipeline gas to Europe, that has only partially counterbalanced by a noticeable increase in imports of pipeline gas from Russia to China. Moreover, it should be expected that countries and regions with natural gas reserves, such as the EAEU (in particular Russia and Kazakhstan, as its main gas suppliers), will place more emphasis on domestic consumption of natural gas within the borders of the EAEU than on exports. Russia faces the challenges of increasing the competitiveness of its domestic industry, gasifying the country at the expense of cheap domestic gas, and "pivoting to Asia". It is now subject to substantial international sanctions, and faces the prospect of a complete embargo on oil and gas and, accordingly, the lack of windfall profits from gas exports to Europe. Overcoming these challenges will require the Russian economy and the Russian gas industry to be placed on a war footing. Russia is already developing a new energy strategy with a planning period until 2050, since its current strategy, although adopted as recently as June 2020, is no longer relevant, because it does not take into account the global challenges and transformations in energy markets caused by the war in Ukraine. In particular, natural gas is likely to play a much larger role in Russia's new energy strategy than it used to do. Interestingly, Kazakhstan, another gas-endowed country within the EAEU, has also reset its energy priorities. Its 'Comprehensive Development Plan of the Gas Industry until 2026', adopted in July 2022, confirms a key role of natural gas in future energy balance and whole economy of the country, whereas before the gas industry in Kazakhstan was largely neglected.

The next few years, therefore, will see a real test for the principle of energy solidarity in the EAEU law⁴ as well as the willingness of Russia to create the EAEU's common gas market and, therefore, to move forward with real integration of national economies under the auspices of the EAEU. It has yet to be seen, in particular, whether Russia and its gas industry are ready to effectively subsidise economies of other member states of the EAEU or, as they say, "Bolívar cannot carry double".

⁴ It can be argued that there is a legally enforceable principle of solidarity in the law of the EAEU, since in accordance with Article 79 of the EAEU Treaty, the EAEU member states have pledged to "conduct a coordinated energy policy". According to Boute, this principle of solidarity exists in EU law. See: Anatole Boute, *The Principle of Solidarity and the Geopolitics of Energy: Poland v. Commission (OPAL Pipeline)* (2020). *Common Market Law Review*, Volume 57, Issue 3 (2020) pp. 889 – 914

II. Legal Basis for the Common Gas Market of the EAEU

It is evident that the regionalization of economies is actively taking place in the world, including in the form of integrations of national gas markets. In particular, within the framework of the EAEU, the EAEU law has emerged as a new regional legal system and a common gas market is being created, and the EAEU member states have pledged to pursue a coordinated energy policy. Accordingly, since Russia uses its weight to determine the development of the EAEU, and the other EAEU member states welcome the prospect of gaining a competitive advantage due to cheap Russian gas, we should expect an increase in the role of natural gas in the energy balance of all EAEU countries. As EAEU law as a new regional law prevails over the domestic laws of individual EAEU member-countries, consent to obey common rules under the EAEU law by its member states is another example of states conceding powers over their national energy economies – i.e., a very rare exception from the predominant energy nationalism of the states. The only similar example internationally in the gas sector is, of course, the single gas market of the EU, based on the consent to common rules in an energy chapter of the European Union Treaty.

The legal basis for the undergoing formation of the common gas market of the EAEU consists of the following major legal instruments:

- 1) Articles 79, 80, 83, 85 and 104 of the Treaty on the Eurasian Economic Union dated 29 May 2014 (the “EAEU Treaty”).
- 2) The Protocol on the Rules of Access to Services of Natural Monopoly Entities in the Sphere of Gas Transportations Using Gas Transportation Systems, including Fundamental Pricing and Tariff Policy as Annex 22 to the EAEU Treaty (the “Annex 22”).⁵
- 3) The Concept of Formation of the Common Gas Market of the EAEU as approved by Decision No. 7 of the Supreme Eurasian Economic Council dated 31 May 2016 (the “Concept”).
- 4) The Program for the Formation of the Common Gas Market of the EAEU as approved by Decision No. 18 of the Supreme Eurasian Economic Council dated 6 December 2018 (the “Program”).⁶
- 5) The Plan of Measures to Form the Common Gas Market of the Eurasian Economic Union as approved by Decision No. 18 of the Supreme Eurasian Economic Council dated 6 December 2018 (the “Plan”).⁷
- 6) The Procedure for the Submission of Information in Electronic Form by the Authorized Bodies of the Member States of the Eurasian Economic Union Within the Framework of the Formation of the Common Gas Market of the Eurasian

⁵ Importantly, in accordance with Article 104 of the EAEU Treaty, the provisions of Annex 22 shall cease to be effective once the Gas IGA, as defined below, takes legal effect.

⁶ According to this Program, the establishment of the EAEU’s common gas market is planned to be carried out in three phases. According to Decision No. 21 dated 11 December 2020 of the Supreme Eurasian Economic Council, the leaders of the EAEU member states decided to move to the second phase of establishing the EAEU’s common market for natural gas. While according to section 12 of the Program the second phase should have been completed no later than 1 January 2022 with the creation of the infrastructural, technological and legal bases of the common gas market, as of end-November 2022 the second phase was still not officially completed, meaning that the creation of the EAEU’s common gas market is already behind schedule.

⁷ Unlike other legal instruments from this list, the Concept, the Program and the Plan constitute soft law and not the hard law of the EAEU. The Plan provides a list of other legal acts and timeline of their development in furtherance of further improvement of the legal basis for the common gas market of the EAEU.

Economic Union as approved by Decision No. 146, dated 2 September 2019, of the Board of the Eurasian Economic Commission.

- 7) In accordance with section 33 of the Program, an international agreement on the formation of the common gas market of the EAEU (the “Gas IGA”) shall be developed⁸ and it should include, among other things, the following:
- a) principles of functioning and regulation of the common gas market of the EAEU;
 - b) the procedure for interaction of the Member states of the EAEU in the transportation and supply of gas from third states and (or) to third states, including ensuring the prevention of resale to third states of gas purchased on the common gas market of the EAEU;
 - c) principles of ensuring access to gas transmission systems;
 - d) principles of pricing and tariff policy formation in the common gas market of the EAEU;
 - e) the procedure for disclosure of information by Member states and subjects of the common gas market of the EAEU and the formation of a list of information to be disclosed;
 - f) the procedure for the exchange of information containing information related, in accordance with the legislation of the Member states, to information of limited distribution (access);
 - g) the list of information provided in the course of interaction of authorized bodies, the Eurasian Economic Commission and subjects of the common gas market of the EAEU in electronic form;
 - h) the procedure for the adoption of acts regulating the common gas market of the EAEU and providing for the non-application of these acts with respect to gas originating from the territories of third States and used in the territories of Member States or supplied by this Member State in the territories of third States, as well as gas produced in the territory of a Member State and supplied by this Member State to third States.

III. The Common Gas Market as the Legal Notion and its Target Model

The EU and the EAEU, along with their respective member nations, have chosen different approaches to regulating their supranational gas markets and reforming their national gas markets. These differences undoubtedly affect the role of natural gas in energy security and in the energy transition in their respective geographical regions. The existing differences in their approaches to integration and reforming their interstate gas markets will surely widen in the years ahead, since “in response to the war in Ukraine, diversification of supplies away from Russia is now a priority, increasing the importance of geopolitics in the EU gas market architecture”.⁹

⁸ The future model of the EAEU’s common gas market will be finally determined in this special international treaty (i.e. Gas IGA) to be adopted, in theory, by end-2022 under the EAEU framework. The draft of the Gas IGA as an agreement has been developed by Russia and was presented for consideration by other EAEU member states at the end of April 2021. At end-November 2022 three key disputes hindered the conclusion of the Gas IGA: (i) formation of tariffs for gas transportation services, (ii) import of gas by the EAEU member states from third countries and (iii) existing long-term bilateral international agreements between the EAEU member countries in the field of gas, provisions of which contradict general principles of the EAEU’s common gas market.

⁹ Boute, A., 2022. Shaping the Eurasian gas market: the geopolitics of energy market regulation. *Geopolitics*. P. 19.

1. Common Gas Market as a Legal and Economic Concept

There is a clear difference, both legally and in economic terms, between the concepts of a “common gas market” and a “single gas market”, as they suggest different degrees of integration of domestic gas markets. In the EAEU’s common gas market (as opposed to the EU’s single gas market), domestic gas markets are subject to national state regulation, including the right to erect barriers to access to the national markets.

The EU’s single gas market was created on the basis of the Anglo-American liberalization and privatization “textbook”, while the design of the EAEU’s future common gas market is largely based on the architecture of the Russian domestic gas market. The Russian gas market in its turn continues to be organized in accordance with the quasi-monopolistic principles of a command economy, with Gazprom as a state-owned and vertically integrated gas company dominating gas production, supply and transportation through its direct and indirect subsidiaries.

Neither international law nor the local legislation of member-countries of the EAEU provide a legal definition of the term “common gas market”. The EAEU law as a regional law also does not provide a legal definition of “common gas market”, however, in accordance with Article 2 of the EAEU Treaty “common (single) market” means “a set of economic relations within the Union ensuring the freedom of movement of goods, services, capital and labour”. There is also a specific definition of the “common gas market of the Union” in the Concept, which is strictly speaking not a legal act, but an instrument of the soft law of the EAEU, as “a set of trade and economic relations between economic entities of the EAEU’s member states in the field of gas transportation and supply between the EAEU’s member states” (see Chapter II of the Concept). In order to understand what the proposed market design of the EAEU’s common gas market is (i.e. what the EAEU’s common gas market is), it seems necessary first to understand the objectives and principles of the interstate gas markets integration in the EAEU. As the “common gas market” is more an economic than a legal concept, an interdisciplinary approach is also needed for a better understanding of this notion.

On the surface, it seems that single gas market of the EU¹⁰ would have a lot in common with the common gas market of the EAEU, because both the EU and the EAEU are in the process of integrating and reforming their domestic gas markets. Any resemblance between the EU’s interstate gas markets integration target model (i.e. market design)¹¹ and the EAEU’s interstate gas markets integration target model, however, stops there. Unlike their EU counterparts, the national gas markets of the EAEU countries will not be absorbed, but will display a variety of functional models (i.e. gas market designs). For instance, in the language of economists, Kazakhstan has adopted (and seems eager to keep) the so-called “main buyer” gas market model for its domestic gas market, whereas Russia’s domestic gas market is stuck in transition

¹⁰ The EU’s single gas market is both the first and the only properly functioning interstate gas market in the world. See: Eremin Sergey, Dontsova Anna. “Experience of integration associations in the formation of the common natural gas market of the Eurasian Economic Union// Innovation and investment. 2016. #8. Available at (in Russian): <https://cyberleninka.ru/article/n/opyt-integratsionnyh-obedineniy-v-formirovanii-obschego-rynka-prirodnogo-gaza-evraziyskogo-ekonomicheskogo-soyuza>.

¹¹ I.e. approaches, principles and mechanisms of functioning of the market. See: Khalova G.O., Abakumova M.M. “Issues of forming a unified gas market of EAEU states” // Innovations and investments. 2019. #9. P. 347. Available at (in Russian): <https://cyberleninka.ru/article/n/voprosy-formirovaniya-edinogo-gazovogo-rynka-gosudarstv-eaes>.

somewhere between an oligopoly and monopolistic competition.¹² The domestic gas markets of Armenia, Belarus and Kyrgyzstan are at the initial stage of formation and are dominated by Gazprom, so have no great importance for the formation of the EAEU's common gas market. As Zemskova has noted, "one of the most striking and discussed features of the EAEU is an asymmetry of its energy markets and the unevenness of the interests of the participating states".¹³

Consequently, it is not an accident that an interstate gas market as a target market design in the EU is called a *single* gas market, whereas in the EAEU such interstate gas market as a target design is called a *common* gas market. The term "common market" was deliberately substituted for "single market" during the negotiations for the EAEU Treaty to make it clear that the member countries of the EAEU were not yet ready for a single gas market and wished to maintain the structural peculiarities of their domestic energy markets, accepting all the consequences that might ensue from doing so.¹⁴ Indeed, according to many economists, generally, there is a three-stage evolution of any interstate integration of gas markets depending on the level of integration:

- 1) Stage 1 – common gas market.
- 2) Stage 2 – single gas market.
- 3) Stage 3- unified gas market.¹⁵

Some Russian economists suggest defining the common gas market in the strict sense of the term as the free purchase and sale of gas between businesses (suppliers and consumers) of the participating countries of the common market, to be secured by way of non-discriminatory access of these businesses to the main gas pipelines in the territory of each member state of the common gas market.¹⁶ The main difference between single and common gas markets is, evidently, that in a common gas market, unlike the single gas market, domestic gas markets are preserved through national state regulation, which encompasses the erection of barriers to access to the national market (i.e. supranational regulation in the common gas market is either weak or non-existent). Other scholars also suggest checking whether mutual gas delivery between countries of relevant gas market is in the export or domestic market mode, as the key criterion for differentiation between the common and single gas markets.¹⁷ Indeed, one of the

¹² Eremin. S.V. Presentation "Common gas market of the Eurasian economic Union: initial prerequisites and prospects for formation" at the International Conference "Energy of Eurasia: new trends and prospects" held in Moscow on 4 December 2015. P.6. Available at (in Russian): <https://docplayer.ru/27997453-Obshchiy-rynok-gaza-evraziyskogo-ekonomicheskogo-soyuza-ishodnye-predposylki-i-perspektivy-formirovaniya.html>

¹³ Kristina Zemskova. "The Common Energy Market of the Eurasian Economic Union: Implications for the European Union and the role of the Energy Charter Treaty (ECT)". Energy Charter Secretariat. 2018. P.11. Available at:

https://energycharter.org/fileadmin/DocumentsMedia/Occasional/1The_common_energy_market_of_the_EAEU-implications_for_the_EU_and_the_role_of_the_ECT.pdf

¹⁴ Makarov Alexander, Davtyan Vague. "Expanding energy cooperation between Armenia and the EAEU countries, taking into account the prospects for creating common markets. P.76. // Geo-Economics of energy. 2019. #3. Available at (in Russian): <https://cyberleninka.ru/article/n/rasshirenie-energeticheskogo-sotrudnichestva-armenii-so-stranami-eaes-s-uchyotom-perspektiv-sozdaniya-obschih-rynkov>.

¹⁵ Belogoryev, Alexey. "Prerequisites for development of common inter-state gas markets". (2015). P.2. Available at (in Russian): https://www.fief.ru/img/files/Obsie_rynki_gaza_stat_14.10.2015_.pdf

¹⁶ Ibid. P.3.

¹⁷ Eremin. S.V. Presentation "Common gas market of the Eurasian economic Union: initial prerequisites and prospects for formation" at the International Conference "Energy of Eurasia: new trends and prospects" held in Moscow on 4 December 2015. P.7. Available at (in Russian): <https://docplayer.ru/27997453-Obshchiy-rynok-gaza-evraziyskogo-ekonomicheskogo-soyuza-ishodnye-predposylki-i-perspektivy-formirovaniya.html>

outstanding issues in connection with the formation of the EAEU's common gas market is whether the supply of gas, for example, from Russia to Belarus or Armenia will be considered as an export or not. The shape of the "market architecture" (i.e. the design of the EAEU's common gas market) will largely depend on the answer to this question.¹⁸ Interestingly, Belogoryev¹⁹ believes that the EAEU Treaty does not clearly state the nature of the common gas market of the EAEU (i.e. whether it is indeed a "common gas market" or merely a gas free trade zone) and he suggests that the proposed gas market design of the EAEU common gas market should be clearly formulated only in the Gas IGA. Eremin²⁰ shares this opinion. He noted that it is yet not clear what the proposed model of the EAEU common gas market is. Would it be a gas trade among multiple private and state-owned companies on the competitive gas market (i.e. liberal model²¹ of the EAEU's common gas market development) or would it be just interstate gas trade between EAEU state members represented by a few "authorized" companies (i.e. monopolistic model of the EAEU's common gas market development)? Shadrina²² has observed that "apparently, the creation of a full-fledged competitive gas market is not an ultimate objective of the EAEU's common gas market initiative. The proposed institutional design demonstrates consolidation of member states in their acceptance of large-scale monopolistic actors backed by respective national governments with a limited inclusion of competition-enhancing instruments, such as, for instance, trading *via* gas exchanges." Some Russian researchers²³ even claim that Russia and Kazakhstan do not want to create a common gas market, despite their official statements to the contrary, and that 2025 will see, instead of a real "common gas market", merely new rules for a gas trade between the EAEU member states (i.e. there will be no real integration of domestic gas markets of the EAEU member states). Interestingly, not only lawyers and economists, but also politicians see the difference between a "common gas market" and a "single gas market", though the criteria they use seem to be different. Russian President Vladimir Putin clearly rejected the possibility of imposing a

¹⁸ Interview with Igor Yushkov, (the leading expert of the Russian National Energy Security Fund and an expert of the Financial University under the Government of the Russian Federation) given on 28 April 2017. Available at (in Russian): <http://caspiabarrel.org/ru/2017/04/ot-obshhego-rynka-gaza-eaes-vyigrayut-belorussiya-i-armeniya/>

¹⁹ Belogoryev, Alexey. "Prerequisites for development of common inter-state gas markets". (2015). P.9. Available at (in Russian): https://www.fief.ru/img/files/Obsie_rynki_gaza_stat_,_14.10.2015_.pdf

²⁰ Eremin S.V. "Natural gas markets in the context of international economic integration: directions of transformation, key factors and challenges". Dissertation for the degree of Doctor of Economic Sciences. National University of Oil and Gas "Gubkin University". Moscow. 2018. P. 234.

²¹ Eremin foresees only two potential alternatives (formats) for the creation of the EAEU's common gas market: so-called "liberal integration" that is something closer to the EU's single gas market; and so-called "regulated integration" that is something closer to interstate gas market in the Mercosur. Eremin believes it is not yet clear which of the two above formats (i.e. liberal or regulated integration) will be chosen as it is a highly sensitive issue from both the economic and political perspective, as discussed herein, but it will be clear once the Gas IGA is adopted. For more information of how Eremin distinguishes "liberal" and "regulated" formats of the proposed EAEU's common gas market see: Eremin. S.V. Presentation "Common gas market of the Eurasian economic Union: initial prerequisites and prospects for formation" at the International Conference "Energy of Eurasia: new trends and prospects" held in Moscow on 4 December 2015. P.9. Available at (in Russian): <https://docplayer.ru/27997453-Obshchiy-rynok-gaza-evraziyskogo-ekonomicheskogo-soyuza-ishodnye-predposylki-i-perspektivy-formirovaniya.html>

²² Shadrina, Elena. (2018). The Common Gas Market of the Eurasian Economic Union: Progress and Prospects for the Institutionalisation. Region. Regional Studies of Russia, Eastern Europe, and Central Asia, 2018, 7(1): 105-37. 7. 105-137. 10.1353/reg.2018.0006. P. 122.

²³ E.g. the Head of the Center for the Study of the World Energy Markets of the Institute for Energy Research of the Russian Academy of Sciences Mr. Kulagin V. is of such opinion. See: Smirnova Yu. S. "The possibility of forming a common gas market of the Eurasian Economic Union in the context of globalization of regional gas markets // Innovation and investment. 2019. #5. P. 45. Available at (in Russian): <https://cyberleninka.ru/article/n/vozmozhnost-formirovaniya-obshchego-rynka-gaza-evraziyskogo-ekonomicheskogo-soyuza-v-usloviyah-globalizatsii-regionalnyh-gazovyh>.

uniform gas transportation tariff on the territory of the EAEU. “As to the uniform tariff offered by our Armenian and Belarusian friends for gas transportation and transit,” he said, “our opinion is that a uniform tariff may be realized only on a single market with a uniform budget and a uniform tax system. The Eurasian Economic Union has not reached such a deep level of integration yet”.²⁴ This means that Russia’s political elite sees the difference between the concepts of ‘common gas market’ and ‘single gas market’ and considers a ‘single gas market’ with ‘a unified tariff’ possible only if there is a sufficient political level of integration among EAEU member countries. The elites of Armenia, Belarus and Kyrgyzstan (and surely too, of Kazakhstan) are, however, not ready to give up an inch of sovereignty over their respective countries, even in exchange for subsidies in the form of cheap gas. There is a serious risk, therefore, that the gas tariff issue will become a dealbreaker not only for the proposed common gas market of the EAEU, but for the EAEU itself.

Many experts believe²⁵, therefore, that a “real” common gas market in the EAEU will be formed, if at all, no earlier than 2050. This is despite the fact that there are favorable preconditions for implementing deep integration processes in the gas sector and creation of the EAEU’s common gas market, including the following: (i) the presence of a developed gas transport infrastructure (i.e. Soviet era high pressure gas pipelines) and the historical experience of the functioning of the gas industry as a part of a single economic complex, (ii) an active gas trade among the EAEU member states (i.e. Russia is the main gas provider for Armenia, Belarus and Kyrgyzstan) and (iii) the significant resource potential of Russia and Kazakhstan.²⁶ It seems that the lack of a unified vision so far among the EAEU’s member states on the target model (i.e. market design) for the EAEU common gas market and the reforms of domestic gas markets needed for these purposes is the main obstacle to the creation of the EAEU’s common energy markets.²⁷ It is obvious that domestic energy markets integration requires compromises and synchronization of national energy strategies of all the EAEU’s member states to solve common problems.²⁸

²⁴ See the speech of President Putin at the summit of the Supreme Eurasian Economic Council on 19 May 2020. Available at (in Russian): <http://kremlin.ru/events/president/news/63367>

²⁵ E.g. see: Smirnova Yu. S. “The possibility of forming a common gas market of the Eurasian Economic Union in the context of globalization of regional gas markets // Innovation and investment. 2019. #5. P. 46. Available at (in Russian): <https://cyberleninka.ru/article/n/vozmozhnost-formirovaniya-obschego-rynka-gaza-evraziyskogo-ekonomicheskogo-soyuza-v-usloviyah-globalizatsii-regionalnyh-gazovyh>.

²⁶ E.g. see: Eremin Sergey, Dontsova Anna. “Experience of integration associations in the formation of the common natural gas market of the Eurasian Economic Union// Innovation and investment. 2016. #8. P. 46. Available at (in Russian): <https://cyberleninka.ru/article/n/opyt-integratsionnyh-obedineniy-v-formirovanii-obschego-rynka-prirodnogo-gaza-evraziyskogo-ekonomicheskogo-soyuza>.

²⁷ E.g. see: Illeritsky N.I. “Formation of a Eurasian Economic Union Common Gas Market: Challenges and Opportunities for PJSC “Gazprom”. // Innovations and investments. 2016. #8. Available at (in Russian): <https://cyberleninka.ru/article/n/formirovanie-obschego-rynka-gaza-evraziyskogo-ekonomicheskogo-soyuza-vyzovy-i-vozmozhnosti-dlya-pao-gazprom>.

²⁸ E.g. see Makarov Alexander, Davtyan Vague. “Expanding energy cooperation between Armenia and the EAEU countries, taking into account the prospects for creating common markets // Geo-Economics of energy. 2019. #3. P.83. Available at (in Russian): <https://cyberleninka.ru/article/n/rasshirenje-energeticheskogo-sotrudnichestva-armenii-so-stranami-eaes-s-uchyotom-perspektiv-sozdaniya-obschih-rynkov>.

2. Target Model of the EAEU's Common Gas Market

While the target model (design) of the EAEU's common gas market will only become clear after the Gas IGA is adopted²⁹, it is possible to predict, at least to a certain extent, the shape of the proposed EAEU common gas market by analyzing the objectives of its creation and the way these objectives are reflected in the relevant provisions of EAEU law. Indeed certain 'outlines' of the future 'architecture' of the EAEU's common gas market are already visible in the signed documents, including the EAEU Treaty, the Concept and the Program.

It is commonly believed that one of the EU's main objectives for creation of the single gas market was to lower gas prices for consumers by liberalizing the gas markets and inducing competition between gas producers and suppliers in the wholesale and retail segments. The objectives of energy integration as well as target interstate gas market models in the EAEU and in the EU, however, are very different.

Belogoryev suggests³⁰ that a common gas market should normally be created based on the following five objectives:

- 1) To bring member countries of the common gas market together, improving both the quality of their common integration, and the threshold of its irreversibility (i.e. integration of gas markets is considered as just one of many dimensions of integration of respective member-countries within the union and, therefore, political support for creation of the common gas market will be given even if such integration of gas markets does not produce any positive economic effect for these member countries).
- 2) To ensure equal economic conditions for business entities from member countries due to the relative equalization of gas prices (excluding transport costs component).
- 3) To improve the energy security of gas-deficient countries by ensuring direct access for their consumers to gas supplies from gas-surplus countries that are part of the common market, as well as in certain conditions for the free transit of gas from third countries.
- 4) To provide additional markets for independent gas producers from gas net exporter countries, which should contribute to the natural growth of competition in gas production.
- 5) To improve the organization of the internal gas markets of the participating countries (first of all, in terms of antimonopoly and price regulation) due to the implementation of measures to liberalize relations within the framework of the common gas market.

EAEU law provides two general and three specific objectives for the creation of the common gas market, as discussed below. However, because the interests of gas-consuming and gas-

²⁹ As mentioned above, many scholars believe that, subject primarily to Russia's political mood, EAEU member states have only two options for the creation of the EAEU's common gas market: either "regulated" integration or "liberal" integration of domestic gas markets. Depending on which of the two above will be in the end of the day reflected in the Gas IGA, all outstanding conceptual differences (e.g. gas pricing and gas transportation tariff) will be resolved accordingly. See: Eremin S.V. "Common gas market of the EAEU: initial prerequisites and prospects of formation". Presentation from the international conference "Energy of Eurasia: new trends and prospects" held on 4 December 2015 in Moscow. Available at (in Russian): https://www.imemo.ru/files/File/ru/conf/2015/04122015/1-04_Eremin.pdf. P. 8-11.

³⁰ Belogoryev, Alexey. "Prerequisites for development of common inter-state gas markets". (2015). P.3. Available at (in Russian): https://www.fief.ru/img/files/Obsie_rynki_gaza_stat_,_14.10.2015_.pdf

producing member states of the EAEU often clash, these officially-declared objectives represent a compromise and were intentionally formulated very ambiguously or as vague, symbolic declarations.

General objectives for the creation of the EAEU's common energy markets (i.e. not only the common gas market, but also the common oil and electricity markets) are stated in Article 79 of the EAEU Treaty, namely:

- 1) to effectively utilize the potential of the EAEU's member states fuel and energy complexes; and
- 2) to provide national economies with the main types of energy resources (electricity, gas, oil and petroleum products).

These general objectives are, evidently, of a declarative nature and do not add much to an understanding³¹ of the proposed market design/target model of the EAEU's common gas market.

The objectives of the creation of the EAEU common gas market have been specified in Section III of the Concept, as follows:

- 1) Improvement of the energy security of the EAEU member states.
- 2) Improvement of the reliability, accessibility and quality of gas supply to gas consumers in the territories of the EAEU member states.
- 3) Increase economic efficiency of the gas transmission systems use located in the territories of the EAEU member states.

To achieve these stated objectives, the following major tasks for the creation of the EAEU common gas market are listed in Section III of the Concept:

- 1) Ensuring non-discriminatory access for the so-called "participants of the common gas market of the EAEU"³² to the common gas market of the EAEU.
- 2) Creation of favorable conditions for the development of fair competition between the participants in the common gas market of the EAEU in gas supply.
- 3) Transition to the market pricing mechanisms for gas in the common gas market of the EAEU.

³¹ It is to be hoped, however, that these two general objectives suggest that a coordinated energy policy of all the EAEU member states may emerge in future. Gas producing member states (i.e. Russia and Kazakhstan) of the EAEU currently act as competitors and struggle for the opportunity to export or provide gas transit from the Central Asia to China. In the case of a more coordinated energy policy of the EAEU member states, Russia and Kazakhstan as gas exporting countries in particular, it will obviously be more difficult for non-EAEU countries (e.g. China) to exploit the internal contradictions of the EAEU member countries. Interestingly, some researchers argue that the introduction of the EAEU's common energy market will spur the development of a coordinated energy policy by the EAEU and will have a positive impact on the China's Belt and Road Initiative project by harmonization and/or unification of energy related regulations across a significant part of the New Silk Road as well as by the liberalization of the energy markets of EAEU Member States, bringing greater competition and abolishing barriers to trade between EAEU Member States in energy and related equipment, technology and services. See: The Emerging Eurasian Common Energy Market: What is Its Potential Impact on China's Belt and Road Initiative? Kembayev†, Zhenis The Journal of World Investment & Trade, May 2019, Vol.20(2-3).

³² In accordance with Chapter II of the Concept, "participants in the common gas market of the Union" means the "gas suppliers and consumers registered in the territories of the EAEU member states and, if necessary, authorized by the EAEU member state to supply and (or) purchase gas on the common gas market of the EAEU".

- 4) Creation of favorable terms for attracting investments in the development of gas transportation systems of the EAEU member states, including implementation of joint projects.
- 5) Non-discriminatory and transparent distribution of the available capacities of gas transmission systems between the participants of the common gas market of the EAEU in accordance with the unified rules for access to the gas transmission systems located in the territories of the EAEU member states.
- 6) Harmonization of regulations and standards for gas of the EAEU member states and regulatory technical documents governing the operations of the gas transmission systems located in the territories of the EAEU member states.
- 7) Providing information exchange based on information on domestic gas consumption, as well as gas transportation and supply pricing, including wholesale gas prices, gas transportation rates through the gas transmission systems.

If we compare the list of the five expected objectives of a common gas market proposed by Belogoryev with the list of official objectives for the creation of the EAEU's common gas market, it is clear that EAEU law fails to stipulate clearly following two important objectives suggested by Belogoryev:

- 1) To ensure equal economic conditions for business entities from member countries due to the relative equalization of gas prices (excluding transport costs component).
- 2) To improve the energy security of gas-deficient countries by ensuring direct access of their consumers to gas supplies from gas-surplus countries that are part of the common market, as well as in certain conditions for the free transit of gas from third countries.

The lack of an explicit statement of the first of these objectives in EAEU law allows Russia to claim, based on its interpretation of certain ambiguities in the EAEU Treaty,³³ that the authority to determine the price for gas transit remains within the competence of individual EAEU member states. This means that Russia may continue its current practice of cross-subsidization as discussed above and, consequently, that differentiation of gas transportation tariffs among different groups of consumers, including between foreign (e.g. Belarusian) and local (i.e. Russian) consumers, is not prohibited by the EAEU law. Russia is unlikely to agree to the equal treatment of local and gas producers, shippers and consumers of the various EAEU member states in the EAEU's common gas market, including equitable tariffs for gas transit and transfer, and its intransigence constitutes a major obstacle to the launch of the EAEU's common gas market in 2025.

As for the second missing objective, it is obvious that improvement of the energy security of all EAEU member states as currently stipulated as an objective in the EAEU law cannot reasonably be interpreted as improvement of the energy security of gas-deficient countries only (i.e. energy security³⁴ has a very different and quite often an opposite meaning for gas-

³³ E.g. see: Manenok, Tatyana. "Why Belarus is in a hurry to create the EAEU common gas market?" dated 18 December 2018. Available at (in Russian): <https://www.belrynok.by/2018/12/18/pochemu-belarus-speshit-s-sozdaniem-obshhego-evrazijskogo-rynka-gaza/>

³⁴ Energy security can be understood differently in different countries. For instance, in Russia "energy security" is defined as "the state of protection of the country's economy and population from threats to national security in the energy sector, which ensures compliance with the requirements stipulated by the legislation of the Russian Federation for fuel and energy supply to consumers, as well as compliance with export contracts and international

exporting countries than it does for gas-deficient countries). It is obvious that EAEU-member countries that are net natural gas exporters (i.e. Russian and Kazakhstan) and EAEU-member countries that are net natural gas importers (i.e. Armenia, Belarus, Kyrgyzstan) have different objectives and expectations from the establishment of the common gas market, and have a different understanding of energy security for their particular countries. While for the net gas-exporting countries of the EAEU (i.e. Russia and Kazakhstan) to preserve the current *status quo* with cross-subsidization of local population and domestic industry and the guarantee of security of demand (i.e. the assurance of steady, predictable demand) is important from the energy security perspective, for the net gas importing countries of the EAEU³⁵ (i.e. Armenia, Belarus and Kyrgyzstan) equal treatment of all consumers on the territory of the EAEU and security of supply is important from energy security perspective. These different interpretations of energy security have the potential to create obstacles for the EAEU's common gas market due to the divergent interests between, on the one hand, gas-rich Russia and Kazakhstan, and on the other hand, Armenia, Belarus, Kyrgyzstan, which are fully dependent on energy supplies from Russia on the other.³⁶ Some scholars even say that idea of creation of the EAEU's common gas market is merely a subterfuge used by Russia to make the idea of joining the EAEU more attractive for other member states.³⁷

For Armenia, Belarus and Kyrgyzstan, indeed, one of the main justifications for joining the EAEU is the creation of the EAEU's common gas market, as it promises to secure equal treatment under EAEU law for consumers incorporated in any EAEU member-country and thereby to create a level playing field for business within the EAEU due to the relative equalization of gas prices (excluding transport costs component). Indeed Armenia³⁸ has joined, and Belarus³⁹ remains an EAEU member mainly because they hoped to secure access to cheap Russian gas. Accordingly, the future of the entire EAEU, as an integration project, depends on the successful creation and functioning of the EAEU's common gas market. At the same time,

obligations of the Russian Federation" (see section 4(a) of the Russian Energy Security Doctrine). According to Russian legal scholars, major problems in the field of energy security in Russia include, among others, the high degree of depreciation of fixed assets in the gas industry (almost 60%) and the mono-dependence of the Russian economy and energy sector on natural gas, which accounts for about 53% of domestic consumption of fuel and energy resources. See Gorodov. O.A. "Introduction to Energy Law" Textbook. Moscow. Prospect. 2015. P. 187.

³⁵ For example, more than 90% of electric power generation in Belarus and more than 40% of electric power generation in Armenia is done using gas from Russia and, therefore, competitiveness of Belarus and Armenian industries and economies against Russian and Kazakh industries and generally economies are heavily dependent on equal or at least comparable gas prices for all these countries. See article (in Russian): <https://eurasia.expert/energeticheskaya-integratsiya-v-evraziyskom-soyuzhe-vzglyad-iz-armenii/>

³⁶ E.g. see "The Common Energy Market of the Eurasian Economic Union: Implications for the European Union and the role of the Energy Charter Treaty (ECT)". Kristina Zemskova. Energy Charter Secretariat. 2018. Available at:

https://energycharter.org/fileadmin/DocumentsMedia/Occasional/1The_common_energy_market_of_the_EAEU-implications_for_the_EU_and_the_role_of_the_ECT.pdf

³⁷ "The Eurasian Economic Union: Problems and Prospects". Seljan Verdiyeva. Page 743. Journal of World Investments & Trade 19 (2018).

³⁸ E.g. see: Davtyan V. "Problems and prospects of Armenia's integration into the common gas market of the EAEU". Russia and the new States of Eurasia, 2017, no. 3, pp. 96-105. Available at (in Russian): <https://www.imemo.ru/publications/periodical/RNSE/archive/2017/3/current-events-and-commentaries/problems-and-prospects-of-armenias-integration-into-the-common-gas-market-of-eeu>

³⁹ According to Mostafa Golam: "The main reason for Belarus to join EEU was to access much-needed financial resources and cheap energy from Russia." Eurasian Economic Union: Evolution, challenges and possible future directions Mostafa, Golam; Mahmood, Monowar Journal of Eurasian Studies, July 2018, Vol.9(2). p.167.

the expected launch of the EAEU's common gas market provides almost no economic benefit⁴⁰ for Kazakhstan⁴¹ and Russia, because they are gas exporting countries that use gas export revenues for cross-subsidization of their local population and industries. The lack of attractive incentives for Russia and Kazakhstan to proceed with the formation of the EAEU's common gas market, unsurprisingly, has resulted in more than six years of inconclusive debates on different approaches to gas pricing and gas transportation tariffs in the EAEU's common gas market. It has yet to be seen how negotiations over the Gas IGA will proceed, and whether any reasonable compromise⁴² is possible, but it is hoped that the presidents of the EAEU's member-countries will finally come to some mutually acceptable agreements on remaining controversial issues and approve the Gas IGA (even if only as a framework agreement) at the meeting of the Supreme Eurasian Economic Council in December 2022.

⁴⁰ This is the official opinion of many Russian experts (including Mr Alexey Belogoryev from the Fund Institute of Energy and Finance, Mr. Vyacheslav Kulagin from the Institute of Energy Studies of the Russian Academy of Science and Alexander Kurdin from the Analytical Center for the Government of the Russian Federation) that expressed their views during the meeting at the Analytical Center for the Government of the Russian Federation. See video from the panel discussion called "the common gas market of the EAEU: assessment of economic effects" that was held on 27 June 2017 at the Analytical Center for the Government of the Russian Federation (in Russian): <https://ac.gov.ru/news/page/sozdanie-obsego-rynka-gaza-eaes-snizit-ceny-i-povysit-energeticeskuu-bezopasnost-stran-ucastnic-13438>

⁴¹ Interestingly, before the "new reality" (i.e. the collapse in demand for natural gas from Russia in Europe because of the war in Ukraine) some Russian experts suspected that Kazakhstan would be able to abuse the privileges of the EAEU's common gas market, as once EAEU's common gas market comes into operation, Kazakhstan will be able to export all of its own gas to China at a higher price, while purchasing gas from Russia at a lower price for domestic consumption. It seems that times have changed since then, because now it is Russia which contemplates increasing the supply of Russian natural gas to Central Asia. President Putin even suggested on 28 November 2022 the idea of creating a "tripartite gas union" of three states (Russia, Kazakhstan, Uzbekistan) with the ultimate goal, evidently, to enable Kazakhstan and Uzbekistan to export all of their own natural gas to China at higher price, while purchasing gas from Russia at a lower price for domestic consumption. This, clearly, would be in Russia's interest, as Russia has to deal somehow with the imminent gas embargo by the EU. Both Kazakhstan and Uzbekistan are already experiencing a shortage of gas yet still need to comply with contractual obligations for export to China and meet increased domestic consumption. Furthermore, for Kazakhstan it would also be technically easier and economically advantageous to secure Russian gas supplies to the north and east regions of Kazakhstan, instead of building a new pipeline to secure Kazakh gas deliveries all the way from the gas-producing regions in the west of Kazakhstan. It seems, therefore, that the EAEU's common gas market and proposed tripartite gas union can provide economic benefits to Russia, Kazakhstan and, in case of tripartite gas union, to Uzbekistan, but only if they are used for transit shipments of Russian gas to China. It has yet to be seen whether the suggested tripartite gas union will materialize, but the idea of using the EAEU's common gas market for transit shipments of Russian gas to China contradicts the general principles of the EAEU's energy law and, moreover, may be considered by the EU as a way of evading Western sanctions.

E.g. See: Eurasianet. "China Concerned Over Kazakhstan's Ability to Deliver Contracted Gas Supplies". 30 November 2022. Available at: <https://oilprice.com/Energy/Natural-Gas/China-Concerned-Over-Kazakhstans-Ability-To-Deliver-Contracted-Gas-Supplies.html>

See also: Halova G. O., Abakumova M. M. questions OF formation of the common gas market of the EAEU States // Innovations and investments. 2019. #9. Available at (in Russian): <https://cyberleninka.ru/article/n/voprosy-formirovaniya-edinogo-gazovogo-rynka-gosudarstv-eaes>.

Interview of Igor Yushkov, (the leading expert of the Russian National Energy Security Fund and an expert of the Financial University under the Government of the Russian Federation) given on 28 April 2017. Available at (in Russian): <http://caspiabarrel.org/ru/2017/04/ot-obshhego-rynka-gaza-eaes-vyigrayut-belorussiya-i-armeniya/>

⁴² As Kembayev noted, "integration of gas markets is not economically useful for Russia. However, since establishing the Common Gas Market is an integral, if not the main, element of the whole integration project of the EAEU, the Russian leadership is ready to make [politically motivated] concessions." See: The Emerging Eurasian Common Energy Market: What is Its Potential Impact on China's Belt and Road Initiative? Kembayev†, Zhenis The Journal of World Investment & Trade, May 2019, Vol.20(2-3), P. 416.

IV. EAEU's Common Gas Market as a Catalyst for Domestic Gas Market Reform

The EAEU's proposed common gas market is, essentially, a 'siren call' for Armenia, Belarus and Kyrgyzstan, because they hope, using legal instruments available under the EAEU's common gas market legal framework, to obtain the legal right to buy Russian gas on the same terms as Russian domestic consumers. It comes as no surprise, therefore, that the issues of gas pricing and the tariff for gas transportation services through pipelines within the EAEU's common gas market have yet to be resolved by the EAEU member states. The imminent official launch of the common gas market of the Eurasian Economic Union in 2025, however, will require urgent and long-overdue reforms of the domestic gas markets in Russia and Kazakhstan. It is also not clear whether it is at all possible to create a properly functioning EAEU common gas market in 2025 as currently envisaged, without Russia and Kazakhstan first rectifying the deficiencies of their domestic gas markets.

The problem, however, is that neither Russia nor Kazakhstan have so far decided the target models for their domestic gas markets and, accordingly, what legal and economic reforms should be carried out in order to achieve the set goals, and in what sequence. Moreover, for decades in both Russia and Kazakhstan lack of political will to proceed with long-overdue gas sector reforms has prevented them from tackling two major problems in their national gas sectors: namely (i) state dominance and (ii) lack of competition.⁴³

Interestingly, researchers from the Moscow School of Management Skolkovo and the Oxford Institute of Energy Studies have confirmed that (i) the concepts of "liberalisation" and "reformation" of a gas market are not coextensive, and that (ii) unlike liberalisation, reformation of the gas market does not require the implementation of all specific measures, including deregulation of wholesale gas prices, third-party access (TPA) and unbundling, in a particular sequential order.⁴⁴ It has yet to be seen, therefore, whether the governments of Russia and Kazakhstan will proceed with liberalisation of the domestic gas market on the basis of the Anglo-American liberalization and privatization "textbook", or whether they will confine themselves to the selective reforms to address some or all of the deficiencies in their domestic gas markets discussed above.

1. Current Status of the Gas Market Reform in Russia

It is generally recognized⁴⁵ that distorted price incentives, lack of competition in the domestic gas market, and the linkage of the domestic price to the price of European oil product baskets are significant deterrents for the further development of the Russian gas sector. This is

⁴³ E.g. see interview with Tatyana Mitrova, Director of the Energy Center of the Moscow School of Management SKOLKOVO and a member of the Board of Directors of the global oilfield services company Schlumberger, given on 21 October 2020. Available at (in Russian): <https://www.youtube.com/watch?v=MNZ7PBzkY9Y>

⁴⁴ Mitrova, Tatiana. Sergeeva, Zlata. Henderson, James. Le Fevre, Chris (2018). Foreign experience of deregulation and reforms of gas markets in the United Kingdom and EU: Lessons Learned for Russia. Moscow School of Management Skolkovo. The Oxford Institute of Energy Studies. Available at: https://sk.skolkovo.ru/storage/file_storage/3aa76c94-969a-4032-9be4-c39238f124e2/SKOLKOVO_EneC_Research_2018.12.01_Rus.pdf P.5.

⁴⁵ E.g. see: D. Gordeev & G. Idrisov & E. Karpel., 2015. "Theory and Practice for Natural Gas Pricing in Russia," VOPROSY ECONOMIKI, N.P. Redaktsiya zhurnala "Voprosy Ekonomiki", vol. 1. Available at (in Russian): https://www.iep.ru/files/text/nauchnie_jurnali/idrisov1-15.pdf

unfortunate, as the Russian domestic gas market will be the cornerstone of the future EAEU's common gas market.

In Kazakhstan, discussion on possible scenarios to reform the market is only just beginning. In Russia, however, various options for reforming the domestic gas market have been discussed for more than two decades,⁴⁶ and certain targeted reforms have already been successfully carried out. In particular, it is widely accepted that certain “elements of liberalization”⁴⁷ are gradually being introduced in the Russian gas sector.

The “Current Energy Strategy of the Russian Federation for the Period up to 2035” (hereafter the “Russian Energy Strategy”)⁴⁸ explicitly stipulates that the creation of a common gas market in the EAEU should be seen as a measure to improve and reform Russia's domestic gas market. Indeed, it is obvious that the creation of the EAEU's common gas market lays the groundwork for the further liberalisation of the domestic gas markets of all of the EAEU member states, including Russia and Kazakhstan. Although the shape of the EAEU's common gas market has yet to be determined, it clearly envisages the gradual demonopolisation of gas exports among the EAEU member states, the development of competition for consumers within the EAEU's common gas market, and the development of exchange (i.e. market) gas pricing in the EAEU member states.

At present, the Russian domestic gas market consists of regulated and unregulated segments: Gazprom and the so-called independent gas producers. Importantly, the current Russian Energy Strategy, effective until 2035, provides for a step-by-step transition from the regulation of the wholesale gas prices of Gazprom to market pricing mechanisms. Gazprom sells gas on the Russian domestic market at regulated prices that remain below the economically viable level, thereby supporting the domestic economy.⁴⁹ QazaqGaz plays the same strategic role for the national economy of Kazakhstan. In other words, cheap/cross-subsidised natural gas nowadays is used by the governments of Russia and Kazakhstan as an equivalent to the “bread and circuses” of ancient Rome: a palliative offered specifically to avert potential discontent. Unlike Kazakhstan, however, Russia is also able and willing to use natural gas as a geopolitical weapon. As a part of its time-honoured social contract⁵⁰ with the Russian people, the Russian

⁴⁶ A.M. Belogoryev, V.M. Feigin 10 Principles and 5 First Steps. Road Map of Reforming the Russian Gas Market. ‘Oil and Capital’. 2018, No. 7-8, p. 14-20. The article is available at: <https://oilcapital.ru/article/tilda/26-07-2018/10-printsipov-i-5-pervyh-shagov>

⁴⁷ Boute, Anatole, Toward an EU-Russian Energy Agreement: Principles of Liberalization Under EU and Russian Energy Law (December 1, 2015). Review of Central and East European Law, Vol. 40, No. 2, 2015; The Chinese University of Hong Kong Faculty of Law Research Paper No. 2015-10. Available at SSRN: <https://ssrn.com/abstract=2697937>. P.117.

⁴⁸ The Energy Strategy of the Russian Federation for the period up to 2035 approved by the order of the Government of the Russian Federation dated 9 June 2020. №1523-p. P. 38. Available at: <https://minenergo.gov.ru/node/1026>

⁴⁹ Yafimava, K., 2015. Evolution of gas pipeline regulation in Russia: third party access, capacity allocation and transportation tariffs. Oxford Institute for Energy Studies, OIES paper NG 95, March.

⁵⁰ As Mitrova and Melnikov rightfully noted, three decades after a command economy under the Soviet Union, low prices for energy in Russia are still regarded as a “public good”, and any attempt to increase them sparks strong protests from consumers. The rather cheap energy does not create incentives for energy efficiency improvements, or for the modernization of existing assets with high specific fuel consumption. The controversial and complicated institutional design of the Russian energy sector, with strong state regulation and some elements of market competition, creates unclear signals for participants. It is associated with high transaction costs, and thus represents one of the major obstacles to large-scale energy transition in the country.

government has for decades,⁵¹ and with few exceptions⁵², asserted its right to regulate the domestic wholesale prices for gas supplied by Gazprom⁵³ and the transportation tariffs for independent gas producers.⁵⁴ The reason is that because such state regulation allows Russian government to support domestic⁵⁵ industrial as well as residential⁵⁶ local consumers by way of cross-subsidization. Currently the Russian domestic gas market, therefore, consists of regulated and unregulated segments: gas produced and marketed by Gazprom domestically is sold primarily at regulated prices that are currently frozen at the level of inflation⁵⁷, whereas gas produced by non-Gazprom producers (i.e. independent gas producers) is sold at unregulated prices (which can be either above or below regulated prices).⁵⁸ It is widely accepted⁵⁹ that the emergence of the independent gas producers spurred the creation in Russia of its unique dual market, where one segment operates on state-regulated prices, and the other on free-market prices. The nature of this double gas market and the progressive growth of administered gas

See: Mitrova, Tatiana & Melnikov, Yuriy. (2019). Energy transition in Russia. Energy Transitions. 10.1007/s41825-019-00016-8. Available at:

https://www.researchgate.net/publication/335766396_Energy_transition_in_Russia.

See also: Mitrova, Tatiana & Henderson, James. (2017). Gas pricing in Russia: between regulation and the market. Available at (in Russian): https://sk.skolkovo.ru/storage/file_storage/68db9371-2e81-42d2-8318-4548ab51294c/research02.pdf P.14.

⁵¹ The origins of the current gas pricing regulations in Russia can be traced back to the fall of the Soviet Union in 1991. For overview of history of evolution of gas pricing regulation in Russia see: See Henderson, James. 2011. "Domestic Gas Prices in Russia – Towards Export Netback?" Oxford Institute for Energy Studies. Available at: http://www.oxfordenergy.org/wpcms/wp-content/uploads/2011/11/NG_57.pdf. P.5.; and

Andronova, Inna & Kolbikova, Ekaterina. 2016. "Concept of Development of the Russian Gas Industry in Foreign and Domestic Markets," RUDN Journal of Economics. Bulletin of the Peoples' Friendship University of Russia. Series: Economics. issue 4, pages 31-38. Available at (in Russian): <https://ideas.repec.org/a/scn/016531/16988750.html>; and

D. Gordeev & G. Idrisov & E. Karpel., 2015. "Theory and Practice for Natural Gas Pricing in Russia," VOPROSY ECONOMIKI, N.P. Redaktsiya zhurnala "Voprosy Ekonomiki", vol. 1. Available at (in Russian): https://www.iep.ru/files/text/nauchnie_jurnali/idrisov1-15.pdf

⁵² Wholesale prices of gas supplied at commodity exchanges and supplied by independent organisations (e.g. Novatek) are not subject to state regulation as well as prices of gas supplied for export.

⁵³ Gazprom's domestic market share in gas supply is, in average, currently about 55%, whereas in summer it normally falls to below 50%. It should be noted, however, that the Russian gas market is characterized by a high seasonality factor and it is Gazprom which has obligations to meet peak demand. This means that during the winter period of peak demand, Gazprom's share in domestic gas supplies is significantly higher than that of the so-called independent gas producers (e.g. Novatek). E.g. see Mitrova, Tatiana & Henderson, James & Kapitonov, Sergey. (2019). Main elements and possible scenarios of gas price deregulation in Russia and gas market reform. Available at (in Russian): https://sk.skolkovo.ru/storage/file_storage/a7d6de8b-e1fa-4f51-a7cf-b6d2fab7dfffb/SKOLKOVO_EneC_RU_research_01022019.pdf P. 9.

⁵⁴ Gazprom's transport system (i.e. UGGS) is currently run with little transparency by Gazprom, which owns the UGGS, with tariffs only being officially set for third party users (i.e. independent gas producers like Novatek). Gazprom and its affiliates, therefore, have transportation costs included in their gas supply price.

⁵⁵ Gazprom has exclusive right for export of gas and, therefore, with high revenues from export sales it has been able to offset the low prices in the domestic gas market (i.e. cross-subsidization of domestic consumers at the expense of the foreign consumers).

⁵⁶ Different gas prices are set for industrial and residential customers in Russia, with the former paying higher than the latter (i.e. Russia has cross-subsidization of population at the expense of the industrial consumers in addition to inter-regional cross-subsidization), in complete contrast with European markets, where residential customers pay higher prices due to the extra distribution costs in that sector.

⁵⁷ Mitrova, Tatiana & Melnikov, Yuriy. (2019). Energy transition in Russia. Energy Transitions. 10.1007/s41825-019-00016-8. Available at: https://www.researchgate.net/publication/335766396_Energy_transition_in_Russia.

⁵⁸ See: "Evolution of gas pipeline regulation in Russia: Third party access, capacity allocation and transportation tariffs" / Katja Yafimava. Oxford Institute for Energy Studies, March 2015, P. 36. (OIES paper; NG 95). Available at: <https://www.oxfordenergy.org/wpcms/wp-content/uploads/2015/03/NG-95.pdf>

⁵⁹ E.g. see: Ahrend, Rudiger and Tompson, William, Russia's Gas Sector: The Endless Wait for Reform? (September 17, 2004). OECD Working Paper No. 402. Available at SSRN: <https://ssrn.com/abstract=619266> or <http://dx.doi.org/10.2139/ssrn.619266>

prices have enabled independent gas producers to successfully compete with Gazprom in many segments of its market, particularly in the industrial and electricity sectors. Independent gas producers, have also been able to successfully compete with the Gazprom because the TPA regime under Russian law applicable to Gazprom's transport system (i.e. UGGS) became, generally, enforceable.

As for the current gas pricing mechanism - as many Russian economists have noted⁶⁰, in simple words⁶¹ the wholesale price of gas in Russia so far has been set in practice in accordance with the parameters of the annual indexation established by the Russian Government on the basis of, firstly, application of the "*cost plus*" method to Gazprom's activities, and secondly, political factors. Still according to International Gas Union (IGU), there have been significant changes in price formation mechanisms in Russia lately.⁶² From having domestic production completely in the RBC⁶³ category in 2005, there was a switch to the Gas on Gas Competition (GOG) method⁶⁴ as the independent producers began to compete with each other and Gazprom to sell gas to the power sector and large industrial companies, and the rising Gazprom regulated prices

⁶⁰ E.g. see: Kurdin, Alexander, Регулирование Цен Предприятий: Области Применения, Механизмы и Методы Регулирования, Последствия Для Конкуренции (На Примере Газовой Отрасли) (Regulation of Enterprise Prices: Application Areas, Mechanisms and Methods of Regulation, Impact on Competition (Case Study of Gas Industry)) (March 13, 2017). Available at (in Russian) SSRN: <https://ssrn.com/abstract=2932074> or <http://dx.doi.org/10.2139/ssrn.2932074>. P. 35.

⁶¹ As Kurdin rightfully noted, Russian law is rather unclear on gas price mechanisms regulation as it just stipulates a whole range of pricing methods («концерт методов») without clear guidance on which of them and on what terms shall be used. Kurdin believes that state regulation of wholesale gas prices in Russia *de facto* operates under the "cost plus" mechanism with a number of significant reservations that allow one to talk about the combination of many regulatory mechanisms in the Russian regulatory framework at once. See: Kurdin, Alexander, Регулирование Цен Предприятий: Области Применения, Механизмы и Методы Регулирования, Последствия Для Конкуренции (На Примере Газовой Отрасли) (Regulation of Enterprise Prices: Application Areas, Mechanisms and Methods of Regulation, Impact on Competition (Case Study of Gas Industry)) (March 13, 2017). Available at (in Russian) SSRN: <https://ssrn.com/abstract=2932074> or <http://dx.doi.org/10.2139/ssrn.2932074>. P. 35.

⁶² See: Wholesale gas price survey [Electronic source] / International Gas Union // site of «IGU». –Barcelona: International Gas Union, 2019. Available at https://www.igu.org/sites/default/files/node-document-field_file/IGU_Wholesale%20Gas%20Price%20Survey%202019_Final_Digital%20_100519.pdf

⁶³ Regulation: below cost (RBC) The price is knowingly set below the average cost of producing and transporting the gas often as a form of state subsidy to the population.

⁶⁴ The price is determined by the interplay of supply and demand – gas-on-gas competition – and is traded over a variety of different periods (daily, monthly, annually or other periods). Trading takes place at physical hubs (e.g. Henry Hub) or notional hubs (e.g. NBP in the UK). There are likely to be developed futures markets (NYMEX or ICE). Not all gas is bought and sold on a short term fixed price basis and there will be longer term contracts but these will use gas price indices to determine the monthly price, for example, rather than competing fuel indices. Also included in this category is spot LNG, any pricing which is linked to hub or spot prices and also bilateral agreements in markets where there are multiple buyers and sellers. See: Wholesale gas price survey [Electronic source] / International Gas Union // site of «IGU». –Barcelona: International Gas Union, 2016. Available at: http://www.igu.org/sites/default/files/node-news_itemfield_file/IGU_WholeSaleGasPrice_Survey0509_2016.pdf. P.11.

saw a switch from RBC to RCS⁶⁵, although in 2014 the regulated pricing to the population saw a move from RCS to RSP⁶⁶, maintained thereafter.⁶⁷

Finally, it should be noted one more time, that there are two groups of gas suppliers in the Russian gas market. The first group includes Gazprom and its affiliates, and the second group includes the so-called independent gas producers, the largest of which are Novatek, Rosneft, and Lukoil. Prices for natural gas produced and sold by the Gazprom group of companies on the Russian wholesale market are, generally, regulated by the state. Wholesale prices of gas supplied at commodity exchanges and supplied by independent organizations are not subject to state regulation, nor are the prices of gas supplied for export. Russian law also provides that the maximum volume of gas that Gazprom may sell at commodity exchanges at market prices is 25 billion m³ per year.

Because of the war in Ukraine and the imminent gas embargo by the EC, Russia should not expect its exports of gas to make the same high profits as they did in previous years. This means that Gazprom will soon find it difficult to bear its social burden of cross-subsidization of local population and domestic industry. Furthermore, Gazprom will not be able to secure equitable treatment (i.e. gas prices) of all consumers in the EAEU's common gas market, irrespective of their country of origin, because Russia would have first to abandon its current practice of cross-subsidization of its own local industry and population and to establish fair competition in the respective domestic gas markets of the countries of the EAEU. It is reasonable to expect, therefore, a revival of heated discussions among relevant stakeholders on the long-expected reforms of the Russian domestic gas market. Among the possible scenarios of gas market reforms is a radical proposal for full liberalization of the national gas market, including deregulation of the wholesale gas prices for Gazprom. It is not surprising, therefore, that the most controversial issue for the proposed reforms of the domestic gas market in Russia remains deregulation of wholesale gas prices for Gazprom and the tariff for gas transportation services, so that Russia is ready for the official launch of the EAEU's common gas market in 2025. The problem is, however, that there is a legitimate concern among different stakeholders in Russia that any drastic and poorly thought-through measures for the liberalization of gas prices may jeopardize the nation's plans for the development of local industries and the expansion of its gas networks and gasification of remote areas of the country, and may lead to an uncontrolled rise in gas tariffs and even to rioting. Moreover, as Russian officials continue to insist that the current energy crisis in Europe is caused by the unreasonable energy policy of "accelerated decarbonization" and liberalisation of gas markets pursued by the EU, it would be prudent to expect gas market liberalization in Russia to be put on hold. Indeed, Russia may be forced to operate a wartime economy, in which the state increases its intervention in regulating the domestic gas market and utilizes all competitive advantages it has, including energy resources, for cross-subsidizing its people and industry.

⁶⁵ Regulation: cost of service (RCS) The price is determined, or approved, by a regulatory authority, or possibly a Ministry, but the level is set to cover the "cost of service", including the recovery of investment and a reasonable rate of return.

⁶⁶ Regulation: social and political (RSP) The price is set, on an irregular basis, probably by a Ministry, on a political/social basis, in response to the need to cover increasing costs, or possibly as a revenue raising exercise – a hybrid between RCS and RBC.

⁶⁷ See: Wholesale gas price survey [Electronic source] / International Gas Union // site of «IGU». –Barcelona: International Gas Union, 2019. Available at https://www.igu.org/sites/default/files/node-document-field_file/IGU_Wholesale%20Gas%20Price%20Survey%202019_Final_Digital%20_100519.pdf.

2. Current Status of the Gas Market Reform in Kazakhstan

Interestingly, while in Russia the role of the state in the economy, including the gas sector, will increase in the foreseeable future and reforms of its domestic gas market will probably be postponed indefinitely, in Kazakhstan, on the contrary, we should expect to see an acceleration of long-overdue reforms and a gradual liberalization of the local gas market. The newly adopted “Comprehensive Development Plan for the Gas Industry of Kazakhstan, 2022–2026”, in particular, sets as the long-term goal the creation of a competitive domestic gas market featuring the gradual deregulation of the gas market and the development of gas exchange trading.

As mentioned above, the current domestic gas market model in Kazakhstan is commonly referred to as the so-called ‘main buyer’ gas market model, whose specific features are (i) the presence of a single buyer (i.e. QazaqGaz as a ‘main buyer’), (ii) very weak market competition; and (iii) high barriers to entry for new players. At the same time, it is mainly thanks to the current model of the domestic gas market, as well as to the successful conjunction of world gas prices and significant export earnings, that Kazakhstan has achieved significant success in increasing gas production, gasification of its remote regions, modernisation and construction of main gas pipelines. This has allowed QazaqGaz not only to combine all gas pipelines in Kazakhstan into a single gas transportation system, but also to diversify export markets by ‘opening a window’ to China. According to the current model of the domestic gas market, the following procedure is usually applied in Kazakhstan in the production, sale, sale and distribution⁶⁸ of natural gas:

- 1) QazaqGaz, as a national operator⁶⁹, exercises the pre-emptive right⁷⁰ of the state provided for by law and buys raw gas or commercial gas from subsoil users at a price⁷¹ determined by the formula established by law.
- 2) QazaqGaz then sells gas to its own subsidiary KazTransGas Aimak JSC to all regions of Kazakhstan at regulated wholesale prices, which vary from region to region.
- 3) KazTransGas Aimak JSC, in turn, sells gas to the population and other consumers at final (i.e. retail) prices, which are regulated by the Committee for Regulation of

⁶⁸ Gas transportation services in Kazakhstan are provided by QazaqGaz through its subsidiaries.

⁶⁹ According to Article 9 of the Law of the Republic of Kazakhstan ‘On Gas and Gas Supply’ dated 9 January 2012 (the ‘Kazakh Gas Law’), the status of a ‘national operator’ implies the legislative endowment of QazaqGaz with certain functions, including engaging in the implementation of state policy in the area of gas and gas supply, as well as certain legislative obligations, including the obligation to ensure, under the conditions established by the Kazakh Gas Law, the uninterrupted supply of commercial gas to consumers connected to the facilities of the unified commercial gas supply system and the obligation to ensure the construction, operation, modernisation and (or) reconstruction of facilities of a unified commercial gas supply system, in accordance with the general gasification scheme of the Republic of Kazakhstan.

⁷⁰ In order to ensure energy security and meet internal needs for commercial gas, the Republic of Kazakhstan represented by QazaqGaz has a pre-emptive right to purchase alienated raw gas belonging to subsoil users in accordance with the legislation of the Republic of Kazakhstan on subsoil and subsoil use and subsoil use contracts, as well as commercial gas produced by subsoil users in the process of processing the raw gas that they have produced and belonging to them in accordance with the legislation of the Republic of Kazakhstan on subsoil and subsoil use and subsoil use contracts (hereinafter - the ‘state’s pre-emptive right’) (See Article 15 of the Kazakh Gas Law).

⁷¹ QazaqGaz as a national operator executes the state’s statutory preemptive right to purchase raw gas and commercial gas from subsoil use producers in Kazakhstan (i.e. most of the gas produced in Kazakhstan is associated gas and therefore, gas production is not a major source of revenue for them) at a less-than-fair value price, that disincentivizes production of commercial gas and also discourages its efficient use by consumers.

Natural Monopolies of the Ministry of National Economy of the Republic of Kazakhstan.

Because of the current domestic gas market design, Kazakhstan's gas sector nowadays faces the following major problems:

- 1) Heavily staid and monopolized (i.e. lack of market competition) economy, including in the gas sector.⁷²
- 2) State regulation of the wholesale and retail gas prices and issue of cross-subsidization⁷³ of local consumers at the expense of foreign consumers and of remote or poor regions of Kazakhstan at the expense of gas producing regions as well as Kazakh gas producers.
- 3) Lack of a transparent and cost-reflective gas transportation tariff.
- 4) Undeveloped exchange (i.e. gas hubs) trading of natural gas.
- 5) State's preemptive right of QazaqGaz and the need to liberalize gas exports.
- 6) Incomplete privatization and division of the activities of the monopolists (QazaqGaz) by type of activity (i.e. ownership unbundling).
- 7) Unresolved issue of non-discriminatory third-party access (TPA) to trunk and distribution gas pipelines.

Even more so than Russia, Kazakhstan urgently needs to reform its domestic gas market so to be ready for the official launch on 1 January 2025 of the common gas market of the EAEU. Failure to reform in time may lead to an uncontrolled and rapid surge in gas prices and even a shortage of gas for domestic consumption in Kazakhstan, as EAEU member states are expected to achieve equal netback pricing on the territory of the EAEU. As a result, preserving the *status quo* in the Kazakh gas sector is no longer possible, because QazaqGaz will no longer be able to expect to achieve⁷⁴ the same high profits from its export/transit of gas that allows it to bear its social burden of cross-subsidizing of local population and industries. If the Kazakh government fails to reform the domestic gas market in the near future, the result will be no new foreign direct investment in the gas sector, no exploration and development of new gas fields, and no further expansion of the gas networks. A future of declining gas production and domestic consumption after 2025 and inefficiency and stagnation of the gas sector will become inevitable for Kazakhstan. Moreover, the IEA seems to agree with the government of Kazakhstan that, because of the launch of the EAEU's common gas market, there is a risk that QazaqGaz "could be squeezed out of the market and effectively replaced by a new monopolist"⁷⁵ (i.e. by Gazprom).

⁷² Kazakhstan's gas upstream market is moderately consolidated, and it is dominated by the "Big Three" (i.e. Tengizchevroil LLP, Karachaganak Petroleum Operating B.V. and NCOC that together control about 75% of all gas reserves of Kazakhstan). The wholesale market for the sale of commercial gas in Kazakhstan is effectively monopolized, because the sole supplier of gas for retail sellers is QazaqGaz. The retail market in Kazakhstan is dominated (95% concentration) by JSC KazTransGas-Aimak. One may argue, therefore, there is no real gas market at all in Kazakhstan. See: IEA (2022), Kazakhstan 2022, IEA, Paris <https://www.iea.org/reports/kazakhstan-2022>, License: CC BY 4.0

⁷³ Ever-increasing inefficiency and poor energy efficiency in Kazakhstan is largely because of practices some form of covert protectionism and cross-subsidization.

⁷⁴ According to IEA, "As Kazakh domestic demand rises in the coming years, it may be challenging to find additional gas for export. This in turn is likely to undermine the income stream from exports that effectively subsidise domestic consumption and expansion of the domestic gas pipeline network". See: IEA (2022), Kazakhstan 2022, IEA, Paris <https://www.iea.org/reports/kazakhstan-2022>, License: CC BY 4.0. P.54.

⁷⁵ IEA (2022), Kazakhstan 2022, IEA, Paris <https://www.iea.org/reports/kazakhstan-2022>, License: CC BY 4.0. P.43.

V. Main Pillar of the EAEU's Common Gas Market

1. TPA as a Legal Notion

It is axiomatic that the EU's single gas market regulation is based on three main pillars: third party access, unbundling and strong regulation.⁷⁶ Unlike the EU's single gas market, the EAEU's common gas market as currently envisaged seems to be based just on one main pillar⁷⁷: third party access (TPA). Moreover, unlike the EU's single gas market, the EAEU's common gas market would be formed only at the wholesale level,⁷⁸ and the EAEU's TPA regime would be applicable only to the high-pressure gas pipelines⁷⁹ and only for the gas trade within the boundaries of the EAEU.⁸⁰ Devising an efficient and non-discriminatory TPA regime both to national networks and interconnection as well as transit pipelines for gas, therefore, is crucial for the successful establishment and operation of the EAEU's common gas market. That is why failure to reach agreement on non-discriminatory and transparent allocation of available capacity of gas transportation networks (i.e. non-discriminatory access to gas networks) located on the territory of the EAEU among the so-called "participants of the common gas market"⁸¹ of the EAEU in accordance with the unified TPA rules has been identified⁸² as one of the major obstacles to the proper formation of the common gas market of the EAEU.

The Gas IGA would provide, *inter alia*, uniform rules⁸³ for access to gas networks located on the territory of the EAEU (the "Unified TPA Rules")⁸⁴ and legal principles ensuring the TPA.⁸⁵

Development and implementation of the TPA concept in the EAEU is achieved by means of introduction of both:

- 1) TPA right as a general principle of law; and
- 2) TPA right as a legal norm.

⁷⁶ A. de Hauteclocque; K. Talus; "Third Party Access: A Comparative Study on Access Regimes in EU Electricity Grids and Natural Gas Pipelines" OGEL 3 (2011), www.ogel.org URL: www.ogel.org/article.asp?key=3128. P.1.

⁷⁷ I.e. neither ownership unbundling nor strong independent regulator are planned to be introduced upon creation of the EAEU's common gas market.

⁷⁸ I.e. the retail trade of gas would not be anyhow affected by creation of the EAEU's common gas market.

⁷⁹ I.e. EAEU's law and EAEU's TPA regulation in particular, would not be applicable to the gas distribution networks, underground gas storage facilities (UGS) and, apparently, to LNG facilities located on the territory of the EAEU.

⁸⁰ I.e. TPA right provided by the EAEU's law would not be applicable and cannot be used for export of gas in any non-EAEU country or for transit of gas through the EAEU's member states into any non-EAEU country.

⁸¹ In accordance with Chapter II of the Concept, "participants of the EAEU's common gas market" means "gas suppliers" and "gas consumers" as these legal terms are defined in Chapter II of the Concept. EAEU law requires that "gas companies" as "participants of the EAEU's common gas market" shall be incorporated on the territory of one of the EAEU's member state (i.e. they cannot be foreign legal entities). A "gas supplier" can be any legal entity, including a company incorporated not on the territory of the EAEU.

⁸² See Chapter III of the Concept and Paragraph 7 of the Program.

⁸³ In accordance with Paragraph 34 of the Program, the Unified TPA Rules would be incorporated into the Gas IGA as an annex. Interestingly, the Russian Federation is designated as a responsible party for the development of the draft of the Uniform TPA Rules. This suggests that the EAEU's Uniform TPA Rules would largely be based on the current TPA concept model, as implemented in Russian legislation and Russian legal scholarship.

⁸⁴ See Paragraph 5 of Article 104 of the EAEU Treaty and Paragraph 27 of the Program.

⁸⁵ See Paragraph 33 of the Program.

As a legal norm TPA right has been implemented in the EAEU⁸⁶, unlike the EU⁸⁷, by means of:

- 1) mainly natural monopoly legislation; and
- 2) marginally⁸⁸, sector-specific legislation.

TPA right as a general principle of law has been implemented at a supranational level by the introduction of specific principles drawn from existing EAEU legislation, namely:

- 1) from the EAEU's energy law, the principles of:
 - a) ensuring the development of competition in the common markets of energy resources;
 - b) ensuring non-discriminatory terms for business entities of the EAEU member states in the common energy resource markets⁸⁹;
- 2) from the EAEU's natural monopoly law⁹⁰, the principles⁹¹ of:
 - a) reduction of barriers to entry to domestic markets, including by ensuring access to services of natural monopoly entities⁹²;
 - b) mandatory conclusion by natural monopoly entities of service contracts with consumers for the provision of regulated services, if technically feasible, which shall be determined in accordance with the legislation of the Member States, unless otherwise provided for by the provisions of Sections XX and XXI of the EAEU Treaty;
 - c) ensuring compliance of natural monopoly entities with the rules of access to services of natural monopoly entities.

TPA right as a legal norm would be duly implemented⁹³ at the supranational level by introducing specific provisions of the EAEU's natural monopoly law (i.e. Unified TPA Rules).

⁸⁶ Both on EAEU law (i.e. supranational) level and on local legislation level.

⁸⁷ TPA concept in the EU is purely energy law concept and, therefore, it is implemented only in the EU's sector-specific legislation.

⁸⁸ It could be argued that TPA is a purely natural monopoly law concept under the EAEU law and, therefore, its regulation is implemented only in natural monopoly legislation of EAEU law.

⁸⁹ See Paragraph 1 of Article 79 of the EAEU Treaty.

⁹⁰ See Paragraph 3 of Chapter 2 of Annex 20 to the EAEU Treaty.

⁹¹ I.e. member states of the EAEU shall be guided by these general principles of law in regulation and/or control over activities of natural monopoly entities.

⁹² As Ryzhenkov noted, it is not clear what "entry to domestic markets" means, but he suggests that this shall be interpreted as follows: (i) there shall be free access of consumers to relevant markets (e.g. gas transportation services market) that are in the state of natural monopoly and (ii) natural monopoly entities are prohibited to inhibit somehow access of any company to the respective competitive market. See: Ryzhenkov A. Ya. "Principles of legal regulation of natural monopolies in the framework of the Eurasian Economic Union". Eurasian Advocacy Journal. N.1. 2016. P. 110.

⁹³ Both EAEU law and the local legislation of the member states of the EAEU provide only for regulated TPA (i.e. there is no option to choose a negotiated or regulated system of access to networks in the EAEU).

Importantly, the TPA concept under EAEU law,⁹⁴ is based on two major principles⁹⁵: (i) non-discrimination⁹⁶ and (ii) transparency.⁹⁷

The Unified TPA Rules, once adopted, will cover the list of issues related to the TPA as specified in Paragraph 31 of the Program⁹⁸, including the following major ones:

- 1) procedure for physical connecting to the gas transmission systems located on the territory of the EAEU;
- 2) procedure for provision of access to gas transmission systems located on the territory of the EAEU;
- 3) rights and obligations of the customers (i.e. system users) and service providers (TSOs);
- 4) procedure for publishing information (information disclosure standards) about available capacities, tariffs (prices), and price-setting procedure for gas transportation services within the EAEU's common gas market;
- 5) procedure for determining and allocation of spare capacities⁹⁹, including in case of lack of sufficient capacity to meet all bids submitted;
- 6) legal grounds under which the operators of gas transmission systems (i.e. TSOs) have a right to refuse access to gas transmission systems; and
- 7) dispute resolution procedure in relation to the TPA disputes.

The legal norms of the Unified TPA Rules would be directly applicable in all EAEU member states (i.e. there will be no need to enact local laws in each member state for enforcement of the provisions of the Unified TPA Rules). Moreover, provisions of the Unified TPA Rules, as legal provisions of an international agreement to be ratified by each EAEU member state, would prevail over provisions of contradictory TPA related legal norms found in the local laws of individual EAEU member countries.

2. TPA as a Legal Institute under the Unified TPA Rules

There is a fundamental difference in the understanding of the legal nature of the TPA concept generally and TPA right in particular in the EU and EAEU. The TPA Concept under EU law

⁹⁴ Paragraph 33 of the Program specifically provides that TPA assurance principles for gas-transport systems of the EAEU would be stipulated in the Gas IGA.

⁹⁵ E.g. see Paragraphs 7 and 8 of the Program as well as Chapter III of the Concept, where procurement of the transparent and non-discriminatory TPA is declared as one of the measures to be implemented within the EAEU's common gas market.

⁹⁶ E.g. In accordance with Paragraph 2 of Annex 20 to the EAEU Treaty, in particular, TPA right related services of natural monopolies for users of one EAEU's member state shall be no less favorable than for users from other EAEU's member state, when technically feasible.

⁹⁷ E.g. EAEU law requires disclosure on spare capacity by each of the EAEU's member states. For instance, in accordance with Paragraph 25 of the Program, relevant authorized state bodies of EAEU member states and so-called "subjects of the EAEU's common gas market" (in accordance with Chapter II of the Concept this legal term covers gas suppliers, gas consumers, TSOs and operators of the gas exchanges located on the territory of the EAEU) would be obliged to exchange information on, *inter alia*, spare capacities of gas networks.

⁹⁸ Importantly, that the list of issues to be covered in the Uniform TPA Rules as provided in Paragraph 31 of the Program is non-exhaustive.

⁹⁹ In accordance with Chapter II of the Concept, "free capacity" means "technologically possible free capacity of the main gas pipelines of the member States, determined in accordance with the unified rules for access to gas transport systems located on the territories of the member States". This legal term, as discussed above, suggests that the EAEU's common gas market would not be applicable to LNG facilities.

is, evidently, purely an energy law concept, whereas the TPA concept under EAEU law is purely a natural monopoly law concept.

EAEU law provides a narrow interpretation of the TPA concept as “non-discriminatory access to natural monopoly services”.¹⁰⁰ Annex 20 to the EAEU Treaty¹⁰¹ provides, in particular, for the special legal term “access to services of natural monopoly entities” that means “provision by natural monopoly entities of one Member State of *services related to natural monopolies* to consumers of another Member State on terms no less favourable than those provided for similar services to consumers of the first Member State, when technically feasible”.

The Concept¹⁰² provides¹⁰³ the legal term “access to gas pipeline systems”, which has an identical meaning to the legal term “access to services of natural monopoly entities in the sphere of gas transportation”, that is: “provision of the *right to use* gas transportation systems controlled by *natural monopoly entities* of the Member States for the transportation of gas”. The Program adopted in 2018, however, provided two different legal terms: “access to gas transportation systems” and “access to gas transportation services”, but as equivalents, that have one meaning¹⁰⁴: “provision of the *right to use* gas transportation systems managed by *gas transmission systems operators*¹⁰⁵ (TSOs) for the transportation of gas”. “Access” under the Program, evidently, envisages a broader list of persons obliged to ensure the TPA right than “access” under the Concept – i.e. these are not only TSOs as “natural monopoly entities” that have such special “natural monopoly” status and render “natural monopoly services” under applicable local laws, as it is the case under the Concept, but any other TSOs, including those that do not have a natural monopoly status or that render gas transportation services that are not considered under applicable local law as “natural monopoly services”. It seems, therefore, that there is a trend of broadening of the TPA concept under the EAEU law so that TPA concept under Unified TPA Rules, once they are fully developed and enacted as annex to the Gas IGA in 2025, would not be limited to the natural monopoly law concept of “non-discriminatory access to natural monopoly services”, but would be similar to the TPA as an energy law concept in the EU.

The practical implication of the narrow interpretation of the TPA concept under EAEU law as just “non-discriminatory access to natural monopoly services” (i.e. as a purely¹⁰⁶ natural

¹⁰⁰ This conclusion is based on the interpretation of the legal term “access to services of natural monopoly entities in the sphere of gas transportation” in Paragraph 2 of Annex 22 to the EAEU Treaty.

¹⁰¹ See Paragraph 2 of Annex 20 to the EAEU Treaty. Importantly, in accordance with Paragraph 2 of Article 78 of the EAEU Treaty and Paragraph 1 of Chapter 1 of Annex 20 to the EAEU Treaty, legal norms in Section XIX (*Natural Monopolies*) of the EAEU Treaty and in Annex 20 to the EAEU Treaty, generally (i.e. save for certain exceptions), are not applicable to the gas transportation and gas storage services. The interpretation of the legal definition of “access” in Annex 20 to the EAEU Treaty, however, should be useful for a better understanding of the TPA concept under the EAEU law.

¹⁰² Both Concept and Program lay foundation for the Gas IGA and, therefore, for the Unified TPA Rules, as discussed above.

¹⁰³ See Chapter II of the Concept.

¹⁰⁴ See Paragraph 4 of the Program.

¹⁰⁵ In accordance with Chapter II of the Concept, a “gas transmission system operator” means a legal entity, that is a legal owner of the system or that has a legal right to possess this system based on another legal right, and that conducts operational-dispatch management of the gas transmission system and gas transportation services.

¹⁰⁶ Unlike many other jurisdictions, legal scholarship in the countries of the EAEU do not generally consider natural monopoly law as part of the competition law, but consider them as separate branches of law and branches of legislation. E.g. see: Law and monopolies in modern Russia: monograph / A. Ya. Ryzhenkov. – M.: Yustitsinform, 2017. – 208 p. EAEU law seems to follow this approach, because it provides competition legislation (Section XVIII General Principles and Rules of Competition) and natural monopoly legislation (Section XIX Natural Monopolies) separately in the EAEU Treaty.

monopoly¹⁰⁷ law concept) is that TPA right under EAEU law in this case would not be enforceable for access to gas networks, for instance, in Kazakhstan for export gas from Kazakhstan or transit through Kazakhstan to any of the EAEU's member countries. From 2015¹⁰⁸ gas transportation services for export of gas from Kazakhstan and transit of gas through Kazakhstan have been excluded from the spheres of natural monopoly and, therefore, these services have been excluded from the list of "regulated services"¹⁰⁹. They are therefore no longer subject to natural monopoly regulation (including tariff and TPA) under Kazakhstan's local legislation¹¹⁰.

Moreover, under Kazakh law,¹¹¹ a company that constructs and operates an object (e.g. a gas transportation system) intended solely for its own needs, is exempted from the Kazakh Natural Monopoly Law's regulations (i.e. including tariff and TPA regulation), even if as a general rule such activities (e.g. operation of the gas transportation system) are recognized as a natural monopoly activity. This means that under Kazakh law it is possible that certain TSOs would not be required to have the status of "natural monopolies entities" if they construct and use their own gas transportation networks for their own purposes only. Consequently, a narrow interpretation of the TPA concept as "non-discriminatory access to services of natural monopoly entities in the sphere of gas transportation" (i.e. as a purely natural monopoly concept) makes the TPA right under EAEU law non-enforceable in such cases.

In this respect the *Rosneft v Sakhalin Energy*¹¹² court case in Russia provides an extreme example and a relevant case study. Sakhalin Energy Investment Company Ltd (hereafter "Sakhalin Energy") is a consortium¹¹³ established for development of the Sakhalin-2 oil and gas project¹¹⁴ in the Okhotsk Sea, around Sakhalin Island in the Russian Far East. To be able to transport gas from its gas fields along the north-east coast of Sakhalin Island to its own LNG plant¹¹⁵ on the south coast of Sakhalin Island, Sakhalin Energy constructed and operates¹¹⁶ the Trans-Sakhalin pipeline.¹¹⁷ Rosneft has repeatedly sought access rights in the Trans-Sakhalin

¹⁰⁷ Under EAEU law, the legal term "natural monopoly" means "a situation of the services market when the creation of a competitive environment to meet the demand for a particular type of services is not possible or is economically infeasible due to the specific technological features of production processes and provision of these services" (see Paragraph 2 of Annex 20 to the EAEU Treaty).

¹⁰⁸ Paragraph 5 of Article 78 of the EAEU Treaty specifically leaves it to the discretion of local legislations of each of the EAEU's member states to decide which of the services provided by natural monopoly entities shall be included in the spheres of natural monopolies.

¹⁰⁹ In accordance with article 4 of the Law of the Republic of Kazakhstan "On Natural Monopolies" No. 204-VI 3PK dated December 27, 2018 (hereinafter – "Kazakh Natural Monopoly Law"), the "regulated services" means "the goods, works, the services provided by subjects of natural monopolies in spheres of natural monopolies and which are subject to state regulation by authorized body".

¹¹⁰ See Paragraph 2) of Article 5 of the Kazakh Natural Monopoly Law.

¹¹¹ See Paragraph 4 of Article 3 of the Kazakh Natural Monopoly Law.

¹¹² Case N A59-3071/2014. *JSC "Oil Company Rosneft" v Sakhalin Energy Investment Company Ltd.*

¹¹³ Importantly, Gazprom Sakhalin Holdings B.V. (subsidiary of Gazprom) as one of the shareholders of the Sakhalin Energy owns a 50% plus 1 share. See at: <http://www.sakhalinenergy.ru/en/company/management/>

¹¹⁴ Sakhalin Energy signed an Agreement of the Development of Piltun-Askokhskoye and Lunskeye Oil and Gas Fields on the Basis of Production Sharing (hereinafter – the "Sakhalin-2 PSA") in 1994 with the Russian State, represented by the Government of the Russian Federation and Sakhalin Oblast Administration. This Agreement was the first PSA in Russia. See at: <http://www.sakhalinenergy.ru/en/company/psa/>

¹¹⁵ Sakhalin Energy produces liquefied natural gas (LNG) at this LNG plant that it then exports to Asia.

¹¹⁶ The Sakhalin -2 PSA contains important provisions in respect of ownership of various assets, including the project's pipelines. Sakhalin Energy has ownership rights over assets acquired or created (as part of costs incurred by the project). See: Evolution of gas pipeline regulation in Russia: Third party access, capacity allocation and transportation tariffs / Katja Yafimava. Oxford Institute for Energy Studies, March 2015, P. 21. (OIES paper; NG 95)

¹¹⁷ See at: <http://www.sakhalinenergy.ru/en/company/assets/pipelines/>

pipeline (in order to transport 8 bcm/year of gas from Sakhalin 1 to its planned Far East LNG plant). However, in 2013 its request was refused by Sakhalin Energy, which claimed that there was insufficient spare capacity in the pipeline. In April 2014, Rosneft lodged a complaint with the FAS¹¹⁸ (Russian competition agency) in respect of refusal of access, and filed a corresponding case against Sakhalin Energy in the Sakhalin arbitration court.¹¹⁹ Interestingly, one of the major counter arguments that Sakhalin Energy raised was that it could not be recognized as a natural monopoly entity, and, consequently, could not be obliged by Russian law (i.e. by provisions of the Russian natural monopoly law in particular) to award all system users an equal right of access to its gas system (i.e. TPA right).¹²⁰ This argument Sakhalin Energy supported by facts that (i) it uses its own gas pipeline for its own use only and (ii) that it does not render gas transportation services to anyone else, including Gazprom (i.e. there is no commodity market for gas transportation services, because Sakhalin Energy cannot render services to itself) and, therefore, is cannot be considered as a natural monopoly entity under Russian natural monopoly law. Courts of the first two instances upheld Sakhalin Energy's arguments, and the second instant court¹²¹ specifically agreed with the above argument of Sakhalin Energy, stating that gas transportation services can only be recognized as a natural monopoly if there is a commodity market (i.e. goods (services) produced for the purposes of trade, exchange or other introduction of goods (services) into civil circulation). Although this court decision was later overruled by a higher court, and Sakhalin Energy ultimately lost the case,¹²² this seems to have happened merely because Russian law is silent on this matter (i.e. whether gas transportation system constructed solely for a company's own needs is exempted from the natural monopoly regulations). Kazakh law, however, as discussed above, specifically exempts such gas pipelines from natural monopoly regulation and, therefore, it seems that in a similar situation in Kazakhstan, Rosneft would have lost the case. If in the final version of the Uniform TPA Rules, therefore, the TPA concept is still implemented as a purely natural monopoly concept, the enforceability of the TPA right under EAEU law against TSOs in Kazakhstan who use their own gas transportation network for their own purposes only would be questionable.

At this stage, however, it is yet too early to predict the final TPA concept model in the Unified TPA Rules. For instance, current legal provisions of the EAEU law¹²³ impose general statutory obligation on all TSOs that operate on the common gas market of the EAEU to comply with respective natural monopoly laws of the EAEU's member states while rendering gas transportation services. This statutory obligation, evidently, does not take into account cases possible, for instance, in Kazakhstan, as discussed above, when a TSO is not a natural monopoly entity under respective local law or when a particular gas transportation service for export or transit is not subject to natural monopoly regulation under relevant local law. It implies that, from the current EAEU law perspective, the TPA concept is still a legal institution of the EAEU's natural monopoly branch of legislation (i.e. that TPA concept is a purely EAEU's natural monopoly law concept) and the alleged ongoing major shift in understanding of the TPA concept in the EAEU law itself, as we have elaborated above, may not be the case.

¹¹⁸ Federal Antimonopoly Service (hereinafter – the “FAS”).

¹¹⁹ See at: Evolution of gas pipeline regulation in Russia: Third party access, capacity allocation and transportation tariffs / Katja Yafimava. Oxford Institute for Energy Studies, March 2015, P. 21. (OIES paper; NG 95)

¹²⁰ I.e. because Sakhalin Energy is not a natural monopoly company, TPA concept as a natural monopoly concept cannot be applicable to Sakhalin Energy.

¹²¹ See Decision of the Fifth Arbitration Court of Appeal of the Russian Federation dated 30 June 2015. Case N A59-3071/2014.

¹²² See Decision of the Supreme Court of the Russian Federation dated 11 December 2015, N 303-ЭС15-16828.

¹²³ See Paragraph 53 of the Program.

3. Legal Nature of the TPA Right under the EAEU Law

It can be argued that, because the TPA concept is a public law (i.e. natural monopoly law) concept under EAEU law, a TPA right under EAEU law is a purely administrative way of allocating available transfer capacity (i.e. equivalent of a one-off license) owned by natural monopoly companies and, therefore, no secondary trade of capacity is possible under EAEU law.

We believe, however, that the TPA right as currently implemented in EAEU law (i.e. as it will be enshrined in the Uniform TPA Rules, once adopted), more resembles a right under an obligation (i.e. a subjective legal right to demand performance) in the so-called obligations legal relationship (*обязательственное правоотношение*). In other words, even though the TPA concept in the EAEU is indeed a public law concept, the TPA right that is triggered by the relevant legal provisions of the public law has a private (civil) law legal nature.

Legal relations between a gas system user and a gas system operator related to the TPA in the EAEU's member countries are, evidently, private (civil) law relations (i.e. they do not lie in the sphere of the cases arising from public legal relationships), because they are so-called property legal relations (*имущественные правоотношения*)¹²⁴ that meet the following mandatory features of the private (civil) law relations¹²⁵:

1. Both parties (i.e. gas system user and gas system operator) of these legal relations are legally equal¹²⁶ (*юридическое равенство*) and independent persons (i.e. none of them has powers to command each other) and can be liable to the full extent of their own assets (*имущественная обособленность*).
2. Unilateral transactions (*односторонняя сделка*)¹²⁷ and contracts, evidently, are the major legal facts (*юридический факт*) that trigger a particular legal consequence (i.e. creation of these TPA related legal relations), as discussed below.
3. Peculiar to civil law relations means of legal defense (i.e. civil remedies) can be used by each party in these legal relations. A gas system user, in particular, has the legal right to initiate a court proceeding and claim damages and/or file a complaint with a respective competition authority, but is not obliged¹²⁸ to do so, and may opt not to protect its interests.

¹²⁴ It was Korepanov who first came to the conclusion, that TPA right is a so-called proprietary right (*имущественное право*) but his analysis was based on oil pipelines regulation in Russia. See: Korepanov K.V. "Legal regulation of the transportation of oil and gas through gas pipelines". Thesis for the degree of candidate of legal sciences. Moscow State Law University. 2016. P. 170.

¹²⁵ See Russian civil law: course book, in 2 volumes, V.S. Yem, I. A. Zenin, N. V. Kozlova, and others, edited by E. A. Sukhanov, 2nd ed. Moscow: Statute Publ., 2011. Vol. 1. General part. Real right. Inheritance right. Intellectual property rights. P. 111.

¹²⁶ In all the local laws of the EAEU's member states, the principle of civil law equality is considered the criterion constituting civil law relations in accordance with which the status of the parties of the civil law relations is determined. For instance, in relation to Russia, Orlov says that: "This states that no subject of Russian civil law, including physical and juristic persons, as well as state and municipal bodies, has priority over any other: the parties in the civil law relation are equal. Thus, a party to a contract, including a public law subject, has no coercive power in respect of another party. On the contrary, their relations are regulated by the same civil law norms. This, however, does not concern issues in which the public law subjects exercise their powers as public authorities". See: Orlov, Vladimir. (2019). Legal Sources and Interpretation in Russian Civil Law. ATHENS JOURNAL OF LAW. 5. P. 124.

¹²⁷ I.e. An official and duly submitted request for access by a gas system user shall be considered as a unilateral transaction, as discussed below.

¹²⁸ I.e. autonomy of the will principle of civil law.

Because TPA related legal relations between a gas network user and gas network operator are civil law relations, in accordance with the civil laws¹²⁹ of all EAEU's member countries they can be qualified, most likely, as either so-called obligations legal relationships (*обязательственное правоотношение*) or so-called real right legal relationships (*вещное правоотношение*).

The concept "access" under EAEU law (i.e. under the Uniform TPA Rules, once adopted) is stipulated as a legal term "access to services..."¹³⁰ which means "provision of the *right to use* gas transportation systems..."¹³¹ The legal term "gas transportation system" under EAEU law is understood, evidently, as immovable property or as immovable property complex and, therefore, gas transportation system as an individually determined thing may be the object of the so-called¹³² real rights (*вещные права*) and so-called limited real rights¹³³ (*ограниченные вещные права*). The right (power) *to use the property* is generally understood in the local legislation¹³⁴ and legal scholarship¹³⁵ of all the EAEU's member countries as a legal permission to exploit the property for economic or other purposes by utilising its useful qualities. Literal interpretation of the legal term "access to services" under EAEU law, therefore, suggests that the TPA right under EAEU law and the local laws of the EAEU's member states should be understood as some kind of limited real right (i.e. subjective legal right under civil law) that belongs to any system user by operation of law.

A systematic interpretation of the EAEU law and local legislations of the EAEU's member states, however, suggests, that the TPA right under EAEU law cannot be considered as a limited real right, for the reasons stated below. Firstly, all real rights formalise the relationship between a person and a thing, giving the person an opportunity to use the thing in his own interests without the participation of other persons.¹³⁶ The TPA right, however, does not suggest that a system user would itself "use" the grid by way of transportation of gas using its own technical, human and other resources. Quite the opposite: because of the TPA right, the system operator expects that an owner of the network would be obliged to render him "transportation" services for certain fee to be paid (i.e. tariff). In other words, the TPA right actually requires participation of another person (i.e. the operator of the network). Secondly, it is an imperative requirement of the local laws of all EAEU member states that all types of limited real rights

¹²⁹ E.g. see Russian civil law: course book, in 2 volumes, V.S. Yem, I. A. Zenin, N. V. Kozlova, and others, edited by E. A. Sukhanov, 2nd ed. Moscow: Statute Publ., 2011. Vol. 1. General part. Real right. Inheritance right. Intellectual property rights. P. 124.

¹³⁰ The legal term "gas transportation services" in accordance with Paragraph 2 of Annex 22 of the EAEU treaty means "services for the transportation of gas using gas transportation systems".

¹³¹ See Paragraph 2 of Annex 22 of the EAEU Treaty and Paragraph 4 of the Program.

¹³² According to Sukhanov, these categories of real rights upon which EAEU member countries' concepts were modelled were originally defined in German-based legal systems seen today in Germany, Austria and Switzerland. Somewhat different types of real rights are also found in French legislation and in other countries of continental Europe. See: Sukhanov, Yevgeny, "The Concept of Ownership in Current Russian Law" *Juridica International*, VI/2001. Available at: <https://www.juridicainternational.eu/index.php?id=12534> P. 104.

¹³³ E.g. the right of permanent and unlimited use of land, servitudes, and the right to develop another person's land parcel. Under civil laws of all the EAEU's countries, the objects of all limited real rights, with limited exception, are immovable objects.

¹³⁴ E.g. see Article 188 of the Civil Code of the Republic of Kazakhstan dated 1994, that says: "The right to use shall represent the legally-enforced possibility to extract from the assets their useful natural properties and also to extract benefits out of it. A benefit may be in the form of income, gain, fruit and in other forms."

¹³⁵ E.g. Sukhanov, Yevgeny, "The Concept of Ownership in Current Russian Law" *Juridica International*, VI/2001. Available at: <https://www.juridicainternational.eu/index.php?id=12534> P. 104.

¹³⁶ *Ibid.* P. 103.

existing under respective national laws shall be explicitly stipulated in local legislation (i.e. an exhaustive list, or *numerus clausus*, of limited real rights).¹³⁷ The TPA right is not specifically recognized as a limited real right in the legislation of the EAEU's member states and, therefore, it cannot be treated as one.

The TPA right as currently implemented in EAEU law, therefore, more resembles a right under an obligation (i.e. a subjective legal right to demand performance) in the so-called obligations legal relationship (*обязательственное правоотношение*).¹³⁸ "Obligation" as applied under civilian law, means a legal tie (*vinculum iuris*) by which one or more parties (obligants) are bound to perform or refrain from performing a specified conduct (prestation).¹³⁹ Paraschuk¹⁴⁰, for instance, says that the concept of "access to pipeline" in theory may have two different meanings: (i) as access to gas transportation services commodity market or (ii) as access to an "item of property" (*доступ к объекту права собственности*) - i.e. physical access to immovable facilities and equipment for gas transportation by way of leasing of the gas pipeline. Paraschuk also believes that the first of the above two possible meanings has more merit, and understands "access to commodity market" as a non-discriminatory access of organizations (i.e. network users) to gas transportation services provided by natural monopolies (i.e. TSOs) using gas transportation systems.

The "TPA right" as a subjective right under EAEU law corresponds with an obligation to connect to the grid, contract and a duty to perform on the side of the undertaking in control of the energy transmission system. So, from the legal point of view, the TPA concept under the EAEU law suggests, that the TPA right is not a stand-alone, autonomous subjective right, but it is a subject matter¹⁴¹ of and it results from underlying civil law relationships (*гражданское правоотношение*), where a system user is a "creditor" that has a right¹⁴² to demand¹⁴³ performance (i.e. TPA right) and a system operator is a "debtor" that is obliged to perform certain actions, if requested, for a fee (tariff).

Our reading of EAEU law suggests, therefore, that the TPA right is generally understood under EAEU law as a *subjective right* of a system user to require a so-called natural monopoly entity (i.e. TSO) to demand performance of the following two powers:

¹³⁷ Ibid. P. 104.

¹³⁸ I.e. in the law of obligations, unlike the real rights that has immovable property as the object, the object is the conduct of the debtor.

¹³⁹ BAUDOUIN, J.-L., P.-G. JOBIN, & N. VÉZINA, *Les Obligations*, 6th edn. (Cowansville: Éditions Yvon Blais, 2005), P. 19.

¹⁴⁰ Paraschuk. S.A. "Antitrust regulation of access to gas transportation system through pipelines under the laws of Russia." *Lawyer Journal* N.1. 2016

¹⁴¹ Legal rights and obligations of counterparties constitute a subject matter of a civil law relationship. See Russian civil law: course book, in 2 volumes, V.S. Yem, I. A. Zenin, N. V. Kozlova, and others, edited by E. A. Sukhanov, 2nd ed. Moscow: Statute Publ., 2011. Vol. 1. General part. Real right. Inheritance right. Intellectual property rights. P. 112.

¹⁴² As in any civil law relationship, a creditor often simultaneously acts as a debtor as well, so in this case a system user as a debtor is obliged to pay a tariff to the system operator.

¹⁴³ Or not to demand, as in civil law relationships it is a legal right, but not a legal obligation.

1. to get *access* (i.e. to be physically connected¹⁴⁴ to the grid¹⁴⁵ and to execute a gas transportation agreement in form and substance¹⁴⁶ satisfactory to the imperative requirements of local natural monopoly law) to the gas network; and
2. to *use* (i.e. to render “natural monopoly services” related to gas transportation through a gas network for a fee (tariff) in accordance with the executed gas transportation agreement) of the gas network.

Gavrilina seems to reason in the same way, because she points out that a right to access a high-pressure pipeline consist of two interconnected components: (i) access to technical connection and (ii) access to gas transportation services.¹⁴⁷

As for the legal grounds for the TPA right as a subjective right within an obligations legal relationship (*обязательственное правоотношение*) to arise, as Sukhanov¹⁴⁸ noted, it can be, among others:

1. a so-called unilateral transaction¹⁴⁹ (*односторонняя сделка*); and
2. a contract¹⁵⁰ (*договор*).

A duly submitted request from a gas system user to provide *access* to the gas network, evidently, shall be considered as a *unilateral transaction* that triggers creation of the obligations legal relationship between the network user and network operator, but only with regards to the first above mentioned power: i.e. a demand to get physically connected to the grid and a demand to execute a gas transportation agreement in form and substance satisfactory to imperative requirements of local natural monopoly law (hereinafter – the “Unilateral TPA Obligation”). That is under the Unilateral TPA Obligations a TPA right as a subjective right provides a power to demand *access* (i.e. to demand to get connected and to execute a gas transportation agreement) to a gas network, but it does not, strictly speaking, include the power *to use* (i.e. to demand performance of the gas transportation services in accordance with the executed gas transportation agreement) the gas network. Once the relevant gas network operator performs all its duties under the Unilateral TPA Obligation¹⁵¹, the Unilateral TPA

¹⁴⁴ Execution of the separate connection to the grid agreement is required.

¹⁴⁵ In contrast to EU law, the EAEU law obligation to provide access to the grid implies that the system user shall also have a right (subject to compliance with imperative requirements of law) to be connected to the grid. Paragraph 31 of the Program, in particular, says that Unified TPA Rules shall provide, *inter alia*, procedure for physical connecting to the gas transmission systems located on the territory of the EAEU.

¹⁴⁶ The TPA concept under EAEU law is, evidently, a natural monopoly concept, whereas the local natural monopoly laws of the EAEU’s member states provide for imperative requirements for the form and substance of the gas transportation agreements.

¹⁴⁷ Gavrilina E.A. “State regulation of connection of oil production facilities and oil refineries to high pressure pipelines”. *Entrepreneurial Law Journal* N.1 2015. P.P.60-61.

¹⁴⁸ See Russian civil law: course book, in 2 volumes, V.S. Yem, I. A. Zenin, N. V. Kozlova, and others, edited by E. A. Sukhanov, 2nd ed. Moscow: Statute Publ., 2011. Vol. 2. Special part. Law of Obligations. P. 43.

¹⁴⁹ Transactions are defined in the civil laws of all EAEU member states as actions of individuals and legal entities aimed at the establishment, modification or termination of civil law rights and obligations. A unilateral transaction is one that may be made by an express of will by a single person or legal entity.

¹⁵⁰ Paragraph 7 of Annex 22 to the EAEU Treaty explicitly says that TPA shall be ensured “on the basis of civil law contracts” (i.e. gas transportation agreements).

¹⁵¹ I.e. it will procure connection of the user to the grid and it will execute the gas transportation agreement with the network user.

Obligation¹⁵² and the relevant TPA right for *access* are automatically terminated by virtue of this performance.¹⁵³

Instead of the Unilateral TPA Obligation, however, a new obligations legal relationship and, consequently, a new TPA right for *use* would be created upon execution of the gas transportation agreement (hereafter the “Contractual TPA Obligation”). This new TPA right as a subjective right provided by a *contract*, however, would be limited to the power to *use* (i.e. to demand performance of the gas transportation services in accordance with the gas transportation agreement) the gas network. TPA right under the Contractual TPA Obligation, accordingly, would terminate as any other contractual right and obligation once the gas transportation agreement is terminated or expired in accordance with applicable law.

It seems, therefore, that TPA right under EAEU law, effectively, is split into two separate subjective legal rights (i.e. two different TPA rights) with different legal bases (i.e. one TPA right is created by a unilateral transaction and another TPA right is created by a contract) and with different substance (i.e. one empowers only *access*, whereas the other empowers only *use* of the gas network, as discussed above), but both of them under the private (civil) law legal framework.

The practical implications of this conclusion is that TPA right under Unilateral TPA Obligation is not a freely transferable object¹⁵⁴ of law under EAEU law (i.e. such TPA right cannot be assigned to any third party) because Unilateral TPA Obligations are, evidently, so-called personal obligations (i.e. performance of such obligation is possible only to initial creditor – i.e. to the gas network user who submitted request for access).¹⁵⁵ The TPA right under Contractual TPA Obligation, however, in theory¹⁵⁶ should comport the free transfer, by way of assignment¹⁵⁷ of rights and obligations under the gas transportation agreement. As a practical implication, it means that in the EAEU gas network users at some point in the future would be able to trade contracted capacity on a secondary market, but only based on executed gas transportation agreements.

VI. Conclusion

Unlike the EU’s single gas market, the EAEU’s common gas market seems to be based on only one main pillar: third party access (TPA). The objectives and design of the EAEU’s proposed common gas market and the reforms of domestic gas markets required to realize this common market, however, have not yet become clear. Moreover, because of the war in Ukraine and the depletion of its gas export revenues, Russia is clearly not ready to countenance the equal treatment of all consumers in the EAEU’s common gas market, irrespective of their country of origin, because this would require it first to abandon its current practice of cross-subsidizing

¹⁵² And, consequently, all rights and obligations under this Unilateral TPA Obligation, including TPA right related to first power to demand *access* to a gas network, as a subjective right.

¹⁵³ See Russian civil law: course book, in 2 volumes, V.S. Yem, I. A. Zenin, N. V. Kozlova, and others, edited by E. A. Sukhanov, 2nd ed. Moscow: Statute Publ., 2011. Vol. 2. Special part. Law of Obligations. P. 75.

¹⁵⁴ Same reasoning Logofet had in relation to the TPA right, but for oil high pressure pipelines. See: Logofet D.D. “Access right to high pressure oil pipelines: two systems of regulation”. Oil, Gas, Law Journal N.2. 2006. P.37.

¹⁵⁵ See Russian civil law: course book, in 2 volumes, V.S. Yem, I. A. Zenin, N. V. Kozlova, and others, edited by E. A. Sukhanov, 2nd ed. Moscow: Statute Publ., 2011. Vol. 2. Special part. Law of Obligations. P. 61.

¹⁵⁶ Subject to the imperative provisions of the relevant local laws of the EAEU member states, where respective gas transportation agreements have been executed.

¹⁵⁷ See Russian civil law: course book, in 2 volumes, V.S. Yem, I. A. Zenin, N. V. Kozlova, and others, edited by E. A. Sukhanov, 2nd ed. Moscow: Statute Publ., 2011. Vol. 2. Special part. Law of Obligations. P. 61.

its own local industry and population and to establish fair competition in the respective domestic gas markets of the countries of the EAEU.

One of the most profound effects of the war in Ukraine will be its impact on the Russian gas market, as it will force Russia to curtail all its plans to liberalise its domestic gas market. This, in turn, means that the common gas market of the EAEU will not be as liberal as originally envisaged. This, again, will slow down the process of the liberalization of gas markets, including the deregulation of wholesale gas prices, in all the EAEU countries for a long time. Most importantly, it will slow down or even halt the creation of the EAEU's common gas market, since Russia will have to preserve its cross-subsidization mechanisms in the coming decades for both political and economic reasons.

Evidently, Russia will use its competitive advantage, *viz.* large reserves of relatively cheap natural gas, for as long as possible. At the same time, it is already clear that Russia's political leadership has lost some of its former enthusiasm for renewable energy as well as for integrating energy markets within the EAEU. Finally, it is yet to be seen also whether Russia will be able to use the EAEU's common gas market as a bypass for transit shipments of Russian gas to China.

Based on all these considerations, it is clear that many things will have to go right for the common gas market of the EAEU to be formed in a timely manner and function properly, and at present the chances of success do not appear to be very high.