DEVELOPMENT OF FUTURE CROSS-BORDER PIPELINES IN THE BLACK SEA - A LEGAL PERSPECTIVE

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Contents

1. Chapter 1: Introductory Remarks

1.1. Introduction

"As distances from producing fields to consuming markets increase, so will the frequency with which large-scale pipelines straddle international boundaries,"[1] said Browning and Dimitroff (2009) and as much as it is a self-evident fact,[2] the reference exposes a key feature of the energy sector, namely its inherently cross-border nature.[3]

When it comes to the development of cross-border offshore pipelines, the first significant projects started to be developed in Europe in the North Sea in the 1970s.[4] However, given the enlargement of the European Union further to the east and the soon depleted hydrocarbons reservoirs in the North Sea, it has come the time for Europe to divert some of its attention to one of its more secluded seas, whose strategic location has sometimes overshadowed its other prospects. From a strategic and historical point of view, the Black Sea region has always been the gateway separating the Orient from the Occident and has witnessed numerous conflicts. The annexation by Russia of Crimea, the Ukrainian peninsula with vast coastal exposure to the Black Sea and the ongoing war started by Russia in 2022, shook once again the region to the core and led to an even tenser situation.

Although cross-border offshore pipelines have been developed for more than 50 years, no regional nor international instruments exist that would provide a fully functioning legal framework for their development, whether onshore or offshore.[5] As a result, transnational pipelines are subject to a mix of national, regional, and international regulations, each representing an ever-increasing and entangled dimension that needs to be considered. These dimensions do not apply individually, rather they influence each other on different levels and sometimes overlap.

In the last decade, the European Union's ("EU") influence in the Black Sea region has increased exponentially. Since 2007 two of its six coastal states are member states ("MS" for either singular or plural) of the EU, i.e., Romania and Bulgaria. Lengthy negotiations have also occurred between Turkey and the EU, as Turkey applied to become a member of the European Economic Community in 1987.[6] However, recent developments in Turkey have led the EU Parliament to request the suspension of negotiations.[7] As regards Ukraine, in an expedite procedure speeded by the war, the country was granted a candidate status in June 2022, however an actual estimation for Ukraine's accession to the EU block is yet to be established. Georgia also applied for EU membership in March 2022.[8]

Thus, the role of EU law in developing offshore pipelines in the Black Sea is increasingly consequential and the actions taken at EU level have ricochet implications for the entire region. To this end, although the drive behind EU's rationale to amend Directive 2009/73/EC concerning common rules for the internal market in natural gas ("Gas

[1] W. Browning and T. Dimitroff, '*Transboundary Pipeline Development and Risk Mitigation*' G Tuberville (ed), Oil and Gas Law: A practical Handbook (2009) p. 93.
[2] Roggenkamp M.M., Rogcwell, Ronne, Del Guayo, '*Energy Law in Europe National, EU and International Regulation*', Third Edition, Oxford University Press (2016) p. 65.
[3] K Talus, 'Internalization of Energy Law', Research Handbook on International Energy Law (2014) chapter 1.
[4] Roggenkamp, M. M., 'Petroleum pipelines in the North Sea: Questions of jurisdiction and practical solutions' *Journal of Energy & Natural Resources Law*, (1998) 16(1), 92-109.
[5] Redgwell, C., 'Mind the Gap in the GAIRS: The role of Other instruments in LOSC Regime Implementation in the Offshore Energy Sector' p. in Bankes, N., and Trevisanut, '*Energy from the Sea: An International Law Perspective on Ocean Energy*', S. (Eds.), BRILL (2015).
[6] See <https://ec.europa.eu/neighbourhood-enlargement/countries/detailed-country-information/turkey_en> (accessed on 30 June 2023).
[7] See Press Release from the EU Parliament on 13-03-2019, available at: <https://www.europarl.europa.eu/news/en/press-room/20190307IPR30746/parliament-wants-to-suspend-eu accession-negotiations-with-turkey > (accessed on 30 June 2023).
[8] See< https://www.consilium.europa.eu/en/policies/enlargement/georgia/> (accessed on 30 June 2023).

Directive")[9] did not concern the Black Sea, but the operation of the Nord Stream 2 pipeline in the Baltic Sea, the implications of the amendments brought by Directive 2019/692 amending the Gas Directive ("2019 Amendment") will have on future offshore pipelines in the Black Sea region are equally, if not even more severe. For these reasons, when analyzing the EU law segment, this present paper will focus primarily on the implications the 2019 Amendment will have on the development of transnational gas pipelines in the Black Sea.

1.2. Methodology and research question

The implications of the Gas Directive and the amendments brought by the 2019 Amendment, regarding the development of cross-border pipelines have already been discussed in the legal literature to a certain extent. Talus (2017)[10] argued that EU energy law, and therefore the Gas Directive (prior to the amendment) was not applicable to external gas pipelines entering the EU internal market, Hancher and Marhold (2019)[11] focused on the competencies of EU to regulate external pipelines, especially about the 'upstream' part of such pipelines, Talus and Wustenberg (2017)[12] discussed the risks entailed from an international law perspective if EU energy law is extended to non-EU countries and Yafimava (2019)[13] discussed the impact the amendment will have on Nord Stream 2 and focused on providing solutions for the project to continue.

Scholars have shown, little interest in analyzing how the 2019 Amendment, combined with the other two segments (international and national) will affect other existing or future transnational pipelines. As a result, this contribution will propose an innovative approach to the topic, by filling a specific gap and analyzing the legal perspective of developing cross-border gas pipelines in the Black Sea region. Therefore, the main research question of this contribution is: *how will the amendments to the Gas Directive impact the development of cross-border pipelines in the Black Sea?* To perform this analysis the paper will use a doctrinal methodology, grounded on the latest legislative amendments to Gas Directive, but also on a series of other legal instruments, in particular, the United Nation Conventions on the law of the sea and the EU treaties, when applicable.

2. Chapter 2: The Black Sea in international law and the impact on energy activities

2.1. The Black Sea in international law

Before diving into the legal aspects of developing cross-border pipelines in the Black Sea, it is necessary to first position the Black Sea in the international context. Is it really a sea, or a lake? And more importantly does the legal status of the Black Sea matter in the analysis of cross-border gas pipelines?

The Black Sea is situated in Southeastern Europe and borders 6 coastal states, i.e., Romania, Bulgaria, Turkey, Georgia, Russia, and Ukraine. Given its strategic location, at the crossroad between Central Asia, Europe and the Middle East, many civilizations have sought to impose dominance over the Black Sea, with some conflicts continuing to the present day.[14]

From a geographical perspective, the Black Sea has little connection to other seas or the ocean. Its only connection to the world's oceans is actually through the Sea of Marmara an inland sea within the borders of Turkey, which further connects the Black Sea with the Mediterranean Sea and then the Atlantic Ocean. The Black Sea connects with the Sea

[9] Hereinafter references made to the Gas Directive refer to the amended version, after the implementation of the 2019 Amendment.
[10] Talus, K., 'Application of EU energy and certain national laws of Baltic Sea countries to the Nord Stream 2 pipeline project, '*The Journal of World Energy Law & Business'* (2017) 10.1 30-42, p 33.
[11]Hancher, L. & Marhold, A., 'A common EU framework regulating import pipelines for gas? exploring the Commission's proposal to amend the 2009 gas directive', '*Journal of Energy & Natural Resources Law'* (2019), vol. 37, no. 2, pp. 1–15
[12] Talus, K., 'Risks of expanding the geographical scope of EU energy law', '*European Energy and Environmental Law Review*' (2017), 26(5).
[13] Yafimava, Katja, 'Gas Directive amendment: implications for Nord Stream 2', '*The Oxford Institute for Energy Studies*', (2019).
[14] The annexation of Crimea by Russia in 2014 has created multiple ripple effects. From an energy point of view, one effect is that Romania now has a de facto offshore border with the Russian Federation (see Dudau, R, 'The Ukraine crisis: Legal and energy security impacts in the Black Sea Basin', '*Caspian report',* (2014).

of Marmara through the Strait of Bosphorus[15] and by the Strait of Kerch with the Sea of Azov[16]. Having such a narrow connection to the world ocean led to the assertion that the Black Sea should not be regulated like any open sea, but rather, due to its closed nature, only the riparian states should have access to it.

The discussion regarding the legal status of the Black Sea differs in nature from the one conscerning the Caspian Sea, one of the most contested bodies of water, for one important reason: The Black Sea connects with the world ocean through the Bosphorous Strait, whereas about the Caspian Sea it has been asserted that "as a landlocked body of water, laying 27 meters below the ocean level, without any direct outlet to the ocean, the Caspian is not stricto sensu a sea, i.e., part of the world ocean (…)".[17] Vinegradov (1996) also states that the Caspian Sea does not meet the definition of an enclosed or semi-enclosed sea under article 122 of The United Nations Convention on the Law of the Sea ("UNCLOS"), and therefore "international law of the sea does not automatically apply to this water body."[18]

Following on the above interpretation, it could be argued that if a sea has access to the open ocean through natural straits, such as the Bosphorous Strait, the legal regime applicable is in fact the one dictated by international law, more precisely by UNCLOS, as the primary instrument regulating the rights and duties of states offshore. In addition, a historic reason why the Black Sea retains its status as a sea instead of a lake or body of water[19] is that it was a dispute over the Black Sea which led to the definitions of an enclosed sea and a semi-enclosed sea, now regulated under UNCLOS.[20]

An analysis of the status of the Black Sea is not done for purely theoretical reasons. More so, how the Black Sea is perceived in international law has practical effects on the coastal states and their ability to perform activities offshore. According to the international law of the sea, the rights of coastal states offshore, differ from those exercised onshore. If the Black Sea were to be considered a lake or an inland body of water, as opposed to a sea, the discussion would be limited to the agreement reached by the coastal states on how to delineate their respective shares and rights.[21]

The 1936 Montreux Convention[22] places the Black Sea in a unique situation, as it remains today "the only sea where the bordering coastal states were given a special legal status by international agreement to regulate and limit the access of military vessels".[23] However, this sui generis status did not extend to the exploration and exploitation of natural resources offshore, nor does it address the issue of who has the right, if any, to regulate these activities.

The Black Sea is considered a sea by the international community also due to the ruling of the International Court of Justice ("ICJ") in 2009 regarding the dispute on the delimitation of the continental shelf between Romania and Ukraine.[24] As maritime areas are regulated under the international law of the sea; such a delimitation would not be possible if the Black Sea was not considered a sea.

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[15] The Bosphorus strait, together with the Dardanelles Strait (connecting the Sea of Marmara and the Aegean Sea), are known as the border between Europe and Asia. Since 1936 the passage through the aforementioned straits is governed by the Montreux Convention.

[16] See Zhiltsov, S.S., S. Zonn I., and Kostianoy A.G., '*Oil and gas pipelines in the Black-Caspian Seas Region*' Springer International Publishing, (2016) p 30.

[17] Vinogradov, S., 'The Caspian Sea: Quest for a New Legal Regime' (1996) 9 LJIL p. 87. The authors also mention that the only connection to the open seas is through the Volga River. A good example of a dispute arising out of the status of an enclosed body of water is the discussion surrounding the Caspian Sea, whose status has only recently been clarified. For a legal discussion regarding the status of the Caspian Sea see: Dubner, Barry Hart '*The Caspian: Is It a Lake, a Sea or an Ocean and Does It Matter? The Danger of Utilizing Unilateral Approaches to Resolving Regional/International Issues'*, Penn State International Law Review (2000), Vol. 18: No. 2, Article 2. Available at <https://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1477&context=psilr > (accessed on 30 June 2023).

[18] Ibid 90.

[19] The Caspian Sea is defined in article 1 of the Caspian Convention of 12 August 2018 of the aforementioned convention as 'the body of water" See Pietkiewicz, 'M. Legal status of Caspian Sea–problem solved?', '*Marine Policy'*, (2021), 123 p. 5.

[20] Oral, N., '*Regional co-operation and protection of the marine environment under international law: the Black Sea'*, Martinus Nijhoff Publishers, (2013) p. 28.

[21] Vinogradov (1996) (n16) p. 91.

[22] Montreux Convention Regarding the Regime of the Straits of 20 July 1936, with the primary object to limit the access of war vessels through the Strait of Bosphorous.

[23] Oral., N. (2013) (n19) 28.

[24] Romania v Ukraine, Judgment, ICJ GL No 132, (2009) available at: <https://www.icj-cij.org/public/files/case-related/132/132-20090203-JUD-01-00-EN.pdf> (accessed on 30 June 2023).

2.2. The impact of the international law of the sea in the energy sector

The second part of the chapter will examine whether or not coastal states have the right to regulate offshore activities, and in particular, cross-border gas pipelines. This section will analyze the maritime areas regulated by the international law of the sea that are relevant in the Black Sea and the rights and duties coastal states have in each of these maritime areas, i.e., (i) the territorial waters, (ii) the continental shelf, (iii) the Exclusive Economic Zone and (iv) the high seas. The continental shelf of the Black Sea in particular will be closely analyzed, as its characteristics offer an insight into the practical aspects of developing energy projects in the Black Sea.

To understand on what grounds coastal states exercise activities offshore, this section will first establish the relationship between jurisdiction and sovereignty. As stated by F.A. Mann[25], jurisdiction is "an aspect, or an ingredient or a consequence of sovereignty."[26] In the same terms, ICJ has stated that even if the title on which a state exercises jurisdiction rests in its sovereignty, "a state's sovereignty is not equalled to its jurisdiction."[27] Therefore, jurisdiction can be defined as the manifestation of a state's sovereignty and refers to the ability to regulate a certain activity, namely, to "prescribe and enforce a rule of law."[28]

Although there are multiple legal principles used as the basis for jurisdiction, the following are commonly accepted for the allocation of jurisdiction in international law: a) the territoriality principle, b) the nationality principle, c) the universality principle and d) the protective principle.[29] From this four, only the territorial principle will be further elaborated on as it is considered the primary basis for jurisdiction in the energy sector; it provides that states are allowed to enact legislation and enforce it within their territory.

Considering the above, the following questions arise: (i) how much does the territory of a state stretch into the sea? and (ii) what happens if activities are performed outside the territory of a state?

One of the oldest and most known principles of international law is the freedom of the high seas[30], meaning that any interested party is free to use the high seas, as it is res communis, i.e., common property.[31] With time, the principle evolved and allowed for one exemption, i.e., the territorial waters, which at first were 3 nautical miles.[32] Nowadays, territorial waters or the territorial sea extends up to 12 nautical miles (circa 22 km) from the shores.[33] A state's sovereignty extends to the territorial sea which includes not only the water column itself but also the seabed, subsoil and air space above the territorial sea. Because the territorial sea is seen as an extension of the land territory, a state enjoys full jurisdiction over its territorial sea, with only minor exceptions, such as the innocent passage of ships.[34]

As activities offshore increased and technology made possible the exploration of the seabed, the concept of a continental shelf was introduced.[35] In 1958 the United Nations introduced a series of conventions on the international law of the sea, delimitating the jurisdiction of the coastal states over 3 maritime areas: (i) territorial sea[36], (ii)

[25] Maria Gavouneli, '*Functional Jurisdiction in the Law of the Sea',* Brill, (2007) 7.
[26] Ibid 5.
[27] Case of SS Lotus, France v. Turkey, Judgement no. 9 (1927) pp. 3-33.
[28] Roggenkamp (n 4) p.93.
[29] Gavouneli (2007) (n 24) p. 7.
[30] H. Grotius, Mare Liberum (Elzevier, 1609); Shaw 2008, p. 553-554.
[31] Roggenkamp, M.M., 'Submarine Electricity and Gas Interconnectors – a treaty perspective', 'European Energy Law' Report IV Chapter 13 (edit.: Roggenkamp M. and Hammer U.) 2007, p. 247.
[32] Shaw, M.N., 'International Law', Cambridge University Press, 2008, sixth edition, p. 554. The Cannonball rule.
[33] Since the adoption of UNCLOS in1982, the territorial waters extended to 12 nautical miles.
[34] UNCLOS article 2 para 1 and 2.
[35] In 1945, The Truman Proclamation on the Continental Shelf introduced for the first time this concept.
[36] United Nations, Convention on the Territorial Sea and the Contiguous Zone. Done at Geneva, on 29 April 1958, United Nations, Treaty Series, vol. 516, p. 205.

continental shelf ("CS")[37] and (iii) the high seas[38]. In 1982 when UNCLOS was adopted, a new maritime area was defined, i.e., the exclusive economic zone ("EEZ"). The EEZ is the area beyond the territorial sea which extends for 200 nautical miles (but not beyond) from the baselines from which the breadth of the territorial sea is measured.[39]

According to the UN Conventions on the Law of the Sea,[40] in the EEZ and CS coastal states have sovereign rights concerning the exploration and exploitation of natural resources.[41] The exact meaning of sovereignty rights has been greatly debated, especially as regards the issue of ownership. While the legal literature seems to be in quasi agreement on the fact that sovereign right does not mean ownership of the seabed,[42] some states have nevertheless declared such ownership over the resource or the seabed itself. However, what is undisputed is that sovereign rights refer to something less than sovereignty, as such rights can be exercised only to carry out certain activities provided by the law of the sea, and thus in the CS coastal states exercise only functional jurisdiction (to explore and exploit natural resources), as opposed to full jurisdiction in the territorial waters.

In contrast to the territorial waters and the CS, which exist de facto, coastal states need to expressly claim an EEZ. Declaring an EEZ provides coastal states with the possibility to extend, at least in part, their jurisdiction to that area, as a coastal state with a declared EEZ has sovereign rights for exploring and exploiting natural resources, including oil and gas in this maritime area.[43]

Five of the six coastal states bordering the Black Sea have ratified the UN Conventions on the Law of the Sea and declared an EEZ.[44] The exception is Turkey, which has not ratified any of the aforementioned conventions, although it declared an EEZ in 1986.[45] Irrespective, the principles codified in UNCLOS and the other UN Conventions on the Law of the Sea are widely known as principles of customary international law, and therefore Turkey is bound to abide by them.[46]

An important characteristic of the Black Sea is that it lacks the final maritime area regulated under UN Conventions on the Law of the Sea, i.e., the high seas, due to its enclosed nature.

2.3. Oil and gas resources in the Black Sea' continental shelf

The Black Sea is undoubtedly a crucial transit route for the transportation of natural gas, but focusing solely on the rivalry between the EU and Russia would be oversimplifying the matters,[47] considering that at one point the Black Sea region has been referred to as "the cradle of European oil production."[48]

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[37] United Nations, Convention on the Continental Shelf. Done at Geneva, on 29 April 1958, no. 7302. United Nati ons –Treaty Series 1964 Vol. 499, 311–354 < https://treaties.un.org/doc/Publication/UNTS/Volume%20499/volume-499-I-7302-English.pdf > (accessed on 30 June 2023).

[38] United Nations, Convention on the High Seas. Done at Geneva, on 30 September 1962, no. 6465. United Nations –Treaty Series United Nations, Treaty Series, vol. 450, p. 11. <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-2&chapter=21> (accessed 30 June 2021).

[39] Article 57 UNCLOS.

[40] The Geneva Conventions and UNCLOS shall be collectively referred to as "the UN Conventions on the law of the sea".

[41] Article 54 & 77 UNCLOS for the EEZ and CS respectively.

[42] S. Jayakumar, 'The Continental Shelf Regime under the UN Convention on the Law of the Sea: Reflections After Thirty Years', Center for Oceans Law and Policy, Martinus Nijhoff Publishers (2013), Volume 17 states that: "the specific terminology of "sovereign rights" rather than "sovereignty" (…) was adopted to make it clear that the coastal State did not own the seabed, as advocated by some State, but had all other rights necessary for and connected with the exploration and exploitation of its natural resources." at p 6.

[43] Article 56 UNCLOS.

[44] See an overview of the countries who have ratified UNCLOS at:
<https://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm> (accessed on 30 June 2023).

[45] Decree by the Council of Ministers, No. 86/11264, dated 17 December 1986 at:
<https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TUR_1986_Decree.pdf> (accessed on 30 June 2023).

[46] Gökçe Mete, '*The TurkStream Pipeline Project: An Analysis of Legal, Financial and Technical Aspects',* European Center for Energy and Resources Security, 'Reflections', (2017) p. 45. See also Gavouneli (2007) (n24) p 4.

[47] Kottari., M., Popovici., et all. 'Energy politics, pipelines and the Black Sea basin: On the route to diversification of EU energy sources', '*Published by European Centre for Energy and Resource Security (EUCERS), Department of War Studies, King's College London. Published',* (2013). p. 51.

[48] Ibid p. 51.

Before the discoveries in the North Sea, Romania was one of the largest producers of oil in Europe.[49] The exploration of hydrocarbons in the Romanian continental shelf started in 1969. The first discovery was in 1980, and the first production started in 1987.[50] At the moment exploration and production operations are carried out in the Istria block by the company OMV Petrom, whereas the first commercial natural gas extraction was made from the blocks Ana and Doina by Black Sea Oil & Gas (BSOG), in June 2021[51]. Exploration operations in the deep-water areas of the continental slope are conducted in the Neptune Deep block by OMV Petrom and Romgaz through a joint venture. In June 2023 it was finally announced that OMV Petrom and Romgaz will invest almost 4 billion dollars in the Neptune Deep project in the Black Sea, after the exit of Exxon from the joint venture.[52] The changing of focus from oil to natural gas happened as a result of the depleting reserves of oil found in the shallow waters of the Black Sea.

The natural gas resources confirmed offshore in recent years and the hefty investments in the Romanian CS necessary for their exploration have given rise to new talks regarding the possibility of Romania becoming the next energy hub in Eastern Europe.[53] It has been argued that, if the natural gas discovery can be fully extracted it might amount to more than what is necessary for the internal gas consumption of Romania, and as such lead Romania to become a gas exporter.[54] Significantly larger discoveries than those found in the Romanian CS have been found recently in the Turkish continental shelf, amounting to up to 405 billion cubic meters of gas, which will make it the biggest discovery in the Black Sea, with production forecasted to start as soon as 2023.[55]

2.3.1. Completed and forecasted cross-border pipelines in the Black Sea

In what concerns cross-border pipelines, two major transit pipelines have been completed so far: Blue Stream and Turk Stream. Both pipelines connect Russia with Turkey through the Black Sea. The Blue Stream pipeline was completed in 2002 and has a full capacity of 16 bcm, reaching depths of 2,150 m, on the continental slope.[56]

Turk Stream has a capacity of approx.15 bcm and connects the Russian Black Sea coast with the Turkish landing terminal in Kiyikoy.[57] It has been developed based on the Russian-Turkish intergovernmental agreement. However, as argued by Pirani et all (2020)[58] as Turkey and Russia are not members of the EU, the compatibility of the agreement with the EU law is not relevant, as opposed to the South Stream project, analyzed below.

Other two projects for coast-to-coast pipelines have been anticipated in the Black Sea that would have involve the EU, namely: South Stream connecting the Russian Black Sea coast to Varna, Bulgaria and White Stream which would connect the Georgian coast with the Romanian coast. However, discussions regarding its implementations have stalled since 2015.

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[49] Ibid. p. 51.

[50] 'New drilling campaign in the Black Sea', 'Energy industry review' 15 May 2018 <https://energyindustryreview.com/oil-gas/new-drilling-campaign-in-the-black-sea/ > (accessed on 30 June 2023).

[51] See < https://www.romania-insider.com/bsog-first-black-sea-gas-delivery-romania> (accessed on 30 June 2023).

[52] See <https://www.energynomics.ro/en/omv-petrom-and-romgaz-will-invest-4-billion-dollars-in-the-neptune-deep-project-in-the-black-sea/ > and <https://seenews.com/news/romanias-romgaz-completes-takeover-of-exxon-mobils-stake-in-neptun-deep-793373 > (accessed on 30 June 2023).

[53] See 'Why the Black Sea could emerge as the world's next great energy battleground' <https://www.atlanticcouncil.org/blogs/ukrainealert/why-the-black-sea-could-emerge-as-the-worlds-next-great-energy-battleground/> (accessed on 30 June 2023).

[54] See '*Cross border maritime special planning in the Black Sea- Romania and Bulgaria (MARSPLAN -BS)*' p 302, ExxonMobil announced in February 2013 that it found a natural gas deposit of up to 84 billion cubic meters, which represented at that time three to six times the annual consumption of Romania.

[55] Firat, Kozok and Cagan Koc, '*Turkey expects to announce new Black Sea natural gas discoveris'*, 3rd March 2021, <https://www.worldoil.com/news/2021/6/3/turkey-expected-to-announce-new-black-sea-natural-gas-discoveries> See also <https://www.reuters.com/business/energy/turkeys-natural-gas-found-black-sea-now-comes-710-bcm-erdogan-2022-12-26/> (accessed on 30 June 2023).

[56] See <https://www.offshore-technology.com/projects/blue_stream/> (accessed on 30 June 2023).

[57] Pirani, S., et al. 'Implications of the Russia-Ukraine gas transit deal for alternative pipeline routes and the Ukrainian and European markets. '*OIES Energy Insight 65*' (2020), p. 7.

[58] Ibid p. 6.

South Stream was originally commissioned in 2008 and was planned to have a capacity of 31bcm/year, but during the Russia-Ukraine tensions in 2009, an increase in capacity was considered.[59] Between 2008-2010 multiple intergovernmental agreements were signed by Russia with several EU member states and Serbia. Due to the magnitude of the project and the technical challenges, South Stream was considered "the largest ongoing European gas infrastructure project" at the time it was introduced.[60] However, the project was cancelled in 2014 by Russia, as the EU claimed the intergovernmental agreements concluded between Russian and the EU member states were in breach of EU energy law, namely the Third Energy Package ("TEP"). Considering the current war waged by Russia against Ukraine and the EU's strong desire to disconnect itself from Russian gas, it is fair to assume this project will no longer be of any interest. However, the question remains as to how would a third country interconnector[61] be regulated. Chapter 4 of the paper will discuss at length whether or not EU had a legal basis in claiming the renegotiation of the respective intergovernmental agreements, and what the situation would be if talks regarding a third country interconnector would be re-opened today.

2.3.2. Coastal states' jurisdiction over offshore pipelines.

As stated in the introduction of this paper, the inherently cross-border nature of the energy sector means that pipelines often cross multiple borders and therefore are going to be subject to multiple jurisdictions, according to the territoriality principle[62]. This section aims at answering how is the jurisdiction over cross-border offshore pipelines established. The two categories of cross-border pipelines are as follows: a) field-to-coast pipelines or upstream pipelines - connecting an offshore gas production facility in the CS of one coastal state with the mainland of another coastal state and b) transit or coast-to-coast pipelines or interconnectors – connecting the shores of two coastal states.

2.3.3. Field-to-coast cross-border pipelines

For practical reasons, this first part of the section will propose the analysis of the jurisdiction of a potential field-to-coast pipeline from Romania to Bulgaria. The subsection will first provide the rules based on which jurisdiction is established and later apply the rules to the practical example.

A state has full sovereignty and therefore the ability to impose its full jurisdiction in the territorial waters, which also includes the seabed and the subsoil stretching for 12 nautical miles into the sea.[63] Thus, a state has full jurisdiction over the construction, operation and development of a pipeline entering its territory. This is further underlined by UNCLOS in article 79 (4) which establishes that a coastal state has the right to "*establish conditions for cables or pipelines entering its territory or territorial sea*." States still need to grant the right of innocent passage through their territorial waters, as provided in article 17 of UNCLOS, but other than that, they have full control over the activities performed therein.

However, beyond the territorial waters, two legal regimes can be identified for submarine pipelines: a) the freedom to lay pipelines as part of the freedom of the high seas[64] and b) the sovereign rights of the coastal states in the CS in connection with the exploration and exploitation of their natural resources.[65]

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[59] Stern, J., Pirani, S., & Yafimava, K., 'Does the cancellation of South Stream signal a fundamental reorientation of Russian gas export policy?', '*Journal of Self-Governance & Management Economics*', (2015) p.2.
[60] Ibid p. 2.
[61] According to article 3 of the 2019 Amendment, an interconnector means a transmission line which crosses or spans a border between member states for the purpose of connecting the national transmission system of those Member States or a transmission line between a Member State and a third country up to the territory of the Member States or the territorial sea of that Member State.
[62] As mentioned in section 2.2. the territoriality principle refers to the it provides that states are allowed to enact legislation and enforce it within their territory.
[63] Article 2 para 2 UNCLOS. The territorial waters can also stretch for less than 12 miles. It is up to the coastal state to establish that. All territorial seas in the Black Sea stretch for 12 nautical miles.
[64] Article 87 of UNCLOS.
[65] Article 79 (4) UNCLOS.

These two regimes need to be analyzed together when discussing jurisdiction over cross-border pipelines, as the sovereign rights coastal states exercise offshore translate into a functional jurisdiction allowing them to legislate the construction and operation of pipelines.[66] In this sense, UNCLOS provides that a coastal state: "has jurisdiction over cables and pipelines constructed or used in connection with the exploration of its continental shelf or exploitation of its resources or the operation of artificial islands, installations and structures under its jurisdiction"[67] However, pipelines connecting an offshore production facility located on the CS of one coastal state with the shores of another coastal state, do not fall under the definition provided above, and as such are not covered by the jurisdiction of the receiving coastal state, since no direct connection with the exploitation of the natural resources located in its CS exists.[68] These pipelines will in return be subject to the freedom to lay pipelines or *jus, communications*. Meaning that the coastal state through which the pipeline crosses, cannot prohibit its construction. This rule is now expressly provided under article 79 para 1 of UNCLOS.[69] Nevertheless, the freedom to lay pipelines in the CS is not absolute, as coastal states still need to consider the other freedoms and in particular the pipelines already in place.[70]

2.3.3.1. Example of a field-to-coast pipeline

As a practical example of how jurisdiction over a field-to-coast pipeline will be established, the section envisages a potential pipeline between Romania and Bulgaria. The choice for considering a future field-to-coast pipeline between these two countries is based on the following hypothesis: From the Black Sea coastal states, Romania has one of the most advanced projects regarding the extraction of offshore gas. In addition, the Romanian CS alone has estimated reserves of 12 million tons of oil and 70 billion m3 of gas, which if extracted would make not only cover Romania's gas needs but could also regain its status as a hydrocarbons exporter.[71] In 2009 the joint venture of Exxon Mobil and OMV Petrom operating in the CS of Romania made a discovery of a natural gas field with reserves of 42-84 bm3 in the deep-water area of the continental slope (approx. 930 m).[72] Since then, Exxon has exited the joint venture, having sold its 50% share in the joint venture to Romgaz.[73] It has been argued that once production starts, the annual supply of natural gas will be 6.5 bm3, which represents almost half of the Romanian gas consumption.[74] If the overall gas production in Romania is proven to be more than the annual internal consumption, the gas could be directed through a field-to-coast pipeline to Bulgaria.

As regards jurisdiction, as it will be connected to a production facility on the CS in Romania, the latter will have functional jurisdiction over the part of the pipeline situated in its CS, and as such it will be able to legislate all matters related to its development and operation. On the other hand, the moment the pipeline will cross into the CS of Bulgaria, it will no longer be connected to a production facility in that maritime area, and as provided above, it will be subject to the freedom to lay pipelines and acquire the status of a transit pipeline.[75] A reasonable observation is made by Langlet (2014) who argues that even if a state does not have jurisdiction over the entire pipeline, given that the design and technical details will be the same for its entire length, the state from which the pipeline originates still holds

[66] See Case C-111/05 (2011) BVC 300, Aktiebolaget v Skatteverket, where the court held that: "*the sovereignty of the coastal State over the exclusive economic zone and the continental shelf is merely functional and, as such, is limited to the right to exercise the activities of exploration and exploitation laid down in Articles 56 and 77 of the Convention on the Law of the Sea. To the extent that the supply and laying of an undersea cable is not included in the activities listed in those articles, that part of the operation carried out in those two zones is not within the sovereignty of the coastal State*" para 59.
[67] Article 77 UNCLOS.
[68] Roggenkamp (2007) (n30) p. 251.
[69] The 1958 Convention on the continental shelf did not expressly mentioned so.
[70] Article 79 para 5 of UNCLOS.
[71] Sageata. R., 'Romania – A future regional energy hub', '*Romanian Review on Political Geography*', (2015), XIII 229-236.
[72] Zhiltsov, et al. (n15) p. 59.
[73] See (n 51).
[74] Zhiltsov, et al. (n15) p. 60. See also <https://www.reuters.com/business/energy/romania-could-be-net-gas-exporter-coming-years-with-neptun-project-2023-06-22/> (accessed on 30 June 2023).
[75] Article 87 of UNCLOS, See also Langlet, D., 'Transboundary Transit Pipelines: Reflections on the Balancing of Rights and Interests in Light of the Nord Stream Project' (2014), *ICLQ, 63*, 977-988, p 979.

considerable influence over the specifics of the pipeline. Finally, the part of the pipeline crossing the territorial waters of Bulgaria and reaching its shore will be under the full jurisdiction of the Bulgarian Government.

Therefore, a field-to-cost pipeline is subject to more than one jurisdiction. In practice, coastal states usually enter into an intergovernmental agreement to establish the rules regarding the development of such a pipeline.[76] An in-depth analysis of the intergovernmental agreements concluded at EU level will be provided in Chapter 4 of this paper.

2.3.4. Coast-to-coast pipelines

As regards the jurisdiction of a coast-to-coast pipeline, these are also subject to multiple jurisdictions. On one hand, the portion of the pipeline located on the seabed of the territorial waters of the coastal states is under their full jurisdiction, and the portion of the pipeline located on their respective CS is subject to the freedom to lay pipelines, as no connection to the exploration and exploitation of offshore natural resources exists. In addition, the pipeline could cross the CS of a transit state (with no connection of the pipeline to the mainland).

However, as already explained the freedom to lay pipelines is not an absolute right. Coastal states laying pipelines on the CS of others still need to observe the rules put in place by those coastal as part of their functional jurisdiction. This is the manifestation of the protective principle77, and could for example related to environmental protection rules to "prevent, reduce, and control any pollution from the pipelines.[78] In addition, a coastal state can also influence the course for the laying of such pipelines, as its consent is required for establishing the course, according to article 79 para 3 UNCLOS.[79]

In this sense, it has been successfully claimed by states that cables transiting a state must obtain a permit. As there is no notable difference between laying cables and pipelines in the EEZ, the same situation could also arise in case of pipelines, meaning that transit states may require operators of the pipeline to obtain a permit.[80] Nevertheless, this does not mean that coastal states could go as far as to prohibit the laying of the pipeline on their CS, they are limited to delineating the course and prescribing measures "as pertaining to the design and the construction of the pipeline and the manner of laying it."[81]

2.3.4.1. Example of a coast-to-coast pipeline

One example of a coast-to-coast pipeline in the Black Sea is the White stream project which was meant to bring gas from Georgia (extracted from the Caspian Sea) through the Black Sea and connect to the mainland of Romania, and from there to other MS of the EU. The project was meant to initiate from Georgia, crossing its territorial seas and its CS and entering the CS and territorial waters of Romania. As White Stream did not have any production facilities connected to it, its jurisdiction would be divided as follows: Georgia will be able to legislate the part of the pipeline crossing its territorial waters, as it has full jurisdiction in that area. The section in the CS (of Georgia, Ukraine as transit state and Romania as the receiving state) would be subject to the freedom to lay pipelines provided by article 87 of UNCLOS,[82] together with the rules put in place by the coastal states based on the protective principle described above.

The analysis of how to establish jurisdiction of offshore pipelines is inherently linked to the maritime areas where said pipelines will be located. In the territorial waters states, have full jurisdiction over submarine pipelines, however, outside this area two regimes apply: a) the freedom of the high seas and b) the sovereign rights of coastal states regarding exploration and exploitation of their resources. This is where the distinction between field-to-coast pipelines

[76] There have been cases when the matter was resolved only by means of agreements between the private parties involved.
[77] Gavouneli (2007) (24) p 32.
[78] Roggenkamp (2007) (n30) p. 252 see footnote 19 and Article 79 para 2 UNCLOS.
[79] See case regarding Denmark for the laying of the Nord Stream 2 pipeline.
[80] Müller, H. K., 'Legal bases for offshore grid development under International and EU law: why national regimes remain the determining factor' (2013), p. 6.
[81] Roggenkamp (2007) (n30) p. 252.
[82] Article 87 UNCLOS – freedom of the high seas.

and coast-to-coast pipelines comes into place because coastal states can impose their jurisdiction over the pipelines in their CS only if they are connected to the exploration and production of offshore natural resources (i.e., field-to-coast). If no direct connection exists (i.e., coast-to-coast), the jurisdiction of the coastal state is limited to a protective jurisdiction, regarding environmental protection and the safety of offshore activities.[83]

2.4. Conclusion

Coastal states' rights offshore increased gradually, over history. If at first states would not have any individual rights, since the entire sea was considered *res communis*, with time coastal states' rights offshore increased gradually, and now they stretch not only in the territorial waters, as the first maritime area but also in the continental shelf and exclusive economic zone. The analysis further revealed that coastal states have different rights with regard to regulating pipelines in their CS, depending on whether or not such are connected to an offshore production facility or are merely transit pipelines.

The chapter also provided an overview of the status of the exploration and production activities performed in the Black Sea, to give a more concrete insight into to specifics of the Black Sea. This overview affirms that although the Black Sea is rich in hydrocarbons, given the depths and anoxic environment where such are usually found, the extraction is for most coastal states only in the early stages.

Finally, the Chapter also analyzed the existing cross-border pipelines in the Black Sea basin and concluded that only coast-to-coast pipelines involving non-EU countries have been completed, whereas pipelines involving EU MS as receiving states have been either cancelled, in the case of South Stream or have no clear ongoing trajectory, i.e., White Stream. The following chapter will continue with the analysis of the applicable EU law and the impact of the new amendment to the Gas Directive.

3. Chapter 3: Implications of EU law

Since the Black Sea has the legal status of a sea, the answer to the question of how jurisdiction over offshore exploration and production activities is divided between coastal states is mainly provided under the UN Conventions on the Law of the Sea. However, the law of the sea merely provides who has the right to legislate, and not the regime itself. Thereby, this chapter will analyze the legislation applicable to the operation of offshore pipelines at EU level, considering two of the six Black Sea coastal states are members of the EU. At EU level the Gas Directive is the most significant piece of legislation as regards the legal regime applicable to gas pipelines. Therefore, the main question this chapter aims to answer is how will the 2019 Amendment impact future developments of cross-border offshore pipelines in the Black Sea?

The chapter will be divided into 4 substantial sections. The first section will address the legal grounds based on which EU law applies to the energy activities performed in the Black Sea basin. The second section will analyze the provisions of the Gas Directive before the 2019 Amendment and whether or not it applied to gas pipelines between MS and third countries. The analysis will be aided by arguments provided under the Opinion issued by the Legal Services of the EU Council in light of the EU's request to conclude an agreement with Russia regarding the operation of Nord Stream 2. Subsequently, section 3 will analyze the 2019 Amendment, and will address the impact on (i) field-to-coast pipelines and (ii) transit pipelines to and from third countries. The Chapter ends with an assessment of the detrimental impact the 2019 Amendment will have on future offshore gas pipelines.

3.1. The applicability of EU law in the Black Sea basin

3.1.1. EU competence in the energy sector

Before analyzing the provisions of EU energy law, and their impact on the Black Sea basin, this section will first address whether the EU has the competencies to legislate such matters. As mentioned earlier, the EU law dimension

[83] Roggenkamp (n 4) p.109.

applies to energy activities carried out in the Black Sea given that 2 of its coastal states are members of the EU, i.e., Romania and Bulgaria and Ukraine and Georgia are part of the Eastern Partnership and aspiring EU MS.

The distribution of competences between Member States and the EU is provided under the Treaty on the Functioning of the European Union ("TFEU") and according to article 4 (2) lit. (i) of the latter, MS and the EU have a shared competence as regards regulating the energy sector.[84] According to article 2 (2) of TFEU, a shared competence means that both the EU and the MS "can legislate and adopt legally binding acts in the energy field."[85] MS are therefore free to enact legislation in the energy sector, but only if the EU has not already made use of its competence before the MS, or if it has subsequently released that power.[86]

Since the entry into force of the Lisbon Treaty[87] in 2009, the primary legal basis for energy activities in the EU is article 194 of TFEU, which gives the EU legislator a mandate from the MS to enact legislation in this field.[88] As far as European energy law is concerned, article 194 of TFEU represented an innovation, as it included for the first time a specific chapter on energy, defining "the key competencies and overall objectives of the Union's energy policy".[89]

The first paragraph of article 194 TFEU enumerates the aims of EU energy policy, i.e., (i) to ensure the functioning of the energy market, (ii) the security of supply of the internal market, (iii) the promotion of energy efficiency and saving and the development of new, renewable sources, and (iv) the promotion of interconnection of energy networks.[90] Although the aims established above are to be accomplished by shared competence between the EU and the Member States, the latter will retain their right to determine their energy mix and the general structure of its supply.[91]

There have been many discussions as to the real effect article 194 had on EU's ability to legislate in the energy sector, especially since the TEP, a comprehensive set of EU secondary law covering to a great extent the entire energy chain, was enacted in March 2009, before the entering into force of the Lisbon Treaty.[92] However, given the broad language of article 194, the powers held by the EU seem to have heavily increased since its entering into force.[93]

The development of cross-border pipelines is perhaps the best example of how the competencies in the energy sector have shifted towards the EU after the entering into force of the Lisbon Treaty. Considering one of the objectives provided in article 194 (1) is "to promote the interconnection of energy networks", Delvaux (2012) stated that as a result, the EU could "conclude treaties under international law with energy exporting (third) countries, which could create restrictions to the MS scope of action".[94] This assumption has proven to be correct, as, in June 2017, the European Commission ("EC") requested a mandate from the European Council to negotiate an agreement with Russia for the development of the interconnector pipeline "Nord Stream 2". Although the EC was not granted the right to conclude such an agreement,[95] it is clear that the EU considered it was within its rights to file such a request. Additionally, as the request was never formally lifted by the EU, this shows that an international agreement between

[84] Article 4(2) (i) TFEU.
[85] Delvaux, B. '*EU law and the development of a sustainable, competitive, and secure energy policy-opportunities and shortcomings',* Intersentia (2013) Antwerpen p. 301.
[86] Article 2 (2) TFEU and article 2 (2) TFEU.
[87] The Treaty of Lisbon was signed on 13 December 2007 and entered into force on the 1st of December 2009. The Lisbon Treaty amended both the Treaty on the European Union ("TEU") and TFEU. The EU become a successor of the European Community and acquired legal personality as a public international law actor. See Bram Delvaux, Michael Hunt and Kim Talus (eds) '*EU Energy Law and Policy Issues',* ELRF Collection, Volume 3 (2012) Intersentia page 263.
[88] Opinion of A-G Mengozzi in case C-490/10 (*Parliament v. Council*), p. 23
[89] Delvaux (2013) (n 84) 302.
[90] Art. 194(1) TFEU
[91] Art. 194 (2) TFEU.
[92] TEP was adopted in March 2009. See Hancher, L., & Salerno, F. M., 'Energy Policy After Lisbon' in A. Biondi (Ed.), "*European Union Law after Lisbon*", (2012), pp.367-402, p. 374-387.
[93] Delvaux. B., Hunt. M., & Talus. K., 'EU Energy Law and Policy Issues', '*ELRF Collection',* Volume 3 (2012)
[94] Ibid.
[95] Yafimava, K., 'Gas Directive amendment: implications for Nord Stream 2', '*The Oxford Institute for Energy Studies*', (2019). p. 8.

the EU and another third country for the development of cross-border pipelines could still be considered in the future by the EU.

3.1.2. EU Law applicability offshore

As analyzed in Chapter 2, the international law of the sea establishes the rights and duties that states can exercise in different maritime areas; however, the EU is not a state, and as a result, the extent to which EU law can apply to each maritime area is not as straightforward.

Article 52 para 1 of the Treaty of the European Union ("TEU") defines the territorial scope of EU primary law[96] by providing a list with the MS where the Treaties will apply. In plus, para 2 of the aforementioned article refers to article 355 of the TFEU which offers further insight into the applicability of EU primary law to the overseas territories of the MS. However, neither of these provisions tackle the applicability of EU primary or secondary law offshore.[97] To this end, the European Court of Justice ("the ECJ" or "the Court") has produced various judgements where it concluded that EU secondary law shall apply to the same geographical areas as the Treaties, provided that the secondary legislation expressly states that it shall not be applicable in certain areas.[98] Therefore, the answer to whether or not EU law applies offshore is the same for both EU primary law and secondary law, unless otherwise provided.

However, the question remains as to whether or not EU law can apply offshore. The ECJ took it upon itself to provide insight into this matter and the case law leads to a two-folded conclusion. Firstly, the ECJ states that the "national territory of the Member States (…) also consists of the territorial sea, its bed and subsoil."[99] In Aktiebolaget NN v Skatteverket the Court argued that considering a coastal state has sovereignty over its territorial waters, as provided under UNCLOS,[100] it means that the territorial waters are part of a coastal state' territory. This reasoning equates the notion of sovereignty with territory.[101] Therefore, by corroboration with article 52 of TEU which states that EU law applies to the territory of its MS, EU law will also apply in the territorial waters of the MS.

Secondly, in the same case[102] the ECJ stated that as coastal states only have functional jurisdiction in the EEZ and the CS, their "sovereignty is limited to the rights provided under article 56 and 77 of UNCLOS, which concern inter alia the exploration and exploitation of the natural resources therein."[103] Using the same reasoning as the one expressed for the territorial waters, i.e., sovereignty equates territory,[104] the Court concluded that when activities fall outside the scope of articles 56 and 77 of UNCLOS, "these activities do not fall within the sovereignty of the coastal state and thus fall outside the field of application of EU law."[105] Moreover, in the Kik Case, the Court excluded the laying of pipelines (which are not connected to a production facility) in the CS and EEZ from the jurisdiction of a MS, as any State is allowed to lay such infrastructure, and thus it excluded this activity from the applicability of EU law.[106]

In conclusion, EU law applies in the territorial waters of its Member States. In the CS and EEZ of MS, EU law applies in so far as the activities regulated fall within the sovereign rights of the MS as provided under article 56 or 77 of UNCLOS.

3.2. The EU regime applicable to gas pipelines

[96]The instruments of primary EU law are established in article 2 para 2 of TUE as follows: "*The Union shall be founded on the present Treaty and on the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties'). Those two Treaties shall have the same legal value*".
[97]Article 52 TEU also specifies in para 2 that "*the territorial scope of the Treaties is specified in Article 355 of TFEU*".
[98]See Niewenhout and Waverijn (2019) 1631 footnote 45.
[99] C-111/05 Aktiebolaget NN v Skatteverket para 57.
[100] UNCLOS article 2 para 1.
[101] Niewenhout and Waverijn (2019) (n101) 1633.
[102] Ibid.
[103] C-111/05 Aktiebolaget NN v Skatteverket para 57.
[104] Niewenhout and Waverijn (2019) (n101) p. 1633.
[105] Ibid. 1635.
[106] Case C-266/13, *Kik*, para 41.

3.2.1. Overview of the rules applicable prior to the 2019 Amendment

The first section of the chapter established that the EU has competencies to regulate activities in the energy sector and that the offshore applicability of EU law is dependent on the specifics of the activity performed. This next section will focus on the legal instruments the EU enacted in the energy sector based on such competencies and the extent to which they regulate cross-border gas pipelines between MS and third countries. The section will also analyze how the 2019 Amendment impacted the legal regime applicable to cross-border field-to-coast pipelines on one hand, and coast-to-coast pipelines on the other hand.

TEP was adopted in 2009 and consists of a set of secondary legislation regulating the EU energy market. With a view to the EU gas market, the Gas Directive is arguably the most important piece of legislation from TEP[107] as it tackles the four main aspects representing the "cornerstone of the internal energy market"[108] i.e., (i) the unbundling of the transportation services from production and supply, (ii) the non-discriminatory third-party access, (iii) tariff regulation and (iv) transparency of the market; This section will only analyze the rules under point (i) and (ii) as such the most problematic for cross-border third country pipelines.

The Gas Directive differentiates between two different types of pipelines i.e., (i) interconnectors and (ii) upstream pipelines, with each category being subject to different rules.[109] The most notable difference is that upstream pipelines are subject to a much lighter liberalization regime than interconnectors, meaning that MS only need "to maintain fair and open access to pipeline capacity,[110] whereas interconnectors are subject to the full requirements of liberalization, including unbundling, non-discriminatory third-party access and tariff regulation. Therefore, how a certain pipeline is defined will have a significant influence on how it is regulated.

The 'unbundling' rules refer to the separation of production and supply from the transportation of gas.[111] The rules put in place by TEP aim to ensure that the natural monopolists that operate the transportation infrastructure will not be active also in the production and the supply of gas, "as control over infrastructure translates into the possibility to influence the competition in those market segments where competition is possible."[112] This is a reflection of the fact that the gas transportation/distribution infrastructure is a natural monopoly, meaning that it would be uneconomical to have more than one infrastructure network. Therefore, the entity operating such infrastructure cannot be also a producer or a supplier, as it could favor its own production/supply over other competitors.[113]

The non-discriminatory third-party access means that MS have to ensure the transmission and distribution networks can be accessed by third parties. Market participants have non-discriminatory access to the transmission or the distribution networks by paying a regulated tariff which is published in advance by the network system operator.[114]

The above rules applied to gas pipelines within the EU before the 2019 Amendment. They covered both pipelines within a single MS and those straddling the borders between two or more MS. However, the extent to which these

[107] Hancher., L and Marhold, A., 'A common EU framework regulating import pipelines for gas?:exploring the Commission's proposal to amend the 2009 gas directive', '*Journal of Energy & Natural Resources Law'*, (2019), vol. 37, no. 2, pp. 1–15. Other relevant instruments for the purpose of this thesis are Regulation (EC) no. 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access the natural gas transmission networks and repealing Regulation (EC) no. 1775/2005 (hereinafter "Gas Regulation") and Regulation (EU) no. 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for Trans-European energy infrastructure and repealing Decision no. 1364/2006/EC and amending Regulation (EC) no. 713/2009, (EC) 7142009 and (EC) no. 715/2009.
[108] Hancher., L and Marhold, A (2019) (n110) p. 290.
[109] Article 2 (definitions) of the Gas Directive.
[110] Article 34 of the Gas Directive. See Riley, A., 'Nord Stream 2: A Legal and Policy Analysis', CEPS Special Report no. 151 Tuesday, (2016), p. 8.
[111] Article 9 Gas Directive.
[112] Talus, K., "Application of EU energy and certain national laws of Baltic Sea countries to the Nord Stream 2 pipeline project", '*The Journal of World Energy Law & Business'* 10.1 (2017) 30-42 p 34.
[113] Talus (2017) (n115) p. 33.
[114] Ibid. 34.

rules were also applicable to pipelines to and from a third country and the EU has been heavily debated in the last few years, as the Gas Directive did not provide a clear answer.[115]

The debate concluded only recently when the EC proposed to amend the Gas Directive, to extend its scope to interconnectors to and from third countries (for the section pertaining to a MS). In this way, the EC confirmed that TEP did not apply to gas pipelines originating from third countries before the amendment, otherwise there would be no point in amending it. However, it is worth mentioning that, South Stream has been cancelled in 2014 precisely due to non-compliance with the provisions of TEP by Gazprom, one of the pipeline's owners and operator.[116]

The decision of the EC to amend the Gas Directive was not sudden. Rather than that, it was the result of a continuous struggle of the EC to impose the TEP rules on the Nord Stream 2 pipeline,[117] connecting Russia and Germany through the Baltic Sea. Before considering the amendment of the Gas Directive, the EC first tried to request a mandate from the Council of the European Union (hereinafter "the Council") to negotiate an agreement between the EU and Russia about the operation of the Nord Stream 2 pipeline.[118] The Opinion[119] issued by the Council Legal Services was not favorable to the EC's cause. The following section explains the role of the Opinion in the EU's decision to amend the Gas Directive.

3.2.2. The Opinion of the Council Legal Services

In light of the EC's request to negotiate an agreement with Russia over the operation of Nord Stream 2, the Council Legal Services issued an Opinion where it concluded that no legal rationale exists for such an agreement, because the Gas Directive "does not set out a comprehensive framework for gas pipelines to and from third countries."[120] The Opinion dismissed both arguments brought forward by the EC for requesting the mandate, namely: a) the existence of a legal void regarding certain parts of the pipeline and b) a conflict of laws as there is a risk of "applying several contradictory regimes to one and the same stretch of pipeline."[121]

As regards the alleged legal void, the Opinion dismissed it as it argued that the offshore sections of the pipeline will be covered by the relevant rules of international law, including the law of the sea (para 16)".[122] In addition, it also stipulated that:

> "*the third state, on the one hand, and the MS concerned and the Union, on the other hand, would, in any event, have jurisdiction to regulate the operation of the pipeline and the respective points of departure and arrival of the pipeline on their territory, and there is no third point of entry or exit along the pipeline*."[123]

The Opinion reaffirms the principles provided under UNCLOS and analyzed in Chapter 2 of this thesis, namely that coastal states have full jurisdiction over the section of the pipeline situated in their territory, which in the case of offshore pipelines refers to the territorial sea. In case the pipeline crosses the EEZ of one or more coastal states, the latter have limited rights regarding the pipeline, related only to the protective jurisdiction.

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[115] See Simon Pirani and Katja Yafimava, 'Russian Gas Transit Across Ukraine Post-2019: pipeline scenarios, gas flow consequences, and regulatory constraints', '*OIES paper NG 105*', (2016).
[116] Yafimava, K., '*Building New Gas Transportation Infrastructure in the EU–what are the rules of the game*?' (2018) p. 119. available at: < <https://www.oxfordenergy.org/publications/building-new-gas-transportation-infrastructure-eu-rules-game/> (accessed on 30 June 2023). See also Behrens, '*The Declared End of Southstream and Why Nobody Seems to Care',* (2014) CEPS, Brussels.
[117] Yafimava (2018) (n119) p. 137.
[118]The Draft Recommendation page 6. The document was leaked to the public and is available at <https://www.politico.eu/wp-content/uploads/2017/07/NS-Draft-Mandate.pdf > (accessed on 30 June 2023).
[119]Council of the European Union, 'Opinion of the Legal Service, Recommendation for a Council Decision authorizing the opening of negotiations on an agreement between the European Union and Russia on the operation of the Nord Stream 2 pipeline – Allocation of competences and related legal issues', 12590/17, Brussels, 27 September 2017, (hereinunder "the Opinion").
[120] Opinion para 36-37.
[121] Opinion para 15.
[122] Opinion para 16.
[123] Opinion para 17.

The Opinion also emphasized that additional international cooperation could be necessary "to ensure that the equipment (of the pipeline) is operated according to a framework established in the interest of all parties concerned." However, this was viewed as a political matter in the eyes of the Council, and not linked to a legal void.

The conflict of laws argument was dismissed based on the conclusion of the Council Legal Services that the Gas Directive does not apply to pipelines from third countries, and therefore no conflict exists. A conflict of laws could only have existed according to the Opinion[124] "if both the Union and the third country had applied their respective jurisdiction over the pipeline." Therefore, as EU law is not applicable, a conflict of laws is excluded.

Although the Opinion did not advise the Council to refuse the mandate requested by the EC[125] as it simply stated that there is no legal rationale for such an agreement, the analysis of the Council Legal Services is in itself revelatory for the question addressed in this chapter. The Opinion clarifies that the Gas Directive and the other relevant instruments in TEP did not apply to offshore import pipelines between a MS and a third country before the 2019 Amendment.

3.2.3. What changed after the 2019 Amendment?

3.2.3.1. Field to coast pipelines

The Gas Directive defines a field to cost (upstream) pipeline as: "*any pipeline (…) operated and/or constructed as part of an oil or gas production project, or used to convey natural gas from one or more such projects to a processing plant or terminal or final coastal landing terminal."*[126] Considering the definition refers to a "*coastal landing terminal*," it is clear that upstream offshore pipelines are included. However, the definition does not clarify if the gas production project and the coastal landing terminal need to be both located within the borders of the EU for the upstream pipeline to be subject to the Gas Directive, or if one of them could originate from a third country.[127] Therefore, the question that arises is if cross-border upstream pipelines were covered or not by this definition before the 2019 Amendment?

The 2019 Amendment did not change this definition. However, it seems to have clarified the third-country issue. Recital (5) stipulates that "*pipelines connecting a third-country oil or gas production project to a processing plant or to a final coastal landing terminal within a Member State should be considered upstream pipeline networks*."[128] On the other hand, field-to-coat pipelines emerging from a MS and landing in a third country are not to be considered upstream pipelines according to the 2019 Amendment, because they have little effect on the internal energy market.[129]

An indication that upstream pipelines from third countries were not covered under the initial definition is the amendment of article 34 para 4 of the Gas Directive, which regulates cross-border disputes regarding refusal to grant access to the upstream pipeline. The updated article now expressly refers to upstream pipelines originating from third countries, as opposed to the initial provision which only referred to upstream pipelines between one or more MS.

As the proclaimed aim of the 2019 Amendment was to extend the application of the Gas Directive to import pipelines from third countries to "avoid distortion of competition in the internal energy market and negative impacts on the security of supply",[130] not including cross-border field-to-coast pipelines in the interconnectors category, seems unusual.[131] That is because such pipelines also bring imported gas into the EU market, much like the transit pipelines and their impact on competition could be just as significant while being subject to a much lighter regime. However, as argued by Jones (2021) the regulatory regime of upstream pipelines is not as stringent because they are not

[124] Opinion para 22
[125] Yafimava, K., "The Council Legal Service's assessment of the European Commission's negotiating mandate and what it means for Nord Stream 2", '*Energy insight 19'*, (2017) page 4.
[126] Gas Directive article 2 (2).
[127] Hancher & Marhold (2019) (n110) p. 295.
[128] 2019 Amendment Recital 5.
[129] Ibid.
[130] 2019 Amendment recital 3.
[131] William-James Kettlewell, "Import Pipelines under the Third Energy Package", in Jones et all, '*EU Energy Law, Volume 1: The Internal Energy Market'*, Claeys & Casteels Law Publishing, (2021) p 830-831.

considered to be part of any transmission system, "which is what triggers most of the requirements of the Gas Directive".[132]

Most of the gas projects in the Black Sea are mainly in the exploration phase and are still awaiting the final investment decision to proceed to the production phase. An indirect positive effect of the 2019 Amendment could be related to the asymmetric regime between upstream pipelines and interconnectors. Faced with the stringent requirements for interconnectors to and from third countries under the current Gas Directive, coastal states of the Black Sea could be incentivized to expedite production of the offshore gas fields and connect them to landing coastal terminals.

There are 3 possible scenarios for developing cross-border field-to-coast pipelines in the Black Sea that would involve the EU and these are: a) a field-to-coast pipeline between two members of the EU (i.e., Romania and Bulgaria), b) a field-to-coast pipeline from a third country to EU (e.g., from Turkey to either Romania or Bulgaria) and c) field-to-coast pipeline between the EU and a third country.

However, the possibility of a future pipeline connecting an offshore production field from a MS to a third country does not seem very plausible. This is because the third countries, Russia and Georgia are gas producers and would not need to import gas, or in the case of Turkey, because it already receives gas from Russia through two offshore transit pipelines, i.e., Blue Stream and Turk Stream, an onshore pipeline, i.e., TANAP and have also begun their own gas explorations offshore. One possible scenario would be connecting an offshore field in the CS of Romania with a coastal landing terminal in Ukraine, as a neighboring coastal state. In this case, such a pipeline would not be covered by the regulatory requirements of the Gas Directive, if this occurs before Ukraine implements the provisions of the latter.

A field-to-coast pipeline from a third country to the EU could be envisaged between Turkey and either Bulgaria or Romania. However, this is also rather unplausible at least for the foreseeable future, as discoveries made by Turkey in the Black Sea are still at a very incipient phase. A more plausible scenario is the development of a cross-border field-to-coast pipeline between Romania and Bulgaria, which will be discussed in more detail below.

What could be the rationale for developing such a pipeline? The proximity between the two countries and the fact that they are both MS of the EU, therefore subject to the same requirements under the Gas Directive, are important factors to consider. However, even more important will be to find a market for the gas produced offshore. It is estimated that if all the discoveries in the Neptune block in the Romanian CS come into production, they will represent more than the annual consumption of Romania.[133] This will mean that Romania will want to export part of the production from the Black Sea and for that it will have to be assessed if Bulgaria is a plausible market or not.

The geological characteristics of the Black Sea will also have to be considered. The Black Sea is known for its harsh environment, with low levels of oxygen, making the construction of subsea pipelines challenging. In addition, in contrast to the North Sea, with whom the Black Sea is sometimes compared,[134] most of the Black Sea basin is relatively deep, with a 1000-2000 water column.[135] Considering the largest discovery in the Romanian CS lies between 100 and 1,700 m below water, it will be important to have an impact assessment to analyze what is the most economical (the Neptune Block) and safest way of bringing the gas to the shore, and if the CS of Bulgaria is more favorable, this should be taken into account when planning how to connect the fields to the shore.

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[132] Ibid. 830.

[133] See See 'Cross border maritime special planning in the Black Sea- Romania and Bulgaria (MARSPLAN -BS)' p 302, ExxonMobil announced in February 2013 that it found a natural gas deposit of up to 84 billion cubic meters, which represented at that time three to six times the annual consumption of Romania.

[134] Kitchka, A., & Dovzhok, T., '*Why the Black Sea basin is still immature petroleum province? An analysis of geological constraints and exploration problems*' (2013).

[135]The Neptun Deep block is found in water depths between 100 m and 1,700 m. <https://www.offshore-technology.com/projects/neptun-deep-gas-field-project-black-sea/> (accessed on 30 June 2023).

In conclusion, the 2019 Amendment appears to have enlarged the definition of field to coast (upstream) pipelines, by adding that pipelines connecting gas fields from third countries to final coastal terminals within a MS should be considered upstream networks. On the contrary, if the receiving state is a third country, in this case, the Gas Directive will not apply. However, this amendment does not have a major impact on the foreseeable development of cross-border field-to-coast pipelines in the Black Sea. The reason is that the most plausible scenario for such a pipeline in the Black Sea is between two members of the EU, which would have been subject to the rules under TEP even before the 2019 Amendment.

3.2.3.2. Interconnectors or transit pipelines. How TEP became applicable to transit pipelines from the third country?

According to the Gas Directive, an interconnector was defined as a "*transmission line which crosses or spans a border between MS for the sole purpose of connecting the national transmission systems of those MS*."[136] In contrast, the definition under the 2019 Amendment now includes the transmission lines "between a MS and a third country up to the territory of the MS or the territorial sea of that MS."

In the initial proposal to amend the Gas Directive, the definition also referred to the EEZ of the MS, in addition to the territorial waters. Meaning, the Gas Directive would have applied to the part of the pipeline passing through the EEZ of a MS, as if it was crossing its territory,[137] which would have been in violation of UNCLOS. However, in the final version of the amendment, the application of the Gas Directive was limited to the territorial waters of the MS where the connection point is found. This means that the scope of EU energy law was extended with 12 nautical miles, the breath of territorial waters.[138] In practical terms, this would be achieved by creating a virtual entry point at the border of the territorial sea, where the first interconnection takes place. From that point on, the Gas Directive applies.[139]

Changing the definition of an interconnector, to cover transmission lines between a Member State and a third country was not only sufficient to make the provisions of the Gas Directive applicable,[140] but it also meant that the provisions set under Regulation no. 715/2009 on conditions for access to the natural gas transmission networks ("Regulation no. 715/2009") would apply to transmission lines to and from MS, as the latter states in article 2 (2) that all relevant definitions contained in the Gas Directive also apply.[141]

Another clarification that needs to be made refers to whether or not a section of a pipeline that simply crosses the territorial waters of another country would be subject to the provisions of the Gas Directive. The answer to this question can be found in recital 9 of the 2019 Amendment which specifies that the provisions of the Gas Directive apply "in the territorial sea of the MS where the first interconnection point with the MS' network is located". Therefore, if a transit pipeline enters the territorial seas of a MS where there is no interconnection point, the Gas Directive will not apply to that section of the pipeline.[142]

However, what happens if the pipeline crosses the territorial sea of a third country? This could be relevant for the Black Sea in a scenario where a transit pipeline emerging from a third country would cross the territorial waters of another third country (e.g., the White Stream project originating from Georgia crossing the territorial waters of Ukraine before reaching Romania). A reasonable interpretation would be that if the Gas Directive is not applicable in the territorial waters of a MS, even much so it should not apply in the territorial waters of a third country.

This approach also helps streamlining permitting procedures and puts the executive decisions regarding the regulatory aspects in charge of only one regulatory authority, meaning the National Regulatory Authority ("NRA") of the MS

[136] Gas Directive Article 2 para (17).
[137] Hancher & Marhold (2019) (n 110) p. 299
[138] See Kim Talus in video conference, 6 March 2019, available at: <https://fsr.eui.eu/eu-common-rules-for-gas-import-pipelines-the-amendment-to-the-gas-directive/.> (accessed on 30 June 2023).
[139] Ibid.
[140] Kettlewell (2021) (n 134) p. 831.
[141] Ibid. 831.
[142] Ibid. 828.

where the interconnection point is found. The respective NRA has then the obligation to cooperate with the authorities of other concerned member states, to apply consistently the provisions of the Gas Directive.[143]

To sum up, the most important change brought by the 2019 Amendment entails that coast-to-coast pipelines to and from third countries will be subject to the provisions provided under the Gas Directive. The most delicate rules these pipelines will have to comply with are those detailed in section 3.3.1. The next section will analyze if applying these rules to transit pipelines in the Black Sea could prove detrimental to their successful development.

3.2.4. Are the new rules detrimental or not to third-country transit pipelines in the Black Sea?

For pipelines originating from third-countries the most problematic issue is by far the unbundling requirement under article 9 of the Gas Directive. The 2019 Amendment provides a derogation from the ownership unbundling requirement[144] for existing pipelines that were completed by the day of entry into force of the amendment if the owner of the pipeline is a vertically integrated company.[145] In return, MS may implement, under certain conditions, an alternative to the ownership unbundling requirement, such as an independent system operator[146] or an independent transmission operator.[147]

On one hand, it could be argued that because there were no existing coast-to-coast pipelines to the EU at the time the 2019 Amendment was adopted, any new transit pipeline constructed in the Black Sea will not benefit from this derogation and will have to abide, for the section subject to the Gas Directive, with the ownership unbundling rule, and be "total independent from the producers or suppliers of the gas going through the interconnector."[148]

On the other hand, this cannot be considered a detriment *de iure*, but rather *de facto*, since no pipelines of this type have been successfully completed in the Black Sea. However, this analysis cannot avoid a remembrance of the South Stream. Were it not for the EC arguing its compliance with TEP at a time when TEP did not apply to third-country interconnectors, South Stream might have been completed by the time the 2019 Amendment entered into force.

For pipelines which have been completed before 23 May 2019 (the day of entry into force of the 2019 Amendment), article 49a of the 2019 Amendment provides that the MS where the first connection point is located may decide to derogate from the provisions regarding unbundling, third party access and the tariff regulation, in so far as such derogation is necessary for either the recovery of the investment or for security of supply reasons. The derogation can be granted if it is not "detrimental to competition or the effective functioning of the internal market in natural gas, or the security of supply in the Union."[149] However, this derogation applies to existing pipelines only, which means that future pipelines are not covered by it.

Concerning the third-party access rule, it "will depend on whether the third country also has similar third-party access requirements on the entry (exit) of the interconnector."[150] This could prove difficult, as most third-country exporters, including Russia, have a state monopoly over the export of gas.[151] Therefore, the MS at one end of the pipeline could and must offer capacity to any third party; however, there might not be a third party with the right to accept such an offer at the other end of the pipeline.[152]

[143] Article 41 (1) (c) of the 2019 Amendment.
[144] 2019 Amendment Article 9 para 1 (a).
[145] Gas Directive article 2 para 2020 states: '*vertically integrated undertaking' means a natural gas undertaking or a group of natural gas undertakings where the same person or the same persons are entitled, directly or indirectly, to exercise control, and where the undertaking or group of undertakings perform at least one of the functions of transmission, distribution, LNG or storage, and at least one of the functions of production or supply of natural gas*;".
[146] Gas Directive article 9 para 8 (a)
[147] Gas Directive article 9 para 8 (b)
[148] Kettlewell (2021) (n 134) 847.
[149] Article 49a of the 2019 Amendment.
[150] Kettlewell (2021) (n.134) p. 847.
[151] See Yafimava (2019) (n 12) page 3.
[152] Ibid. See also Yafimava (2019) (n12).

One last aspect that needs to be discussed is the possibility granted by the Gas Directive to apply for an exemption under article 36, which is separate from the possibility of requesting a derogation as provided above and relates expressly to new infrastructure. According to article 36 of the Gas Directive, new infrastructure projects would be able to apply for an exemption from the unbundling rules, third-party access, access to storage and access to upstream pipeline networks and tariff regulation.[153] In order to be exempted, one of the conditions is that the level of risk attached to the investment is so high, that the investment would not take place unless an exemption was granted. The exception could also be provided for infrastructure that "significantly increases the capacity in the existing infrastructure."[154]

Since new coast-to-coast pipelines to and from third countries are now considered interconnectors, for the section under the MS jurisdiction, it means that future pipelines will be able to apply for such an exemption.

The exemption procedure under article 36 is not new. The 2019 Amendment only amended the existing exemption procedure, by changing one of the criteria, as follows: Article 36 para 1 (e) originally stated that in order for an exemption to be granted it must not be a) "detrimental to competition or the effective functioning of the internal market", or b) "the effective functioning of the regulated system to which the infrastructure is connected."[155]

In contrast, the new criteria provide that the exemption must: a) "not be detrimental to competition in relevant market which are likely to be affected by the investment," b) "to the effective functioning of the Union's internal market in natural gas," c) "the efficient functioning of the concerned regulated systems" or d) "to security of supply of natural gas within the Union."[156]

The text is misleading, as it does not clarify which are the markets likely to be affected by investment, as such are presented as a separate market from the Union internal market. Given that the target of the 2019 Amendment was Nord Stream 2, it could be argued that the markets affected by the investment refers to Ukraine, which will be bypassed as a transit country and thus, lose transit revenues. From this point of view, a coast-to-coast pipeline in the Black Sea might also affect other markets since it will diversify traditional transit routes that connect Russia and other gas-producing countries in Asia with the EU market.

Although it could be argued that after the 2019 Amendment, new interconnectors from third countries are eligible to apply for an exemption, and thus the new regime is more favorable to them, the fact that they are excluded from the derogation in article 49 (a) weighs heavier. This is because the exemption in article 36 contains multiple requirements, and in the end, the EC decides whether or not the respective new pipeline meets them. The exemption in article 49a has less stringent requirements.[157] For example, article 49a provides that the derogation must not be "detrimental to competition", while article 36 (1) states that the pipeline has to "enhance competition" in order to be granted an exemption.

It remains to be seen if the amended article 36 will be decisive in the development of cross-border pipelines in the Black Sea, considering that in the failed attempt of South Stream, Gazprom as the owner of the pipeline chose not to apply for the exemption (as it was in place at the time), precisely because of how the EU delayed the process for exempting another pipeline, the OPAL,[158] which took more than seven years to be considered.[159]

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[153] Article 36 Directive no. 2009/73 concerning common rules for the internal market in natural gas (hereinafter referred to as "Gas Directive") "major gas infrastructure, i.e., interconnectors, LNG (…).
[154] Article 36 para 2 Gas Directive.
[155] Article 36 para 1 let e. Gas Directive.
[156] Article 36 para 1 (e) 2019 Amendment.
[157] Talus, K., "EU gas market amendment-despite of compromise, problems remain.", '*Oil, Gas & Energy Law Journal (OGEL),*' v.17.2 (2019). p.7.
[158] The OPAL pipeline is the onshore extension of Nord Stream.
[159]Yafimava (2018) (n119) p. 119.

3.2.5. Conclusion

This chapter aimed to analyze the implications of EU law on the development of cross-border gas pipelines in the Black Sea. The first section addressed the EU's competencies both in the energy sector and offshore. The analysis concluded that the EU and the MS have shared competence in the energy sector; however, since the adoption of the Lisbon Treaty in 2009, the EU's powers have significantly increased. As regards the applicability of EU law offshore, the analysis concluded that EU law applies in full in the territorial waters of the MS, whereas in the CS and EEZ, EU law applies only in so far as the activities regulated are connected to the sovereign rights enjoyed by the MS.

The second part of the Chapter focused on the secondary law enacted at EU level in the gas sector. It analyzed the provisions of the Gas Directive before the 2019 Amendment and revealed that due to the definition provided for interconnectors, third-country interconnectors were excluded from its scope. To reach this conclusion the analysis focused on the Opinion of the Legal Services of the EU Council about the EU's request to conclude an agreement with Russia for the operation of Nord Stream 2. The Opinion concluded that the requested mandate does not have a legal rationale, since the Gas Directive does not apply to third-country interconnectors. The third section analyzed in detail the provisions applicable to third-country pipelines after the 2019 Amendment, differentiating between upstream pipelines (field-to-coast) and interconnectors (coast-to-coast). It concluded that by redefining the notion of an interconnector, the EU made the entire secondary legislation enacted with regards to the EU gas market applicable to third country interconnectors, whereas in the case of upstream pipelines, only pipelines originating from third countries will be subject to the Gas Directive.

The difference between the regimes applicable to the 2 types of pipelines is significant, with third-country interconnectors being subject to the entire liberalization regime, i.e., unbundling, third-party access, tariff regulation and market transparency. On the opposite, third-country upstream pipelines are subject to a much lighter regime, under article 34 of the Gas Directive. Finally, the chapter concludes that the 2019 Amendment significantly decreases the chances of developing future third-country pipelines, since, outside the EU, the rules provided under TEP have little prospect to be implemented.

4. Chapter 4: Chances of bilateral or regional cooperation after the 2019 Amendment

This chapter aims to answer the following question: how does the 2019 Amendment influence the prospects of bilateral or multilateral cooperation between the coastal states bordering the Black Sea? More precisely, the Chapter will analyze the conditions under which MS will be allowed to negotiate and enter into agreements with third countries for the operation of upstream pipelines and interconnectors.

The chapter will be divided into 3 sections. The first section will analyze the rules on how intergovernmental agreements were concluded and negotiated before the entry into force of the 2019 Amendment and it will include a case study regarding the intergovernmental agreements signed for the construction of South Stream. The second section will analyze the changes introduced by the 2019 Amendment regarding intergovernmental agreements with third countries and lastly, section three will discuss the possibility of a regional agreement for the development of cross-border coast-to-coast pipelines, as a practical solution to unlock the development of offshore pipelines.

For clearance, the treaty envisaged in this last section would only cover coast-to-coast pipelines and excludes field-to-coast pipelines. The reason for such an exclusion relates to the fact that the most realistic prospects for the development of a field-to-coast pipeline is between Romania and Bulgaria, two members of the EU, therefore the elements that would warrant cooperation could be better catered by a bilateral agreement or simply by private contracts.

4.1. Intergovernmental Agreements in the energy field.

4.1.1. Intergovernmental agreements under the EU law before the 2019 Amendment

The instruments traditionally used in the development of cross-border infrastructure, especially offshore,[160] have been intergovernmental agreements ("IGA" or plural "IGAs"). According to Zajdler (2012),[161] they would usually regulate matters such as jurisdiction, approval of tariffs, licensing regime, cooperation on rules regarding construction, operation and decommissioning, safety regime, tax regime and dispute settlement mechanism.[162]

IGAs are defined in EU law,[163] as legally binding agreements concluded between one or more MS and one or more third countries, or between one or more MS and an international organization concerning *inter alia* the construction or operation of energy infrastructure with a physical connection to at least one MS.[164]

Some key elements can be drawn from this definition. First, an IGA under EU law is an agreement involving a MS and a third country, this excludes the agreements concluded between two MS. Secondly, a physical connection to the energy infrastructure has to be found in at least one MS. This excludes the situation in which the only MS party to the agreement is just a transit state, without any physical connection linked to its shores.

In 2012 the EC adopted Decision no. 994/2012[165] which established an information exchange mechanism concerning intergovernmental agreements between MS and third countries in the field of energy. Employing this mechanism, the EC asked the MS who have concluded IGAs to submit all of them to the EC, "in so far as they contain elements which have an impact on the functioning of the internal energy market or on the security of energy supply in the Union."[166] This meant that the EU would have an *ex-post* right to examine the IGAs, and if they were found inconsistent with the EU norms, they had to be revised/re-negotiated. However, Decision no. 994/2012 did not include the right to examine the IGAs prior to the ratification, unless the MS themselves would require this from the EC. This was considered ineffective as far as ensuring compliance with the EU law since they were already concluded by the time the EU could review them.

In 2017 the above issue was resolved, as Decision no. 994/2012 was replaced by Decision (EU) 2017/684.[167] The provisions now include an ex-ante right to examine the compatibility of IGAs with the EU norms, before their ratification.[168]

In conclusion, all IGAs concluded or amended after 2017 regarding gas pipelines need to be notified to the EC for an assessment regarding compliance with EU law. However, at the time Decision, 2017/684 was adopted, third country interconnectors were not covered by the Gas Directive, and thus, not subject to the ex-ante assessment of the EC.

4.1.2. The IGAs concluded in the attempt to develop the South Stream

As previously mentioned, the South Stream pipeline was supposed to bring natural gas from Russia to Bulgaria, crossing the Black Sea, and from there continuing onshore to Austria or Italy.[169] For the development of South Stream, several IGAs were concluded between Russia and the involved states during 2008-2010, some of which are members of the EU (Bulgaria, Hungary, Greece, Slovenia, Croatia, and Austria) and some non-EU (Serbia).

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[160] Zajdler, R., 'Legal Aspects of Electricity and Gas Interconnectors with Third Countries, EU Energy Law, Legal constraints with the implementation of Third Liberalization', Cambridge Scholars Publishing, (2012) 139.
[161] Ibid 1.
[162] Ibid 44.
[163] Decision (EU) 2017/684 of the European Parliament and of the Council of 5 April 2017 on establishing an information exchange mechanism with regard to intergovernmental agreements and non-binding instruments between Member States and third countries in the field of energy.
[164] Ibid.
[165] Decision 994/2012 on establishing an information exchange mechanism with regard to intergovernmental agreements and non-binding instruments between Member States and third countries in the field of energy (repealed) in OJ L 299, 27.10.2012, p. 13–17.
[166] Ibid article 3 para 1.
[167] Decision no. 994/2012 was replaced by Decision (EU) 2017/684167 on establishing an information exchange mechanism with regard to intergovernmental agreements and non-binding instruments between MS and third countries in the field of energy (hereinafter "Decision 2017/684").
[168] This is in contrast to IGAs on electricity which have to be notified only if the MS did not reach a firm conclusion regarding compatibility see Kettlewell (2021) (n134) p. 847.
[169] Yafimava (2018) (n119) p. 114.

All the South Stream IGAs were conducted even before the Decision 2012/994 was adopted, therefore, before the EU had the right to examine them either *ex-post* or *ex-ante*. However, two years after acquiring the ex-post right, in 2014, the EU rendered them incompatible with EU law and requested they be renegotiated or cancelled,[170] even filing an infringement procedure against Bulgaria for not denouncing its IGA with Russia.

Note should be made that those IGAs are still in place, as Russia refused to renegotiate. The reason why the EU deemed the Bulgarian-Russian IGA to be incompatible with EU law is that in its view it violated the TEP, especially the rules regarding unbundling, tariff regulation and third-party access rules, although all the South Stream IGAs, including the Bulgarian – Russian IGA were signed before the entering into force of the TEP.[171] Whether or not the EU had the right to examine and render incompatible the provisions of the IGAs with the TEP is now irrelevant for future third country interconnectors, as not only TEP is in force, but also Member States will have to observe the provisions therein for any future IGAs.

4.1.3. New rules under the 2019 Amendment

It is important to mention that there are three possibilities to conclude IGAs at EU level with third countries: (i) between MS and third countries; (ii) between the EU and third countries (when the EU has exclusive competence)[172] and (iii) between both the EU and the MS and the third country (when competence is shared between the EU and MS).[173]

Considering that energy is a shared competence,[174] according to section 3.1.1. in Chapter 3, individual MS could negotiate IGAs regarding the operation of third-country interconnectors, in so far as the EU has not done so already. The above was confirmed by the Opinion of the Council Legal Services analyzed in section 3.2.2. On the same point, in order to make an exhaustive analysis, the Council Legal Services also analyzed the grounds based on which the EU has exclusive competence, i.e., article 3 (2) TFEU. This would have been the case if the IGA would "affect common rules or alter their scope."[175] As these grounds were not upheld, the Opinion concluded that "the envisaged agreement does not fall into an area of exclusive Union competence."[176]

Thus, the EU would have to seek either (i) the approval of the MS to conclude the agreement alone, as member states in their capacity as members of the Council can choose to grant the EU such a right, or (ii) to jointly conclude the agreement.[177]

However, article 49b of the 2019 Amendment, provides that:

> "*if a MS intends to enter into negotiations with a third country in order to amend, extend, adapt, renew or conclude an agreement on the operation of a transmission line with a third country concerning matters falling entirely or partly, within the scope of the Directive, it shall notify the Commission (…). The Commission shall authorize the MS concerned to enter into formal negotiations with a third country for the part which may affect Union common rules unless (…) a) is in conflict with Union law (…) b) is detrimental to the functioning of the internal market in natural gas (…) …*"

This means that the EU will now have quasi-unlimited control on the negotiation or re-negotiation of IGAs concerning third-country interconnectors.[178] More so, the text reads that the EC will not authorize the MS to pursue the IGA if it is in "conflict with Union law." This could be interpreted as though the IGA must comply in full with all the provisions

[170] Yafimava (2018) (n119) p. 118.
[171] Ibid.
[172] Article 3 TFEU for areas where the EU has exclusive competences;
[173] Article 4 TFEU for areas where the EU and MS have shared competences, including the energy sector;
[174] Article 4 (2) (i) TFEU,
[175] Opinion page 13.
[176] Opinion p.15.
[177] Opinion para 62 p. 15.
[178] Talus (2019) (n 157) p.7.

of TEP and any other relevant legislation, that could be considered "Union law," including the Gas Regulation and the network codes.[179]

Meaning, for the part of a third-party interconnector that "may affect Union common rules," i.e., the section in the MS where the first interconnector point is, the agreement will have to comply with the rules provided under the Gas Directive, irrespective of what the provisions of the IGA would be for the section located in a third country.[180] Therefore, there is no real incentive, from a regulatory point of view for a third country to enter into such an agreement.[181]

As Yafimava (2019)[182] states, it appears that the empowerment procedure under article 49b, might not be so frequently used. On the opposite, the EU seems to have "robbed itself of an opportunity" to conclude such an international agreement, which could have helped resolve any particular concerns regarding the operation of a cross-border interconnector.[183]

In conclusion, from a legal point of view, the competencies that EU now holds on the negotiation and completion of IGAs between MS and third countries have heavily increased compared to before the 2019 Amendment, as it now expressly includes third-country interconnectors. Hence, the 2019 Amendment has severely decreased the chances of concluding such agreements, irrespective of the empowerment procedure provided therein.[184]

4.1.4. Adopting a common framework for the Black Sea Coastal States

Cross-border offshore pipelines are subject to an entangled mix of legal provisions, from international, national and regional law. In the last decades, the EU' influence in the Black Sea has grown exponentially, and as a result, EU law is now one of the main legal dimensions involved in regulating cross-border offshore pipelines. The 2019 Amendment cemented the debate regarding the applicability of EU energy law to third country interconnectors and made it clear that all future pipelines pertaining to that category shall be subject to EU law, in so far as they are connected to the EU mainland.

However, in what concerns EU vs non-EU coastal states in the Black Sea, the balance inclines towards non-EU coastal states, albeit some of them are members of the Eastern Partnership. Therefore, although the EU has increased its powers to negotiate and conclude agreements on behalf of MS, an instrument solely designed under EU law would most probably not be accepted by all the Black Sea riparian states.[185]

Having said so, a solution for creating a stable legal environment for future offshore pipelines would be for the coastal states to enter into a framework agreement based on international law which could include all the necessary provisions needed for the development of cross-border projects. Although there will be no way in circumventing the provisions under the 2019 Amendment, as MS need to comply with Union law, it could still include relevant provisions on how to operate the section of the pipeline uncovered by EU law, i.e., the section located on the CS.

4.1.5. Conclusion

This Chapter aimed at analyzing how the 2019 Amendment will impact the possibility to conclude IGAs between MS and non-EU countries bordering the Black Sea regarding the development of offshore cross-border pipelines. The analysis first focused on what the rules were before the 2019 Amendment, and it revealed that the EU has gradually increased its competencies regarding IGAs concluded by MS with third countries. In 2012 this assessment was done *ex-post*, meaning that after the conclusion of the IGA the EU would assess its compatibility with EU law. However,

[179] Ibid 7.
[180] Yafimava (2019) (n12) p. 8.
[181] Ibid.
[182] Ibid 9.
[183] Yafimava (2019) (n12) p. 9.
[184] Ibid.
[185] B. De Witte, A. Thies, '*Why Choose Europe? - the place of the European Union in the architecture of international legal cooperation*' in B. van Vooren, S. Blockmans and J. Wouters (eds), 'The EU's role in global governance: the legal dimension', Oxford University Press, (2013) p. 28.

since 2017, the EU was able to request a copy of the IGA before it was signed by the MS, and if found in breach of EU law, the MS would have to renegotiate before ratifying it.

One remark is that third-country interconnectors were not subject to EU energy law before the 2019 Amendment, according to the analysis in Chapter 3, therefore, they should not have been covered by these provisions. The example of South Stream, however, proved the opposite. The second section focused on the impact the 2019 Amendment would have on existing and future IGAs concluded with third countries for the operation of offshore pipelines. The section concluded that existing IGAs between MS and third countries could remain in place as they were, but only until the Union would enter into a new IGA with the same third country or until a renegotiation takes place.

As regards future IGAs as long as they contain matters covered by the Gas Directive, MS have to notify the EC if they are considering negotiating such an agreement and provide relevant documentation. The EC will authorize the MS to enter into negotiations only if it is considered that they will not be in conflict with Union law or be detrimental to the functioning of the internal market.[186]

To this end, the Chapter revealed that the 2019 Amendment has severely decreased the chances of concluding IGAs with third countries, irrespective of the empowerment procedure provided under article 49b which seems rather irrelevant given the conditions imposed. Lastly, section 3 discussed the possibility of concluding a framework agreement for developing coast-to-coast pipelines in the Black Sea, as a practical solution for establishing a set of stable and predictable provisions which long-term endeavors such as cross-border pipelines require. Nevertheless, the actual chances of such an agreement are hard to assess and would have to take into account not only the legal implications but also political unrest and the divergent interests of the Black Sea coastal states.

5. Chapter 5: Concluding remarks

For the EU, the Black Sea region offers the only area through which a potential physical link with Central Asian and Middle East energy resources could be established.

The addition of the European law dimension, after two of the coastal states adhered to the EU in 2007, and the aspiration of Ukraine and Georgia to soon join the block, has added extra complexity to the development of cross-border pipelines in the Black Sea, and as the present contribution has shown, it seems it has been more detrimental than supportive. The research question of this paper was to assess how the 2019 Amendment to the Gas Directive impacted the development of cross-border pipelines in the Black Sea. The analysis revealed that as a consequence of the shared competencies in the energy sector, the EU has legislated increasingly the functioning of the internal gas market. The liberalization of the EU gas market reached its peak with a third set of directives enacted in 2009 which provided the four most important rules representing the cornerstone of the internal energy market, i.e., unbundling, third-party access, tariff regulation and market transparency.

By changing the definition of an interconnector to cover transmission lines originating from or to third countries, the 2019 Amendment has made the Gas Directive and the related EU legislative acts applicable to interconnectors from or to third countries, for the section of the interconnector (pipeline) under the jurisdiction of the MS where it will be connected. This hinders the future prospects of coast-to-coast pipelines in the Black Sea, as the producing countries which would act as sending states are usually third countries, and the internal market rules might be considered too burdensome by their governments and face political disinterest. With regard to upstream pipelines (field-to-coast), the 2019 Amendment provides that only upstream pipelines from third countries will be considered under such definition, as upstream pipelines originating from EU and reaching a third country have little effect on the functioning of the internal market.

Lastly, not only did the 2019 Amendment changed the regime of third country interconnectors, but it also provided that all future intergovernmental agreements concluded between a MS and a third country will have to be authorized

[186] Article 49b the 2019 Amendment para 3.

by the EC, as soon as the MS is considering a negotiation with the third country. This is actually where the 2019 Amendment's impact lies.

To sum, this contribution shows that, although the target of the 2019 Amendment was not related to the energy activities in the Black Sea, it heavily impacted the regime under which gas projects will be considered after it entered into force. Nevertheless, the current situation in the Black Sea cannot be denied. The world has entered into a new reality ever since Russia invaded Ukraine in early 2022, and the Black Sea has by no means been shielded by this war. The attacks on the Snake Island alone have undoubtedly changed the way investors see gas projects in the Black Sea, considering the high investments required to bring such projects into production. Although the chances of coastal states' cooperation for the development of a multilateral agreement concerning gas projects in the Black Sea have objectively diminished, if recent history teaches us anything, is that in the face of adversity strong bonds can be forged between allies, and with the growing concern of climate change and the need to find new means for energy security, the Black Sea and its vast resources may prove to be a worthy ally.

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