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STATE RESPONSIBILITY CONCERNING TRANSIT NATURAL GAS PIPELINES UNDER EUROPEAN UNION LAW, INTERNATIONAL LAW AND DOMESTIC LAW

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ÖZET

Avrupa ve Asya'yı birbirine bağlayan Türkiye, hidrokarbon kaynağına sahip Hazar Havzası ve Orta Doğu ile Avrupa'daki büyük ithalatçı ülkeler arasında konumlanmıştır Bakü-Tiflis-Ceyhan, TANAP, Türk Akımı gibi başlıca doğal gaz boru hattı projelerinin başarıyla tamamlanmasıyla birlikte Türkiye "enerji koridoru" özelliğini kazanmıştır. Petrolden farklı olarak, doğal gazda transfer boru hatları ağırlıklı olarak kullanılmaktadır. Bu durumda ortaya çıkan yüksek yatırım maliyetleri sebebiyle, projelerin işletenleri bu iletim hatları üzerinde uzun süreli bir monopol güce sahip olmayı hedeflemektedir. Bununla birlikte, doğal gaz boru hatları işletenleri ile doğal gazın iç pazardaki alıcıları arasında bir rekabet söz konusudur. Avrupa ve Türkiye'de enerji piyasaları tüketicilerin yararı için bu rekabeti yönetmek üzere düzenlenmektedir.

Tezin ilk aşamasında, doğal gaz boru hatlarından doğan "idarenin sorumluluğu" kavramı çağdaş Avrupa ve Türk Enerji Hukuku'nun yanı sıra Türk İdare Hukuku'nun temel prensipleri açısından incelenmiştir. Türk Enerji Hukuku ile Avrupa Birliği Enerji Hukuku büyük bir uyum içerisinde olduğu için Avrupa Birliği Enerji Hukuku'nun ve özellikle Üçüncü Gaz Direktifi'nin analizi oldukça önem arz etmektedir. Bu bağlamda, tezde doğal gaza dair faaliyetler ve süreçlerin yanı sıra bu işlemlerin aktörleri araştırılmıştır. Aktörlerin tespit edilmesiyle birlikte, idarenin ve tüzel kişilerin faaliyet gösterdikleri alanlar ve bu alanların birbirinden nasıl ayrıştığı incelenmiştir. Bunun devamında ise, kamu hizmeti yükümlüğünden doğan idarenin sorumluluğunun sınırlarını tespit edebilmek için bu işlemlerin kamu hizmeti niteliği değerlendirilmiştir. Bu değerlendirme, idarenin sorumluluğunun temelini oluşturmaktadır. Böylece yapılan işlemlere uygulanacak hukuki rejim belirlenebilmektedir. İçtihatlar ve mevzuatın incelenmesiyle birlikte Özel Hukuk ve İdare Hukuku'nun dikotomisi sorumluluk kavramına bütünleyici bir kapsam getirmektedir.

Çalışmanın ikinci aşamasında ise "idarenin sorumluluğunun" sınır ötesi doğal gaz boru hattından mı yoksa transit transferin bir parçası olduğu için mi ortaya çıktığı sorunsalına odaklanılmıştır. Bu noktada çok taraflı hukuki çerçeveyi oluşturan Enerji Şartı Sözleşmesi, DTÖ/GATT ve ülkeler arasındaki özel doğal gaz boru hatları anlaşmaları devreye girmiştir.

Uluslararası hukuk çerçevesinin incelenmesi, idarenin diğer ülkelere olan sorumluluğu ile idarenin tüketiciler ve vatandaşlar başta olmak üzere yerel ajanlara olan sorumluluğu arasındaki ortak noktaları yakalayacak şekilde gerçekleştirilmiştir. Bu bağlamda her iki

alanda da üçüncü tarafların iletim hatlarına erişimi, hizmetlerin ayrıştırılması, çevrenin ve tüketicinin korunması gibi birçok temel konular belirlenmiştir.

Anahtar Kelimeler: Doğal Gaz, Kamu Hizmeti, İdarenin Sorumluluğu, İdare.

ABSTRACT

Bridging Europe and Asia, Turkey is located between the hydrocarbon sourcing countries at Caspian Basin, the Middle East and the major recipients in Europe. With the successful completion of major pipeline projects such as Bakü-Tbilisi-Ceyhan, TANAP and Turkish Stream, Turkey has now become a major "energy corridor". Yet, different from oil, in natural gas, transfer pipeline system is heavily used and due to high initial capital investments, the operators of the projects aim to sustain a prolonged monopoly on the natural gas transmission network. That is to say, there occurs an "inherent" conflict between the operators of the natural gas pipeline and the domestic recipients of natural gas where in Europe and Turkey energy markets are regulated to manage the competition for the benefit of the consumers.

One aspect of this thesis is to dwell upon the "state liability" stemming from the natural gas pipelines through the lenses of contemporary European and Turkish Energy Law as well as fundamental principles within Turkish Administrative Law. The analysis of EU Energy Law, especially the Third Gas Directive, is useful in the sense that Turkish Energy Law is in great harmony with the EU Energy Law. In this respect, the processes and activities pertaining to natural gas as well as the identification of the actors of these operations are analyzed. Due to this identification, the practice area of administration and private entities and how they are separated is investigated. Followingly, the public service nature of these activities is assessed in a way to determine the limits of state liability stemming from public service obligations. This assessment constitutes the foundation of the state liability which defines the legal regime pertaining to the activities. The dichotomy of Civil Law and Administrative Law creates a conclusive approach of liability with the survey on case law and current legislation.

The second aspect of the study focuses on determining "state responsibility" stemming from being a part of the transit or cross-border natural gas pipeline network. This is where the seemingly relevant sources of multilateral legal framework enter the scene such as Energy Charter Treaty, WTO/GATT and Special Natural Gas Pipeline Agreements between countries. The evaluation of the relevant international law framework is realized in a way to catch the common patterns between "state responsibility" against other countries and the "state liability" against domestic agents, mostly consumers and citizens. In this respect,

several key issues in both areas are determined such as third-party access, unbundling, protection of the environment and consumer protection.

Keywords: Natural Gas, Public Service, State Responsibility, Administration.

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ABBREVIATIONS

ACER : the Agency for the Cooperation of Energy Regulators

BOTAŞ : Boru Hatları ile Petrol Taşıma A.Ş

BTC : Baku-Tbilisi-Ceyhan

DSM : Dispute Settlement Mechanism

DSU : Dispute Settlement Understanding

ECJ : European Court of Justice

ECT : Energy Charter Treaty

EMRA : Energy Market Regulatory Authority

EMRB : Energy Markets Regulation Board

GATS : General Agreement on Trade in Services

GATT : General Agreements on Tariffs and Trade

HGA : Host governmental Agreements

IGA : Intergovernmental Agreement

ILC : International Law Commission

ISO : Independent System Operator

ITO : Independent Transmission Operation

LNG : Liqufied Natural Gas

LNGM : The Law on Natural Gas Market

OFGEM **:** The Office of Gas and Electricity Markets

PSO : Public Service Obligations

RPA : Regulatory Public Authorities

SGEI : Services of General Economic Interest

TAL : Turkish Administrative Law

TANAP : Trans Anatolian Natural Gas Pipeline Project

TAP : Trans Adriatic Pipeline

TFEU : Treaty on the Functioning of the European Union

TGD : Third Gas Directive

TLO : Turkish Law of Obligations

TPA : Third Party Access

WTO : World Trade Organization

INTRODUCTION

Energy trade has the utmost importance for Turkey. This, not only stem from the fact that it heavily depends on external hydrocarbon sources of energy, but also from its carefully drafted long-term foreign trade strategy of being an energy corridor between the major source (Russia and Caspian Basin countries) and recipient countries (Europe). In this respect, in the last two decades many transit and cross-over gas and oil pipeline projects have been successfully completed such as Baku-Tbilisi-Ceyhan (BTC), Trans Anatolian Natural Gas Pipeline Project (TANAP), Turkish Stream. These projects have considerably increased Turkey's role as an important and secure energy corridor in a geography of turmoil.

Unlike oil, natural gas is heavily dependent on pipeline infrastructure to be delivered. This makes pipeline projects a key factor in natural gas trade. Yet, it needs a huge capital investment upfront to construct the pipeline, while the operation and maintenance costs are insignificant. This being the situation, tieing high initial capital to this infrastructure can economically be justified if the operator has a monopoly on the constructed network with a guarantee of purchase for a certain period of time, but not less than 15-20 years. So, generally, it is the state-owned transmission or gas companies (mostly natural monopolies or companies with privileges in their countries) of the source country that realize the deals for pipelines with the companies of recipient countries with a guarantee of minimum purchase amount for a certain period.

Since the construction of pipelines touches so many important issues such as securing the land, getting the approvals for the construction, environmental protection, taxation, investment incentives, insurance and liability to third parties, it needs careful and comprehensive coordination between the countries where the pipeline extends. If the pipeline is only between two countries which is called cross-border pipelines, it is rather easier; but when it includes many countries in between, which is called transit pipelines, overall governing law and unitary jurisdiction need to handle all the issues pertaining to the pipelines.

Setting up such a governing law or jurisdiction is crucially important since it is always possible to face disputes between various parties, such was the case when in 2009-10 winter between Ukraine and Russia, where Ukraine the transit country cut the natural gas

supply to Europe. However, mostly to the fact that there are few natural gas producer countries (such as Russia) and they do not want to lose their monopoly power, so far, it has not been possible to codify a far fledged binding multilateral legal regime to govern transit pipeline issues. What there is, Energy Charter Treaty (ECT), dated 1994, which seems to provide guidance for investment and dispute settlement regime for the energy investments between Western and Eastern Europe. Despite its lack of providing conclusive and comprehensive governance for all the related issues to pipelines, it is still by far the only example of a somewhat multilateral arrangement on a sector/product specific area. Yet, Russia quitted being part of after 2009, reducing its impact and effectiveness on a global scale. Other than ECT, the provision of the World Trade Organization (WTO)- General Agreements on Tariffs and Trade (GATT) concerning "freedom of transit trade" is another tool that could be applied to transit pipeline projects. WTO-GATT is definitely a stronger and binding multilateral agreement compared to ECT, but the scope of obligations concerning "freedom of transit trade" have quite limited applicability to provide comprehensive solutions for all issues of transit pipelines. Besides, its applicability to transit pipelines is still under question, since it is not yet testified under a dispute settlement panel within the WTO.

With the lack of a binding multilateral legal regime for pipelines and being the state-owned companies tieing huge amounts of capital under major obligations, the relevant governments step in to ensure a binding legal environment for these projects under special bilateral agreements, a customized solution to the problem. That is why, when a pipeline project is to be finalized, generally two special bilateral agreements are to be compiled Inter-Governmental Agreement (IGA) and host governmental Agreements (HGA). The first one is between the governments of the countries setting up their obligations and rights for the project as well as their risk liability for the acts of the state-owned companies or the companies take part in the project. The second one between the operator company (or consortium) of the project and host countries that pipeline extends, which indicates the rights and privileges given to the operator company by the host governments mostly concerning land, environment, incentives and taxation. The HGAs are arranged to act as Annexes of the IGAs, yet they do not need to be signed simultaneously.

These Special Agreements seem to have the strongest impact compared to ECT and WTO, since they have the point provisions and concerning domestic legislation they have

the same legal hierarchy of ECT and WTO. In Turkey, according to the Art.90 of the Constitution, properly ratified international Agreements are equal to domestic Acts. Especially, if IGAs include such provisions such as "the provisions of this IHA shall prevail any current domestic Act", it is most probably that IGA's provisions seem to enjoy higher enforceability compared to domestic Acts in case of conflict.

In summary, due to the unique nature of natural gas pipeline projects, as seen states have certain responsibility and liability as a result of these special international agreements as well as other multilateral agreements such as WTO and ICT.

But that is only one side of the coin. Issues related to the natural gas pipeline, its construction, its transmission, as well as its functioning as part of the domestic natural gas market come with certain other additional state liability. First of all, supply of natural gas to the citizens has been traditionally regarded as a *public service*. This fact still holds today despite the liberalization of the natural gas market players, because the state's obligation to the supervision of the gas market activities still stays. Secondly, Turkey has liberalized its natural gas market, quite in line and harmonization with the EU practices. That is to say, the current domestic legislation as well as the EU legislation urges the state to take some measures such as ensuring competition in the market and protection of the environment and consumer rights. For our topic, maybe the most important of these measures, it's the establishment of the right of Third Party Access (TPA) to the already established transmission network. This means that other players than the operator of the transmission network (means the current pipeline network) can be allowed to use the transmission to sell and send natural gas. This is naturally against the monopoly position of the transmitter (traditionally happened to be exporter or importer of the natural gas in big pipeline projects discussed above). Compounded with unbundling (the separation of transmission and sale/purchase operations), TPA aims to strike the natural monopoly position shaped under the traditional design of the pipeline, which was a must to construct those pipelines at the beginning, but obviously to the detriment of the end consumers. So, what kind of special state liability is envisaged under the natural gas legislation, is a crucial thesis question in a way to compare that with the state responsibility coming from the international framework.

Finally, natural gas supply and its transmission are part of the *public service* area, and the liability pertaining to the public service, stemming from Turkish Civil Law and Turkish Administrative Law, also need assessment. State liability stemming from *objective*

liability and especially its *risk liability* form of *strict liability* needs emphasis to present a conceptual discussion to prepare for practical parts of the research topic.

The thesis has three main chapters. The first chapter aims to provide fundamental information needed to develop conceptual discussions on later chapters. In this respect, natural gas pipelines and the design of natural gas markets are described. Followingly, the regime pertaining to *public service* in Turkey and its application under the Regulation framework to Turkish natural gas market is to be discussed.

The second chapter is mainly divided into three parts. The first two parts examine the issues of state liability and responsibility concerning natural gas pipelines within the EU law and international law (which the findings summarized above at the beginning) respectively. The zenith of the research is the third part where all the previous findings are used to provide a combined evaluation for the potential eight areas of state responsibility for the transit natural gas pipelines in Turkey. For readers, who do not want to bear with the details of conceptual discussion but the eventual findings, moving directly to this part is advised.

The third chapter overwhelmingly focuses a conceptual discussion on *liability* within Turkish Administrative law with a special emphasis to develop a framework for state liability eventually for the Turkish natural gas market. Here, the *risk liability* leaps forward as a cross-cutting principle that can be horizontally applicable to all specific cases of obligations. Besides, the potential specific examples of state liability are to be displayed.

CHAPTER 1

NATURAL GAS MARKETS AND ITS PUBLIC SERVICE NATURE

1. Natural Gas Markets and Its Public Service Nature: A Survey on Main Concepts

The legal regime pertaining to natural gas and its transportation is quite complicated and it touches many frameworks such as public service, regulation, state liability and responsibility as well as consumer protection. In this respect, it needs to equip the reader with the key information regarding the nature and dynamics of natural gas and the main relevant concepts for the development of a healthy discussion. This chapter is to lay the groundwork for the forthcoming Chapters on EU Law, International Law and TAL(Turkish Adminstrative Law).

1.1. Natural Gas Markets and Natural Gas Pipelines: Main Concepts

Natural gas is a naturally occurring hydrocarbon gas mixture consisting primarily of methane, but commonly including varying amounts of other higher alkanes. It is formed when layers of decomposing plant and animal matter are exposed to intense heat and pressure under the surface of the Earth over millions of years. Natural gas is found in deep underground rock formations or associated with other hydrocarbon reservoirs close to oil (petroleum) fields.[1] It is mainly used for electricity generation, heating and as an input for a great variety of industrial products, most notably fertilizers. Similar to electricity it is delivered to end-users via a network but unlike electricity, it can be stored. Even though it is a non-renewable energy source, it is one of the most environmentally friendly hydrocarbons with a lesser amount of carbon emissions.

1.1.1. Natural Gas Industry and Market

Natural gas is the third most used energy source in the world in 2017 with 23.4% share after oil (34.2%) and coal (27.6%).[2] A typical natural gas industry is composed of upstream (extraction/production), midstream (transmission/transportation), and finally

[1] NATURALGAS.COM, ***Background.*** 2013, Available From: http://naturalgas.org/overview/background/
[2] TÜRK PETROLLERİ ANONİM ORTAKLIĞI- TPAO, ***2018 Yılı ham petrol ve doğal gaz Sektör Raporu***, 2019, p.4

downstream activities such as distribution, storage, and liquefication and supplying. Concerning midstream activities natural gas is either transmitted via pipelines or transported via tanker ships of Liquefied Natural Gas (LNG). Unlike oil, when natural gas is extracted, it needs additional and cost-intensive activities to store and transport it in the liquefied form, LNG. That is why; pipelines are constructed near the source fields in a way to transmit as to the recipient, rather than transporting it in liquefied forms. Furthermore, another form of natural gas, from shale rocks is also produced but with costlier techniques, which is mostly applied in North America. That is to say, after production, there are three major types of natural gas, natural gas via pipeline, liquefied natural gas and natural gas from shale rock fields that shape the supply available for consumption in the market.

Unlike oil, the majority of midstream activities in natural gas are realized via pipeline transmission, since transportation via liquefication is a costly activity, making it less feasible and less flexible. Natural gas pipelines are constructed of carbon steel and vary from 51 to 1500 mm in diameter and the gas is pressurized by compressor stations[3]. Due to higher initial costs, the pressurizing is built only in one way, making it not feasible for reverse flow and decreasing its energy efficiency and potentiality to function as a hub for many different combinations of transmission. No other item can be transferred via a natural gas pipeline and it requires high upfront capital investment with very low operational costs later. The payback time is long while the uncertainties and risks are high leading to long-term agreements between producer and recipient with government guarantees on both sides. While only 20% of the oil is imported through pipelines, the pipelines account for 65% of the natural gas.[4]

That is why; we see much presence of pipelines in natural gas business compared to the oil business. This technical problem of natural gas transport leads to the construction of long pipelines from the extraction fields to the distribution hubs. In terms of international relations, this constitutes a major problem since on one hand, the lack of competition brings a very strong power to the few numbers of already established producer countries such as Russia, on other hand in most of the case, for a pipeline project to be economically viable, it needs the passage from transit countries needing strong political coordination between

[3] EUROPEAN COMMISSION, ***Guidance on Energy Transmission Infrastructure and the EU nature legislation.*** Luxembourg: Publications Office of the European Union, 2018, p.14.
[4] EUROPEAN PARLIAMENT, ***An Assessment of the Gas and Oil Pipelines in Europe,*** Directorate General For Internal Policies Policy department: An Extensive Briefing Note, IP/A/ITRE/NT/2009-13, 2009, p. 3.

project countries. Such has been a major issue between Russia, a producer country and Ukraine, a transit country[5]. Besides huge initial investment costs, this politically problematic nature of pipeline business impedes the proliferation of natural gas pipelines and ultimately leads to energy security issues for the recipient countries such as the EU and Turkey.[6]

Similarly, the distribution within the local market is also realized through high pressured pipelines to final customers. That being the case, the implementation of high pressured pipelines leads to high initial investment costs which turns the transmission and distribution business into a natural monopoly.[7] This provides a real problem for the market structure, especially for the end customers, since the customers have to deal with a monopoly which needs to sustain this position in order to recover its large-scale initial investment costs. In summary, unlike oil stations at every corner, you have to deal with a giant natural monopoly, needing governments to efficiently regulate this market with the aim of striking a balance between public good and free-market mechanisms.

The understanding of the network-dependent natural monopoly structure of natural gas markets is critically important because it lies at the heart of the regulations in the EU and Turkey. That is why we see the unbundling main principle in regulating these markets where the production/extraction, transmission, distribution and supplying legs of the industry shall be separate and no one company can function in more than one leg.[8] The basic underlying for unbundling principle is simple: there is always an internal conflict of interest within a vertically integrated company between the transmission/distribution leg and supply leg since allowance access to the network will increase the profits of the transmission/distribution leg while eroding profits of the supply leg.[9] Quite naturally, this principle aims to prevent any giant company from dominating the industry altogether. In the beginning, all these legs were realized by the government or government companies. However, when the neo-liberal move for liberalization of markets has taken the ideal economic policy, especially after the 1980s, the governments began privatizing these markets by introducing the unbundling principle.

[5] Ibid., p.10.
[6] Ibid., p.10.
[7] IŞIKSUNGUR, Özlem Döğerlioğlu, ***Avrupa Birliği Enerji Piyasalarında Tüketiciye İlişkin Düzenlemeler Ve Bu Düzenlemelerin Türk Enerji Mevzuatına Yansımaları,*** unpublished PhD Thesis, Ankara University, 2010, p. 13-16.
[8] EUROPEAN PARLIAMENT, 2009, p.16.
[9] TALUS, Kim. ***Introduction to EU Energy Law***. Oxford: Oxford University Press, 2016, p.26.

It is financially irrational to construct more than one gas pipeline network for any project due to high capital investment costs which makes all producers and suppliers in a market dependent on that one significant network. Due to this dependency, gas networks have an inbuilt monopoly where the project owner will naturally aim to utilize its initial high capital investment as much as possible, which in return might mean higher costs for the potential other users of the network. Thus, for such a market to function with proper competition as well as security of supply, the inbuilt monopoly character shall be regulated to enable *third-party access* (TPA). TPA obligates pipeline operators to grant market competitors access to the gas pipeline in question in a non-discriminatory way.[10] Basically, TPA is a right given to market players who want to import, export and sell natural gas via using the current transmission mechanism. This is against the monopoly power of the transmission operator who takes advantage of full control of the pipeline infrastructure. If TPA is not properly sustained, then the monopoly power will function against the consumer benefit. TPA is instituted in order to ensure full functioning of competition in the natural gas market. TPA also provides the control of the tariffs to be applied by the monopol transmission operator.

This happened to be the evolution of the EU gas legislation, which will be detailed in Chapter 2.1., TPA is not a welcomed practice for the current operators of the pipelines since this will diminish their control on the pipeline, as well as limiting their monopoly position[11]. Yet, the energy market regulator shall monitor the way in which TPA is facilitated in practice which consists of approving the tariffs and the methodologies for calculating the tariffs for transmission services beforehand.[12] Cross-border pipelines have an extremely restricted amount of available capacity for new entrants since primary transmission rights being reserved through long- term capacity contracts. These contracts were concluded prior to the market liberalization waves during the 1990s and early 2000s.[13] For example, the technical capacity of a pipeline is no more than $10bn^3$ per year and this has been allocated to a certain buyer under the IGA-HGA bilateral agreement for a certain time period, quite

[10] GRAGL, P. ***The Question of Applicability: EU Law or International Law in Nord Stream 2***. Review of Central and East European Law. 44., 2019, p.124.
[11] PORINS, Kristians. ***EU Cross-Border Energy Investments in an International Context: The Case of Commodity Transportation and Transmission Infrastructure***. Lund University Press Studdent Papers, 2016, p.38.
[12] For example, this is handled in Art 32 and Art 40 of **Council Directive 2009/73/EC (2009)** concerning common rules for the internal market in natural gas (Third Gas Directive).
[13] TALUS, 2016, p.17.

naturally, the transmission operator may not realize a TPA request due to capacity limits, without incurring damages against the current legal contract holder for the capacity.

The global reserves of natural gas are 193, 5 trillion m^3 where Russia (18, 1%) and Iran (17, 2%) having the largest proven reserves.[14] Total production and so demand in 2017 was 3, 68 trillion m^3 and the leading regions have been Eurasia and North America. With a 5.8% increase, global trade of natural gas happened 1.13 billion m^3 in 2017 where 740.7 bn of it via pipelines.[15] However, the share of LNG increasing to come 40% total trade in near future. The increase of LNG is not a result of price advantage but rather mostly related with the diversification efforts of the vulnerable recipients. Since, the principal mode of transfer via natural gas pipelines, the gas suppliers (producers) are in strong position to urge the recipients. This is mostly employed by Russia, as gas politics, changing supply conditions to each recipient country according to political relations. Furthermore, the end recipient country on a transit pipeline can face cutting of gas supply, not essentially by the original supplier (Russia) but a transit country in the middle, such was the case in 2009-10 winter, Ukraine cutting Russian gas to deter Russia on political matters. That is why, reliance on a large supplier is putting all eggs to the same basket and very insecure, thus recipient countries try to diversify the supplies through LNG (making new pipelines from different sources may not be possible at all or can take years) is a policy not based on economics, but based on politics. The prices for natural gas are generally fixed to the oil prices. Shale rock gas is an unconventional type of natural gas having higher cost of production. With the increase in oil prices, shale rock gas becomes economically viable and widely produced in North America. In USA, the shale rock gas production was nearly 468 bn m^3, nearly half of total natural gas production in North America.

1.1.2. Natural Gas Market in Turkey [16]

In Turkey's energy demand, natural gas is leader with oil having 30.5% share. Turkey is heavily dependent to outside sources for its energy demand, around 75%. In 2018, Turkey's total natural gas consumption was 50.8 bn m^3 where 50.4 bn of it was imported. In general half of the imports are coming from Russia (via 3 pipelines) whereas Azerbaijan (2

[14] TPAO, 2019, p.22
[15] Ibid, p.22.
[16] The information regarding Turkish natural gas market is derived from ENERJİ PİYASASI DÜZENLEME KURULU- EPDK, ***Doğalgaz Piyasası Sektör Raporu: 2018,*** 2019, p. 31-40.

pipelines) and Iran (1 pipeline) are the other major suppliers with pipelines. Turkey also buys LNG from Algeria, Qatar and Nigeria to diversify its suppliers. The share of pipeline gas is gradually decreasing from 90% levels to 77% levels as a result of this diversification policy. Azerbaijan gas is the cheapest whereas Iranian gas is the most expensive. The prices are arranged according to bilateral international agreements and are not announced publicly due to secretive provisions of the Agreements. These agreements have binding minimum annual purchase amounts, and even Turkey does not buy that amount, it has to pay the minimum annual purchase value.[17] In 2018, in Turkey's natural gas imports the shares of principal import countries are Russia (46, 95%), Iran (15, 61%), Azerbaijan (14, 95%), through pipelines; and Algeria (9%) and Nigeria (3, 3%) through LNG.[18]

Table 1: Natural Gas Pipeline Projects in Turkey[19]

Pipeline	Supplier Country	Year of Agreement	Start of Operations	Capacity per Year (billion m^3)	Length (km)
Western Line	Russia	1984	1987	14	875
Blue Stream	Russia	1997	2005	16	501- Turkey 308- Russia 390- Black Sea
Turkish Stream	Russia	2016	2020	15,75 for Turkey 15,75 for Europe	935- Black Sea 165-Turkey 11-Bulgaria
Eastern Anatolia	Iran	1996	2001	10	1491
Baku-Tbilisi-Erzurum	Azerbaijan	2001	2007	6,6	980
TANAP	Azerbaijan	2011	2018 for Turkey 2020 for Europe	6 for Turkey 10 for Transit	1850

Turkey's current natural gas pipelines are displayed above Table 1. As seen, of these six pipelines, the first four are cross-over pipelines, where Turkey is the final recipient country, whereas the most recent two, namely Trans Anatolian Pipeline (TANAP) and

[17] TOPUZ, Kerem, ***The Missing Piece In The Turkey's Gas Hub Ambitions,*** Reseach Paper, Sabancı University Istanbul International Center for Energy and Climate, 2019, p.12.
[18] EPDK, 2019, p.7.
[19] ENERJİ VE TABİİ KAYNAKLAR BAKANLIĞI- ETKB. ***Doğal Gaz Boru Hatları ve Projeleri,*** <https://www.enerji.gov.tr/tr-TR/Sayfalar/Dogal-Gaz-Boru-Hatlari-ve-Projeleri>.

Turkish Stream are transit pipelines making Turkey for the first time a transit country in natural gas pipeline ecosystem. As of 2020, Turkey has secured 60 billion m^3 natural gas capacity per year for domestic consumption and around 26 billion m^3 per year transit transfer. It should be noted that Turkey, via state company BOTAŞ, has 30% share of the TANAP pipeline company.[20] There is also another small pipeline project between Turkey and Greece completed in 2007 where Turkey exports natural gas. This pipeline is the part of TANAP project but completed earlier as a visionary project of Turkey and Greece, and now becomes the part of TANAP. From Greece, it connects to another pipeline project between Greece and Italy, the Trans Adriatic Pipeline (TAP).[21] Turkey, via BOTAŞ, exports annually 0.75 billion m^3 natural gas to Greece (BOTAŞ, 2020)[22].

Graph 1: Natural Gas Pipeline Projects in Turkey, Map[23]

In these pipeline projects, the Turkish government and the only licensed natural gas transmission company, state-owned "Boru Hatları ile Petrol Taşıma A.Ş" (BOTAŞ) took part. Previously BOTAŞ was the only natural gas importer, supplier and transmitter in

[20] Ibid.
[21] Ibid.
[22] BORU HATLARI İLE PETROL TAŞIMA A.Ş.-BOTAŞ ***BOTAŞ Boru Hatları ile Petrol Taşıma A.Ş.,*** 2020 <https://www.botas.gov.tr/Sayfa/lisans-ogrencileri-icin/196>
[23] Ibid.

Turkey. With the gradual liberalization in Turkish natural gas market as well as the maturation of the initially signed pipeline projects such as Western line, in 2007 private sector suppliers has entered in the market and BOTAŞ now supplies 80% of the total natural gas supply. On the other hand, BOTAŞ is still the only licensed transmission company in Turkey. The length of transmission network is around 16.000 km with 9 compressor stations. As a result of unbundling regulations in the market, BOTAŞ is now forced to provide TPA for its pipeline transmission network where according to BOTAŞ records, in 2017, 37 companies having LNG license are provided with that service resulting to 11.15 billion m^3 over total 55,8 billion m^3 pipeline transmission annual volume.[24]The length of local distribution pipeline network is around 103.000 km with around 15 million subscribers[25]. 37% of the gas is used for electricity generation whereas 27% and 25% are used in residential heating and industry respectively.[26]

1.1.3. Natural Gas Pipeline Models

Whether it be a cross-over or transit pipeline, there are at least two countries involved in pipeline projects. Given that the investor might be different from the producer or recipient countries, the number of related countries can escalate. This brings the problem of jurisdiction for the cross-over or transit pipelines. Relatedly, the pipeline ownership structure (incorporated joint venture, unincorporated joint venture, partnership or unit trust), land and environment issues (expropriation, seabed issues), taxation, commercial terms and of course dispute settlement are main legal issues required to be handled properly. To handle these matters, basically two models can be adopted. First one is "Connected National Pipelines Model" which is series of connected domestic pipelines. They are accepted as separate and distinct assets. The other one ise "Unified-Integrated Pipelines Model" which is a single and unified asset with common owners and transport terms. It is regulated by a combination of domestic law, international law and contract.[27]

The first model treats each national section of the pipeline infrastructure as a distinct asset under territorial jurisdiction of the relevant State and mostly governed by its domestic

[24] BOTAŞ, 2020.
[25] EPDK, 2019, p. VII.
[26] Ibid, p. IX.
[27] DULANEY, Michael & MERRICK, Robert. **Legal Issues in Cross-Border Oil and Gas Pipelines**, Journal of Energy & Natural Resources Law, 23(3), 2005, p.247-28.

law as well as operated by that State or its entity. Thus the operation of such a pipeline will be subject to a patchwork of national regimes. In the unified model, as the name urges, the pipeline project is developed and operated by a single unit as well as is governed by an overarching legal framework for the entire length of a pipeline. The most comprehensive international mechanism for pipeline investments, the Energy Charter Treaty (ECT) recommends this model through its two model agreements: Intergovernmental Agreements (IGA) and Host-Government Agreements HGA) and which is between a pipeline operator company (the project company) and each relevant State entity. [28] Both IGA and HGA complement each other. IGA represents a treaty model among the states through whose territories lie within the designed pipeline and it is regulated under public international law. IGA basically deals with the harmonization of tax structures and the provision of land rights concerning the project in all these states.[29] HGA comes later and its entry to force is conditioned on that of the IGA. HGA is between the host states and the project investor(s) and it handles vertical issues for the project activity such as governmental obligations, investor duties, environmental and other relevant standards, liability, termination and issues relevant to the implementation of the project in each specific territory.[30] HGAs are to ensure that the commitments by host governments in IGA are also enforceable for the relevant pipeline entities appointed by the States.[31] IGA and HGA models are structured in a way to provide a reasonable balance between the obligations of a state and the rights of private investors. The basic aim is the sustainable allocation of risk and the equitable distribution of the overall benefits between public and/or private parties engaged in the project.[32] Recently TANAP is realized under Unified-Integrated Pipelines Model of IGA-HGA framework, where it included certain immunity clauses for the project against Turkish domestic Acts. A more detailed discussion on the Special International Agreements will be presented in Chapter 2.2.

In both models there is the combination of domestic laws, international law elements and contract provisions. However, in the Connected National Pipelines Model the host countries are stronger against any potential foreign investor since mostly the domestic law

[28] MEHDI Piri. D. & FAURE, Michael. ***The Effectiveness of Cross-Border Pipeline Safety and Environmental Regulations (under International Law***). N.C. J. Int'l L. & Com. Reg. 40(1), 2014, pp.99-100.
[29] ECT, ***Model Intergovernmental and Host Government Agreements for Cross-Border Pipelines Second Edition***, 2007, p.4. <https://www.energycharter.org/fileadmin/DocumentsMedia/Legal/ma2-en.pdf >
[30] Ibid, p.5
[31] DULANEY and MERRICK, 2005, p.254.
[32] ECT, 2007, p.6.

is upper hand concerning the operation within their countries. In the Unified-Integrated Pipelines Model), the foreign investors are more protected since a single legal regime under international law is appointed. That is why; we see ECT also foresees a dispute solution mechanism for the pipeline projects.

Compared to oil pipelines, technically natural gas pipelines contain more risk potential such as explosion. So, potential liability and compensation pertaining to injuries, deaths and environmental damage are important legal issues to be clarified. Unlike oil (*International Convention on Civil Liability for Oil Pollution Damage-1969),* there is not a targeted international law codification governing potentials *civil liability* in natural gas pipeline projects.[33] So domestic legislation and the EU legislation concerning Health, Safety and Environment (HSE) becomes an important issue to affect the profitability and returns associated with the pipeline. Key issues are the roles to be played, the division of work between government and the private investor with regard to the sharing of risk and rent, and avoidance of the obsolescing bargain where the initial bargain conditions favour the investor but as the fixed assets of the investor increases in the country the bargaining power shifts to the host government.[34]

What *internationally* governs especially the transit regime of gas pipelines is thus a crucial question. Normally a tailor-made IGA-HGA such as the one of TANAP shall be the umbrella document that provide guidance for the jurisdiction of matters. In absence of such detailed IGAs, ECT in general terms, and GATT/WTO on the trade of goods in transit seem to be guiding international codification. The international law aspect of gas pipelines is to be analysed in Chapter 2.2.

1.1.4. Legal Definitions Pertaining to Natural Gas

Under a Civil Law country tradition and unlikely from countries enforcing Common Law; UK and the USA, Turkey has a distinct and independent Administrative Law. The

[33] Some examples of other multilateral international Agreements on civil liability: Paris Convention on Nuclear Third Party Liability (1960), UN Convention on International Liability for Damage Caused by Space Objects (1971), Convention on Civil Liability for Damage resulting from Activities Dangerous to the Evironment (1993-Lugano Convention), International Convention on Civil Liability for Shipments by Sea of Hazardous and Noxious Substances (1996).

[34] UNDP/WORLD BANK ENERGY SECTOR MANAGEMENT ASSİSTANCE PROGRAMME, ***Cross-Border Oil and Gas Pipelines,*** 2003, p.18.

Turkish legal terminology in the Administrative Law as well as in the Civil Law is largely influenced by the Continental Europe countries, if not altogether from one country. While Civil Law incorporates mostly German legal terminology (indebted to Civil Law being codified from Swiss Civil Law), the Administrative Law terminology is mostly from the French. In any case, it does not matter; the Turkish legal terminology is obviously different and not seeming compatible with English Common Law terminology. In many of the cases, there is either not a proper English term equivalent to that certain Turkish legal term or there is one English legal term to meet two-three Turkish legal terms altogether, not letting to fully describe the differences. That is why; we have tried to come up with *literal* translations of Turkish legal terms, irrespective of whether such a term exists in the Common Law. Besides, the Turkish original terms are put next to these English translations in a way to provide guidance for the reader.

However, since it is at the very heart of the discussion and there is apparent confusion not also in Turkish-English, but also in English-to many other European languages, proper terminology for the terms *responsibility* and *liability* is needed since they refer to one word in Turkish "*sorumluluk*".

The terms *responsibility* and *liability* are used interchangeably or synonymously most of the time. This stems from the fact that while there is only one word used in other languages to determine the concept; only in Anglo-American law there two terms exist. In French it is "*responsabilité*", in Spanish "*responsabilidad*", in Italian "*responsabilità*" and in Turkish it is "*sorumluluk*" or "*mükellefiyet*" in Ottoman Turkish; where only one word is used to convey both "responsibility" and "liability". So confusion occurs how these two terms differ from each other, and which terms we need to use in the thesis. In translations, in most of the case "liability" is used for the legal terms.[35] Actually, liability is generally defined as a "parcel" of responsibility[36] and liability occurs explicitly within the law, in a way to be defined as "legal responsibility".[37]

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[35] See for the translation of "sorumluluk" as liability for different terms in AVRUPA BİRLİĞİ GENEL SEKRETERLİĞİ, ***Glossary For The European Union Basic Terms (English – Turkish),*** 2003, Ankara.

[36] BARBOZA, Julia. ***The Environment, Risk and Liability in International Law,*** 2011, Martinus Nijhoff Publishers, London-Boston, p.2.

[37] DICTIONARY.LAW.COM, 2020, "**liability**: n. *one of the most significant words in the field of law, liability means legal responsibility for one's acts or omissions. Failure of a person or entity to meet that responsibility leaves him/her/it open to a lawsuit for any resulting damages or a court order to perform (as in a breach of contract).* http://dictionary.law.com/Default.aspx?typed=liability&type=1

In the field of international law, the International Law Commission (ILC) under the UN has worked on the definitions and usages of these two terms to provide guidance for International Legal text. ILC concluded that the terms "responsibility" refers to a breach of an international obligation stemming from international law such as "state responsibility for wrongful acts" in the sense that a "responsibility" can occur only if there is a wrongful act. On the other hand, the negative consequences of the activities that are within the "law" shall be defined with the term "liability".[38] For example, environmental hazards occur as a result of building a pipeline (with the permission of the state) constitutes a "liability" since it is a result of an activity permitted in the law.

Thus, "responsibility" refers to an umbrella framework that includes duties, obligations and also "liability" within the law. And "liability" is a part of it, but used in legal circumstances. For the sake of useful conceptualization, in the thesis, irrespective of how it is termed in Turkish (or any other language), the liability and/or responsibility pertaining to *domestic law* are to be termed with the word "liability" while those pertaining to the *international law (bilateral or multilateral treaties)* or not falling within the category of "liability" are to be termed within "state responsibility" concept. That is to say, "Responsibility of Sate" will be used as an umbrella concept to cover these two areas: "state responsibility" and "liability" pertaining to the state.

The legal nature of natural gas is not a straight forward and its nature changes according to the conditions. As will be detailed below, it is a "good" according to WTO-GATT, EU and TAL, but the transport, transmission and distribution of it is a "service" and in most of the case, it is deemed to be a service with "public service" nature. Its "public service" nature is defined as *Services of General Economic Interest* (SGEI) within EU legislation, however in TAL there is not a clear indication and definition in that respect. Rather than TAL, in Turkey, the case law demonstrates the "public service" nature of certain services pertaining to the natural gas.

In general, the legal definition of natural gas is shaped together with electricity. Even though, they are forms of energy, energy is not an issue to be defined legally. Instead, electricity and natural gas are defined as "good" both in international agreements and

[38] BARBOZA, 2011, p.22-23.

Turkish legislation as well as the EU legislation. The overarching international agreement document, GATT/WTO Agreement defines natural gas as a "good" or "product" since it is traded across borders via pipelines and being able to be stored in liquefied form.[39] WTO Secretariat interprets that WTO Rules see the production of energy goods as "good" falling under GATT, while energy related services, including transmission and distribution, falling under the scope of the General Agreement on Trade in Services (GATS).[40] Both EU and Turkish legislation confirm with this classification, while accepting natural gas as a "good" the activities pertaining the gas market such as transmission, distribution, and storage are deemed to be "service".[41]

Once natural gas is accepted as a "good", its transportation through the cross-border pipelines can be legally considered as the export of the "goods" and the regime pertaining to export of "goods" are more liberal than export of the services. For example, on 2009-10 winter when Ukraine cut the Russian natural gas transport to Europe, this could be considered as the cut of "transit trade" by Ukraine which was against WTO rules. The legitimate ways of preventing "transit trade" of goods are few cases such as security and environmental concerns. Accepted as "good" natural gas conflicts can be regulated under a more regulated international law framework with definite state responsibility. Concerning domestic operations, natural gas seems to continue its "goods" nature concerning price and taxing considerations whereas since its distribution requires a special network and the monopoly power of this network can work against the benefit of consumers, in terms of liability of the operator, the liability is considered as if the natural gas is a SGEI rather than good. Because SGEI or service nature includes broader range of liability other than just transporting a "good". For example, the operator is deemed liable to ensure the infrastructure in working conditions, handle any safety concerns as well as providing an affordable price to the consumer.

[39] COTTIER, Thomas., MALUMFASHI, Garba., MATTEOTTI-BERKUTOVA, Sofya., NARTOVA, Oolga., DE SÉPIBUS, Jaelle and BIGDELI, Sadeq .Z. ***Energy in WTO law and policy,*** Individual Project No. 6, WTO, 2010, p.3. Electricity's case is interesting. While it is not being able to store it, GATT also recognizes electricity as a "good" since it is defined as a commodity in Harmonized System Nomenclature which is the 12 digit code for all goods that GATT uses basis reductions. Similarly, natural gas is also a commodity. Natural gas's HS Code is 271111100 while for electricity it is 90283019 (Electricity, supply, production).

[40] WORLD TRADE ORGANIZATION-WTO, ***Energy Services: Background Note by the Secretariat***, S/C/W/52 (9 September 1998), 1998, para.36.

[41] IŞIKSUNGUR, 2010, p. 184.

1.2. "Public Service" Notion on Natural Gas Transfer under EU Law and TAL

Having a service nature of the natural gas equips the operator or the relevant public authority with increased state liability. Yet, whether that "service" is to be regarded in legal terms as a "*public service*" is crucially important for our research topic since then there will be specific public service obligations attached to the public service quality of the offerings. We start with the evolution of "public service" concept in the EU with a special reference to natural gas services. Later we will delve into the designation of "public service" under TAL.

1.2.1. Public Service Concepts in EU Law

The definition of "public service" is quite complicated one both in the EU and Turkey. Used mostly by France and in certain countries of Roman law, the wording or concept of "public service" is not used by the EU legislation and a new vocabulary around "*Services of General interest (SGI)*" and "*Services of General Economic Interest – SGEI*) used instead on purpose starting from the Treaty of Rome in 1957. Because the concept of '*public service*' is ambigious and can be confused with the concept of 'public undertaking' or 'public service obligation' where these second concern only some public undertakings and may also apply to many private firms.[42]

The Members do not have coherent and standardized applications of "public service" in domestic affairs. For example, in France there is not a definition of "public service" but it is any activity that public authorities set up as such.[43] In Great Britain, the relevant wording is "civil service" and the term "public enterprise" is used to describe the public ownership of controlling natural monopolies.[44]

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[42] EUROPEAN PARLIAMENT, ***Public Undertakings And Services In The European Union Economic Series W-21 Summary***, <https://www.europarl.europa.eu/workingpapers/econ/w21/sum-2_en.htm#:~:text=A%20public%20service%20is%20an,a%20public%20or%20private%20body>

[43] KLARIC, Mirko. ***Basic Aspects Of Public Services In Law Of European Union,*** Zbornik radova Pravnog fakulteta u Splitu, 46(3) 2009. p..573**.** In a survey conducted by the EU, concerning France such wording of public service has been witnessed within the usage: "public service mission", "public service obligation", "obligation inherent in the concept of public service","public service requirement", "delegation of public service", "public service concession", "public service contract", "concessionnaire or manager of a public service", "public transport service", "public service delivery of drinking water or gas distribution", or, furthermore in respect of a particular service, "guaranteeing that the public service will be executed", "object of the public service", etc., See. BUABY Pierre, et al. ***Mappimg of the Public Services in the EU,*** 2010, <https://www.ceep.eu/images/stories/pdf/Mapping/CEEP_mapping%20experts%20report.pdf>

[44] KLARIC, 2009, p.571.

So, in order to prevent any misleading or confusion for the wording of the concepts, the term "general interest" was chosen to define the services pertaining to public service within the EU framework and firstly the term SGEI was used in 1957 (in Art 90 then, but without any definition).[45] This is quite normal since the EU was started as an economic Union to handle single market and the relevant services coming into the playfield of the EU were economic nature. The expression of 1957 SGEIs, was not changed by the adoption of new treaties (now Art 106 (2) TFEU-of the Lisbon Treaty; Articles 16 and 86(2) of the Treaty of European Community-TEC), and new vocabulary has been circulated within the EU Commission debates such as "services of general interest" (SGIs), "non-economic services of general interest" (NESGIs) and "social services of general interest" (SSGIs).[46]

SGI is not used in the EU Treaties or secondary legislation, but it is derived from the EU Community practice through the term SGEI. SGI is deemed to cover both market (SGEI) and nonmarket services which the public authorities regard as being of general interest and subject to specific public service obligations (PSOs). On the other hand, SGEI is used in the EU Treaties but not defined in the Treaty or in secondary legislation, yet in the EU practice there is broad agreement that the term refers to services of an economic nature which the Member States or the Community subject to specific PSOs obligations by virtue of a general interest criterion. It deemed to cover in particular certain services provided by the big network industries such as transport, postal services, energy and communications.[47] The EU Commission has clarified in its Quality Framework that "*SGEIs are economic activities which deliver outcomes in the overall public good that would not be supplied (or would be supplied under different conditions in terms of objective quality, safety, affordability, equal treatment or universal access) by the market without public intervention. A PSO is imposed on the provider by way of an entrustment and on the basis of a general interest criterion which ensures that the service is provided under conditions allowing it to fulfill its mission.*"[48] The EU law does not create an obligation for Members to designate formally a task or a service as being of general economic interest, yet they are free to designate any service as SGEI by themselves of if the content of the service is question has clear PSOs

[45] BUABY, 2010, p.10.
[46] Ibid p.11
[47] Ibid p.12.
[48] EUROPEAN UNION COMMISSION, ***Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee and The Committee Of The Regions: A Quality Framework for Services of General Interest in Europe,*** Brussels, 20.12.2011 COM(2011) 900 final., 2011, p.3.

they do not need to designate a service as SGEI.[49] As long as that service in question has clear PSOs, it is deemed to be regarded as SGEI even if it is not named as such.

The services pertaining to natural gas market is also defined as SGEI under the Gas Directives.[50] Gas Directive, being the fundamental governing legislation of natural gas

[49] EUROPEAN UNION COMMISSION, ***Commission Staff Working Document Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest,*** Brussels, 29.4.2013 SWD(2013) 53 final/2, 2013, p.21-22

[50] Third Gas Directive, "*Article 3:* ***Public service obligations and customer protection***

1. Member States shall ensure, on the basis of their institutional organisation and with due regard to the principle of subsidiarity, that, without prejudice to paragraph 2, natural gas undertakings are operated in accordance with the principles of this Directive with a view to achieving a competitive, secure and environmentally sustainable market in natural gas, and shall not discriminate between those undertakings as regards their rights or obligations.

2. Having full regard to the relevant provisions of the Treaty, in particular Article 86 thereof, Member States may impose on undertakings operating in the gas sector, in the general economic interest, public service obligations which may relate to security, including security of supply, regularity, quality and price of supplies, and environmental protection, including energy efficiency, energy from renewable sources and climate protection. Such obligations shall be clearly defined, transparent, non-discriminatory, verifiable and shall guarantee equality of access for natural gas undertakings of the Community to national consumers. In relation to security of supply, energy efficiency/demand-side management and for the fulfilment of environmental goals and goals for energy from renewable sources, as referred to in this paragraph, Member States may introduce the implementation of long-term planning, taking into account the possibility of third parties seeking access to the system.

3. Member States shall take appropriate measures to protect final customers, and shall, in particular, ensure that there are adequate safeguards to protect vulnerable customers. In this context, each Member State shall define the concept of vulnerable customers which may refer to energy poverty and, inter alia, to the prohibition of disconnection of gas to such customers in critical times. Member States shall ensure that rights and obligations linked to vulnerable customers are applied. In particular, they shall take appropriate measures to protect final customers in remote areas who are connected to the gas system. Member States may appoint a supplier of last resort for customers connected to the gas system. They shall ensure high levels of consumer protection, particularly with respect to transparency regarding contractual terms and conditions, general information and dispute settlement mechanisms. Member States shall ensure that the eligible customer is in fact able easily to switch to a new supplier. As regards at least household customers those measures shall include those set out in Annex I.

4. Member States shall take appropriate measures, such as formulating national energy action plans, providing social security benefits to ensure the necessary gas supply to vulnerable customers, or providing for support for energy efficiency improvements, to address energy poverty where identified, including in the broader context of poverty. Such measures shall not impede the effective opening of the market set out in Article 37 and market functioning and shall be notified to the Commission, where relevant, in accordance with paragraph 11 of this Article. Such notification shall not include measures taken within the general social security system.

5. Member States shall ensure that all customers connected to the gas network are entitled to have their gas provided by a supplier, subject to the supplier's agreement, regardless of the Member State in which the supplier is registered, as long as the supplier follows the applicable trading and balancing rules and subject to security of supply requirements. In this regard, Member States shall take all measures necessary to ensure that administrative procedures do not constitute a barrier for supply undertakings already registered in another Member State.

6. Member States shall ensure that:

(a) where a customer, while respecting the contractual conditions, wishes to change supplier, the change is effected by the operator(s) concerned within three weeks; and

(b) customers are entitled to receive all relevant consumption data.

Member States shall ensure that the rights referred to in points (a) and (b) of the first subparagraph are granted to customers in a non-discriminatory manner as regards cost, effort or time.

market in the EU, is crucially important to enhance the scope of natural gas activities as well as the state liability concerning thereof. In this respect as indicated in Art.3 (especially paragraph 2) of the Directive, certain PSO may be imposed such as but not limited to environment protection, consumer protection, ensuring competition, security of supply, energy efficiency and climate protection. It seems that, the EU aims to establish natural gas services under SGEI status yet it does not have the relevant level of consensus, so that as of the moment it just lay that understanding as principle. We will definitely delve into this legislation, but not here, in Chapter 2.1.

In this respect, given the diverse public service regimes beyond Members, the name *Services of General Economic Interest* is preferred by the EU in order to define that economic service is deemed to be under PSOs even under situations if that service is given by private institutions via the authorization of the public institutions.[51] This is in line with the recent governance trend of *Regulation* model where the previous economic areas of

7. Member States shall implement appropriate measures to achieve the objectives of social and economic cohesion and environmental protection, which may include means to combat climate change, and security of supply. Such measures may include, in particular, the provision of adequate economic incentives, using, where appropriate, all existing national and Community tools, for the maintenance and construction of necessary network infrastructure, including interconnection capacity.
8. In order to promote energy efficiency, Member States or, where a Member State has so provided, the regulatory authority shall strongly recommend that natural gas undertakings optimise the use of gas, for example by providing energy management services, developing innovative pricing formulas or introducing intelligent metering systems or smart grids where appropriate.
9. Member States shall ensure the provision of single points of contact to provide consumers with all necessary information concerning their rights, current legislation and the means of dispute settlement available to them in the event of a dispute. Such contact points may be part of general consumer information points.
Member States shall ensure that an independent mechanism such as an energy ombudsman or a consumer body is in place in order to ensure efficient treatment of complaints and out-of-court dispute settlements.
10. Member States may decide not to apply the provisions of Article 4 with respect to distribution insofar as their application would obstruct, in law or in fact, the performance of the obligations imposed on natural gas undertakings in the general economic interest and insofar as the development of trade would not be affected to such an extent as would be contrary to the interests of the Community. The interests of the Community include, inter alia, competition with regard to eligible customers in accordance with this Directive and Article 86 of the Treaty.
11. Member States shall, upon implementation of this Directive, inform the Commission of all measures adopted to fulfil public service obligations, including consumer and environmental protection, and their possible effect on national and international competition, whether or not such measures require a derogation from the provisions of this Directive. They shall notify the Commission subsequently every two years of any changes to such measures, whether or not they require a derogation from this Directive.
12. The Commission shall establish, in consultation with relevant stakeholders, including Member States, the national regulatory authorities, consumer organisations and natural gas undertakings, a clear and concise energy consumer checklist of practical information relating to energy consumer rights. Member States shall ensure that gas suppliers or distribution system operators, in cooperation with the regulatory authority, take the necessary steps to provide their consumers with a copy of the energy consumer checklist and ensure that it is made publicly available." https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32009L0073&from=EN

[51] IŞIKSUNGUR, 2010, p. 20-22.

public service are increasingly left to the private institutions where the public bodies focus their energy on monitoring and regulating. This trend will also be analysed in detail in the following parts.

What clear is that natural gas market services are legally public service or SGEI but what unclear is the PSOs obligations in this sector specific regulatory framework.[52] A generally accepted definition is "*the guaranteeing, through regulatory standards, measures or requirements, of levels of consumer or environmental protection that might otherwise not be maintained through the simple operation of the market mechanism*". [53] As mentioned above environment protection (which is also guaranteed under international law), consumer protection, ensuring competition, security of supply, energy efficiency and climate protection are some examples of an exhaustive list.

1.2.2. Definition and Key Qualities of Public Service under TAL

The case of Turkish legislation is neither straightforward. We do not have an umbrella law or constitutional provision claiming that services pertaining to natural gas market are deemed to be *public service.* That is why; we need a closer look among the natural gas legislation, court decisions as well as TAL precedents to develop an understanding of this matter. Our findings on this matter, which will be elaborated in detail at the following part, indicate that not all kinds of services in natural gas sector are to be regarded as public service, yet at least transmission and distribution services shall definitely fall under public service category.

The defining of a service as "public service" (PS) is crucially important because the presence of PS indicates the presence of state liability or PSOs on that matter. Similarly PSs in most of the case are regulated under TAL, having specific legal regime. To define "public service" is not easy. Everybody knows it, but nobody can define it properly. Despite being the backbone of TAL, there is not a written official definition of PS whether in the Constitutional or other legislation. The Constitutional Court defines PS as "*Continuous and regular activities presented to the society in order to meet the general and common*

[52] TALUS, 2015, p.32.
[53] JONES, Christopher. (ed.), ***EU Energy Law— Volume I: The Internal Energy Market— The Third Liberalisation Package*** (Claeys & Casteels, 2010), p. 395.

necessities to ensure the public interest, those being rendered by the state or other public legal persons or under the monitoring and supervision of these."[54] For the top institution of the Administrative Law, Council of State, PS is "*supplied to the public which shall be required to operate continuously and without interruption in a way to meet the general and common necessities those being rendered by an administration established by a statue or under the close monitoring and supervision of that administration via embodying public authority and tools*."[55] PS can be rendered via *a private enterprise* being under the close monitoring and supervision of the relevant public institution.[56] PS can be those activities in accordance with public interest(kamu yararı) which are undertaken directly by public legal persons or by a private legal person as a result of the direction and under the supervision of the proper public legal person.[57]

PS concept has two major elements: organic and material. Material element refers to the function of PS achieving to the goal of public interest. In Art. 47 of the Constitution under the sentence "*Private enterprises performing services of public nature may be nationalized in exigencies of public interest.*" the term 'public service/ services of public nature' is used organically. However, this criterion is not sufficient enough to define the term 'public service' alone since there is no activity that could be considered public service by nature. Because, whether an activity is intended to meet communal needs, thus; whether it is intended to fulfil public interest is judged by political bodies, and particularly by the legislative branch. Therefore, all activities are eligible to be considered as public service, yet, unless an activity that is intended to meet communal needs and fulfil public interest is officially accepted as public service by political bodies, it is not considered as public service.[58]

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[54] The Constitutional Court, 9.12.1994, E.1994/43, K.1994/42-2, "*devlet ya da diğer kamu tüzel kişileri tarafından ya da bunların gözetim ve denetimleri altında, genel ve ortak gereksinmeleri karşılamak, kamu yararı ya da çıkarını sağlamak için yapılan ve topluma sunulmuş bulunan sürekli ve düzenli etkinlikleri"*

[55] The Council of State, First Circuit, 17.4.2000, E.2000/29, K.2000/59,*"umuma arzedilen, sürekli ve kesintisiz bir biçimde işlemesi zorunlu, toplumun genel ve ortak gereksinimlerini karşılamak amacıyla kanunla kurulan idarenin, doğrudan ya da yakın gözetim ve sorumluluğu altında kamusal yetki ve usuller kullanarak yürüttüğü faaliyetler"*

[56] The Council of State, First Circuit, 24.9.1992, *"Çağdaş anlamıyla kamu hizmeti, bir kamu kurumunun ya kendisi tarafından ya da bu kamu kurumunun yakın gözetimi altında özel girişimci eliyle kamuya sağlanan hizmettir."*

[57] GÖZLER,Kemal., ***İdare Hukuk Cilt II,*** Ekin Basın Yayın Dağıtım, Bursa, 2019, p.255. GÜNDAY, p. 332, ATAY, E. Ethem, ***İdare Hukuku***, Turhan Kitabevi, Ankara, 2019, p. 595

[58] GÜNDAY, p.332

Organic element refers to the actorship of the public service. A narrow definition here might claim that a PS shall only be among the activities of public authorities. So a service rendered by a private institution cannot be claimed to be a PS. Such narrow definition reflects the situation in old days and in contemporary society, the administration or government can realize certain public service via the intermediance of private legal persons. Parallel to this, the term "public service" in the provision of the Art. 70 of Constitution "*Every Turk has the right to enter public service."* is used organically. Yet it can be stated that even a PS is to be realized by a private legal person, that PS shall be regulated and supervised by a proper public authority. This definition is crucially important, because much of the activities in natural gas market are now realized by private legal persons under the supervision of public administration body, namely Energy Market Regulatory Authority (EMRA-*Enerji Piyasası Düzenleme Kurulu*(*EPDK*)).

To open up the discussion, it shall be noted that, for a service to fell under PS, it shall include both elements. For example, while the road transportation service is not accounted as a PS, the railway transport is. Even though both include public interest quality, only the railway transport is realized by or under the public authority.[59] Similarly, the activities of public authorities which do not contain public interest element are not either counted as PS. For example, the sale of a building of a municipality to a private person is not a PS. In this regard, the profit-seeking economic activities of public authorities (mostly via Public Economic Enterprises- *Kamu İktisadi Teşebbüsleri*) such as lotteries or banking activities of public banks.[60]

According to some authors, there's a third element, formal element, refers to the quality, not a defining quality but as an outcome, of PSs being bound by a legal regime surpassing civil law.[61] This element emerges from the Blanco Case. The term "public service" was first used in this verdict of French Court of Jurisdictional disputes. The Blanco Case[62], marks the first solid implementation of the adoption of public service as the criteria

[59] GÖZLER, p. 257.
[60] Ibid. p.260.
[61] GÖZÜBÜYÜK Şeref/TAN Turgut, ***İdare Hukuku - Cilt I - Genel Esaslar***, 11. Baskı, Ankara, Turhan Kitabevi, 2016, **(Cilt I)**, p. 589-592. See also, GÜNDAY, Metin, ***İdare Hukuku***, 11. Baskı, Ankara, İmaj Kitapevi, 2017, p.330
[62] The Court of Jurisdictional Conflict made the following decision: "*devletin kamu hizmetlerini yerine getirirken kullandığı kişilerin eylemlerinden kaynaklanan zararların tazminin, bireyler arası ilşkileri kurala bağlayan Medeni Kanuna göre düzenlenemeyeceğini ve bu hizmetin gereklerine uygun, kişiler ile devletin*

of administrative jurisdiction. In other words, formal element refers to the method used in the effectuation of the activity that is qualified as public service, so it states a legal regimer. However, it can be stated that this element alone is also not sufficient enough to describe public service. Because, specific legal provisions are applied to a great extent, along with the emergence of industrial and commercial public services and their regulations within the legal systems.[63]

When case by case analysed, we cannot decide a service as PS by checking whether it is more suitable to be operated under Administrative Law. In this respect, no one public service is fully and unequivocally conducted either solely under Administrative Law or solely under Civil Law. The legal regime of public services is not sole or pure, they are of mixed qualities of the Administrative and Ciivil Laws, depending on the topic and purposes.[64] More than that, as discussed below, there is possibility of some industrial, commercial and economic PSs which fall under Civil Law, so this makes it not adequate for this claimed formal element.

After this brief introduction, we need to delve into the main problems about PS in Turkish Public Administration law. These are types of PSs, the fundamental principles of PS and finally the defining legal regime pertaining to PSs.

1.2.2.1. The Fundamental Principles of PSs in TAL:

There are four fundamental principles of PSs: continuity, changeability/adaptation, equality, neutrality.

Continuity means that PSs shall be performed permanent and regularly except the situation the law foresees. According to Council of State the continuous and compulsory rendering of public service obligations to the benefit of the society has become a general principle in Turkish case law.[65] Continuous rendering of public services does not mean that

menfaatini uzlaştıracak ilkelere göre düzenlenmesi gerektiğine". KARAHANOĞULLARI, Onur, ***Kamu Hizmeti(Kavram ve Hukuksal Rejim),*** 3. Baskı, Ankara, Turhan Kitabevi, 2015, p. 90

[63] ATAY, p.597

[64] DURAN, Lütfi, ***İdare Hukuku Ders Notları***, İÜ Yayınları, İstanbul, S. 2956, 1982, p.306

[65] See, The Council of State, Eight Circuit, 27.11.1997, E. 1996/1687, K. 1997/2669; See also, The Constitutional Court, 09.12.1994, E. 1994/43, K. 1994/42-2; The Constitutional Court, 28.06.1995, E. 1994/71, K. 1995/23; The Constitutional Court, 22.05.1963, E. 1963/205, K. 1963/123; The Constitutional Court,

they have to be performed twenty-four-seven, at all times, with no intervals. The qualification of continuity rendering of public services is more apparent when the societal needs to be fulfilled is assertive at all times. For instance, services of electricity and transportation. In services such as school and library that does not require service at intervals, the principle of continuance refers to constancy in the way the service is conducted.[66]

This brings both responsibility and right to the public administration. In term of rights, the law system can prohibit strikes for public agents in order to realize public services permanently. This include a broad interpretation where teachers, doctors-nurses are considered as public agents, and any strike that can lead to interruptions of public service shall be deemed to regarded as crime.[67] In this regard, the goods owned by public authorities cannot be distrained. Finally, a private legal person provider of a public service via concession agreement cannot benefit from force majeure defence as a reason of interruption of the service. On the other hand, as responsibility, the administration shall take measure for ensuring the continuity of PSs even during holidays. An interruption of a SGEI, in this regard, can be the subject of the breach of continuity principle, making the relevant supervisory public authority liable for service fault (*hizmet kusuru*). Continuity principle in public services is the direct result of the continuity of the state.[68]

The *changeability/adaptation* principle refers to the adaptation of the rendering of PSs in accordance with the changes of circumstances. In this context, public services have to keep up with the changing societal needs and developing technologies.[69] The legal outcome of this principle is the enhanced power of the Administration to change the current

06.03.1964, E. 1963/ 358, K. 1964/17; The Constitutional Court, 17.12.1968, E. 1968/12, K. 1968/65; The Constitutional Court, 31.03.1987, E. 1986/20, K. 1978/9; The Constitutional Court, 13.06.1988, E. 1987/22, K. 1988/19; The Constitutional Court, 21.10. 1992, E.1992/13, K. 1992/50; The Constitutional Court, 16.12.2010, E. 2007/37, K. 2010/114; The Constitutional Court, 01.11.2012, E. 2010/83, K. 2012/ 169; The Constitutional Court, 07.05.2002, E. 2000/17, K. 2002/46; The Constitutional Court, 19.12.2005, E. 2005/143, K. 2005/99; The Constitutional Court, 15.12.2006, E. 2006/111, K. 2006/112; The Constitutional Court, 15.06.2012, E. 2012/30, K.2012/96; The Constitutional Court, 08.11.2012, E. 2012/27, K. 2012/173; The Constitutional Court, 06.02.2013, E. 2011/123, K. 2013/26; The Constitutional Court, 01.04.2015, E. 2013/50, K. 2015/38; The Constitutional Court, 07.11.2014, E. 2014/61, K. 2014/166; The Constitutional Court, 29.01. 2014, E. 2013/130, K. 2014/18; The Constitutional Court, 22.10.2014, E. 2013/1, K. 2014/161; The Constitutional Court, 01.11.2012, E. 2013/50, K. 2015/28.

[66] GÜNDAY, p.334

[67] GÖZLER. p. 302.

[68] Ibid, p. 303

[69] AKYILMAZ, B.; SEZGİNER, M.; KAYA, C., ***Türk İdare Hukuku***, Seçkin Yayıncılık, Ankara, 2017, p. 610. See also, The Constitutional Court, 27.12.2012, E. 2012/102, K. 2012/207; The Constitutional Court, 28.02.2013, E. 2011/21, K. 2013/36.

regulations having an immediate impact on future operations without any liability to the earned rights' of the users.[70] That is to say, whether it be via a concession agreement or a grant of authorization, the public authority in order to adapt to the changing circumstances, can unilaterally change or cancel the rendering or benefit of a SGEI by private legal persons. This shall not be understood that the relevant public authority can arbitrarily do whatever it wants. Rather, the legislative body can change/modify the regulations or cancel it without having any burden on the current SGEI providers and users, yet in principle these acts can be litigated under Administrative law and if they are decided unlawful (*gayri hukuki*), any damages of the relevant parties shall be met by the Administration.[71] "*The State shall fulfill its duties as laid down in the Constitution in the social and economic fields within the capacity of its financial resources, taking into consideration the priorities appropriate with the aims of these duties."* In line with compliance principle, the administration is responsible for adapting to these restrictions while completing the services it effectuates.

The equality principle came to birth via the adoption of 1789 The Declaration of the Rights of Man and of the Citizen. In line with the Art.10 of the Constitution, which basically claims the equality of citizens before law, the benefiting from PSs shall be realized in accordance with equality and there shall not be any discrimination against an individual based on her race, ethnicity, religion, sex and etc. Yet, this does not necessarily mean that there will not be positive discrimination for the more disadvantaged parts of the society. Positive discrimination shall come with a certain Act.[72] The principle of equality in public services are usually related to the principle of neutrality of public services. Neutrality principle is a natural outcome of the equality principle. Neutrality does not provide right to individuals, rather it loads liability to the Administration in realizing its activities. In this context, the neutrality of public services, prevents the conduction of public services in different ways according to the opinions and faiths of the beneficiary or third persons.[73]

In many sources, gratuitousness (*bedavalılık/meccanilik*) is claimed another fundamental principle. According to this principle, there is no reward to be taken from beneficiaries in exchange for the classical public service provided by the administration.

[70] GÜNDAY, p.335
[71] GÖZLER, p.310.
[72] ATAY, p. 609
[73] Ibid., p. 610

However, due to the fact that the number of public services are increasing and the methods of public services are changing in parallel to the development of technologies, more financial resources are required, therefore a certain "reward" has begun to be required in exchange for services.[74] The reward collected from beneficiaries is not a 'price'. Because a price is made of cost and profit. Since the administrator is not a merchant, what is taken from beneficiaries is the cost of participating.[75]

Industrial and commercial services are not subject to any gratuitousness. This instance is not at odds with the principle of equality, instead, it rather supports it. In these activities, profitability and productivity is of importance. However, absolute economic cost is not. [76] For instance, the administration has to consider the current state of the market and public interest while determining a marketing price for natural gas. [77]

In this repect, the the measure for gratuitousness of public services is the type of that public service. Thus, other than public services that the state shall compulsorily render by itself or private persons shall not and cannot render, a certain "reward" can be demanded or the public services.[78]

1.2.2.2. The Types of PSs in TAL

The way of handling PS by the public institutions is the norm for PS and this is defined as PS rendered accoding to the General Administrative Provisions by the Turkish Constitutions under Article 126-128. Here the central and provincial General Administration is described. Yet, the Constitition is also describing the alternative way of handling the PS,

[74] See, The Constitutional Court, 19.04.1988, E. 1987/ 16, K. 1988/8.
[75] AKYILMAZ, B.; SEZGİNER, M.; KAYA, C., p. 615
[76] KARAHANOĞULLARI, p. 238
[77] The Council of State, Eight Circuit, 16.03.1998, E. 1995/ 5447, K. 1998/1162: "*Enerji ve Tabi Kaynaklar Bakanlığı, şehirlerde konut, resmi daire, ticarethane tüketicilerine dağıtım kuruluşları tarafından doğalgaz satışında taban ve tavan fiyatlarını tesbit yetkisi 3194 sayılı Yasada öngördüldüğü üzere piyasa ihtiyaçlarını dikkate alarak ve kamu yararını sağlamak amacıyla kullanmak zorundadır…doğalgaz satış tavan ve taban fiyatlarını tebit ederken;…dağıtım kuruluşlarının maliyetler, yatırım ihtiyaçları, alternatif yakıt maliyetleri, BOTAŞ'ın ithalat şartlarına göre her üç ayda bir dolar bazında belirlediği satış fiyatının kur değişimlerini ve işletme şartları nedeniyle yüklediği ek maliyetleri… yasada belirtildiği gibi… piyasa ihtiyaçlarını araştırmadığı ve bu verilere dayalı olarak öngörmediği sonucuna ulaşılmaktadır."*
[78] ATAY, p.613. The Constitutional Court, 12.01.1971, E. 1969/31, K. 1971/3: "*Devletin başta gelen ve salt ekonomik alan dışında bulunan bir ödevi için yardımcı olmak üzere açılacak ve işletilecek bir kurumun zarardan korunması düşüncesiyle yetinmeyip kazanç amacı gütmesi, sosyal devlet ilkesiyle bağdaşmaz ve böyle bir duruma izin veren hiçbir kural Anayasada yer almış değildir.*"

through private institutions, in Art 47, but not as strong as the previous model. Here, the Constitution mentions that there might be private institutions rendering PS. As a matter of fact, the Constitutional Court mentions this type of PS as being handled according to private business provisions (*özel işletmecilik esasları*).[79] If a PS is not explicitly defined as an industrial, commercial or economic PS, the rule is that it shall be regarded as general public administrative services. However, if that PS deems to have certain qualities such as the service being resembling to private sector services, the service being financed with the fee paid by the users and finally the service is managed by the procedure similar to private sector, then there is large presumption that the PS can be accounted as *industrial and commercial public services.*[80] In summary, Turkish classification mostly resembles to SGEI in the EU law. So, for the sake of developing a comparative discussion, from now on, we will also term PSs rendered under private business service in TAL as SGEIs.

1.2.2.3. The Legal Regime Pertaining to PSs in TAL

It cannot be claimed that an overall legal regimes, such as public administrative law, covers all range and relations pertaining to all PSs. Concerning general administrative PSs, the rule is that the legal regime is the administrative law and the relevant judicial platform is Turkish Administrative Courts. Human resources practices, relations with the users of PS, agreements/contracts related with this type of PSs and finally responsibility and obligations as well as damage as a result of the responsibility all are under the scope of Administrative Courts.

Concerning SGEIs, the relevant legal regime, as rule, is the civil law and the relevant judicial platform is the civil courts (*hukuk mahkemeleri*). The statutes of SGEI agents, contracts and relations with users and issues of liability, in principle, are the subjects of Civil Law. There are some exceptions to this rule in Turkey. First of all, the continuity and equality principles are also applicable to these types of PSs, so for example, it is possible put a prohibition of strike and supposed to provide services to any user without any discrimination. So, if a SGEI is donated with privileges/monopolies/concessions by virtue of public power or authority; this does not make this SGEI necessarily as a general administrative public

[79] The Constitutional Court, 21.01.1988, E.1987/11, K.1988/2. In this case, Turkish Constitutional Court decided that the services of public banks shall be classified as PSs that are rendered under private business provisions.
[80] GÖZLER, 2019, p.282.

service but make the acts of the SGEI based upon those public concession most likely a subject of the Administrative Law. Regulatory actions, granting licence, taxation, expropriation and similar acts of the SGEI are subject to the judicial review of the Administrative Courts. [81]

More importantly, the conflicts and relations between the relevant public authority and the private legal person realizing SGEI (irrespective from the basis of the relation either concession contract (*imtiyaz sözleşmesi*), authorization-licensing (*ruhsat*) are again under the judicial review of the Administrative Law. However, it should be noted that, the administration can decide exclusively that rendering of a PS to be realized by a private legal person. Besides, the legal regime pertaining the govern the relations between the relevant administration and that private legal person can be decided to be governed under the civil law, a right given to the Administration in Art.47(3) of Turkish Constitution.

The legal regime pertaining to the responsibility, liability and damages of SGEIs is an important issue for our thesis. The rule is Civil Law, as mentioned, yet there are varying court decisions concerning the damages realized by Public Economical Enterprises (PEIs). For example, Court of Appeals decided that the damages of PEI to third parties shall be litigated under the Civil Law and in Civil Courts.[82] On the other hand, Council of State decided that the responsibility of PEIs were subject to Administrative Law so the cases shall be concluded by Administrative Courts.[83] Finally, Court of Jurisdictional Conflict (*Uyuşmazlık Mahkemesi*) decided in 1991 that the claim for damage shall be the subject of Administrative Law.[84] The importance of this final decision was that the case was about a death of person due to fall of electric cable of owned by Turkish Electric Institution. The point is that, in general the services of natural gas market are analogously resembled to that of Electric Market, so this decision can provide a precedent pertaining to liability under natural gas markets. Yet, it should be noted that, the rationale for the proper place of Administrative Law in these examples, can mostly be influenced by the presence of PEI.

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[81] Ibid., p. 293.

[82] Court of Appeals, Fourth Circuit, (Yargıtay 4. Hukuk Dairesi), 06.02.1986, E.1986/277, K.1986/932; and Court of Appeals, Fourth Circuit, 26.05.1992, E.1991/3830, K.1992/7097.

[83] General Assembly of Administrative Court Circuits of the Council of State, 06.12.1996, E.1993/773, K.1996/599. See also, The Constitutional Court, 22.12.1994, E. 1994/70, K.1994/65-2: "*Kamu iktisadi teşebbüsleri iç yapı ve ilşkileri yönünden kendi yasalrı ile idare hukuku kurallarına bağlıdır…özel hukuku kurallarına bağlı olsalar da kamu tüzelkişilerinin asıl hukuksal rejimi kamusal mevzuat kuralları ile İdare hukuku kurallarıdır*."

[84] Court of Jurisdictional Conflict, 18.11.1991, E.1991/42, K.1991/43.

Yet, liability for the SGEI carried out by private institutions need closer emphasis, which we aim to handle in Chapter 3.

1.2.3. The Modes of Carrying out Public Services under TAL

As seen above, a PS can be rendered directly by a Public institution or by a private legal person whose under the close monitoring and supremacy of a public institution. In most of the case, general administrative PSs are rendered directly by the relevant Public institution. This can be in two ways: government ("emanet" in Turkish; "régie" in French) and via an established special public institution. The difference is that in the first case there is only state and no other established public legal person rendering the service; in the second case the service is rendered by a separately established public legal person.[85]

The government way can be explained as the effectuation of "public services that can be conducted by the government through services of private individuals" using its own sources, own personnel and service equipments by the government or other legal persons.[86] With the latter method, the public service is conducted by another legal person, a public institution, that is created within the legal personality that is in charge of the service. The reason why this method is used is to be able to effectuate public services under the responsibility of government or local administrations with personnel and economic independence.[87]

It can be claimed that there is no SGEI performed under government rule. They used to be heavily performed under PEIs, which fall to the second category in this classification. Yet as will be discussed below, as per the changing conditions, PEIs have been continuously privatized and the relevant SGEIs began to be rendered by private legal persons. In any case, the PEI which is rendering the SGEI shall have a separate public legal personality (which are established by Statues); it shall have independence in internal affairs and bear a certain level of expertise/specialty. Finally, PEI shall be under close monitoring and supervision of a relevant Public authority.[88] This is a shared quality with private legal bodies of SGEI

[85] GÖZLER, 2019.pp 390-92.
[86] AKYILMAZ, B.; SEZGİNER, M.; KAYA, C., p.630; GÜNDAY, p. 343; ATAY, p.631
[87] ATAY, p. 631
[88] GÖZLER, p.395.

providers, they all are administratively regulated and dependent to a relevant public authority.[89]

Because, as previously mentioned, no private legal person can generate a public service by himself. The basic rationale for that is the requirements of public methods and public permissions while public services are being effectuated. According to Art.6 of the Constitution "*No person or organ shall exercise any state authority that does not emanate from the Constitution*.". So, a private legal person has to base the public permission they rely on while conducting a public service upon relevant legal foundations. This legal foundation can be based on either the employment of a private legal person through an Act or through a contract within the limits envisaged by the Law (one sided by the Administration or two-sided where the will of the private legal person is also reflected). [90]

The modes of rendering SGEI by private legal persons deserve more attention since the current design of Turkish natural gas market are to be shaped according to these modes. As explained above, there are mainly two modes: i) A unilateral statutory authorization by a Public Authority, ii) Authorization via a Mutual Contractual Relationship.

1.2.3.1. Unilateral Statutory Authorization of Private Legal Person by the Public Authority

There are two ways of unilateral authorization, via establishment and via licensing (*ruhsat*). In the first case, relevant public authorities establish a ***private legal person*** such as companies, associations and foundations and afterwards they authorize this private legal person to realize the SGEI in question. So why public authorities need to employ such a method instead of using PEI method? Because, via founding private legal person owned by public authority rather than establishing a public legal body provides the opportunity of instituting the civil law as the legal regime for the organization and operations. So, for example, the personel employed are not officials, rather workers under the Employee Law. Yet, if there are public privileges provided for the private legal persons, as mentioned above, there is the possibility of employing Administrative law concerning the acts derived from that public privilege.[91]

[90] ATAY, p. 632
[91] Ibid, p. 632

In the authorization, a private enterprise demands the rendering of a certain SGEI and the relevant public authority gives a license or permission in return. The initial demand does not change the nature of unilateral relationship, the public authority unilaterally decides. The regulating of SGEIs pertaining to Turkish natural gas market is operated under this licensing method. The relevant public authority, EMRA, provides licenses on production, supplying (export-import), transmission, distribution and finally in storage. As a general rule, the employer-employee relations, relations with the users, contracts signed by this private enterprise operating under license, are all subject of the civil law, while the relations between the Public authority (licensor) and the licensee are within the scope of Administrative Law. However, if the licensee uses rights such as monopoly privileges based upon the authorization given by a public authority, these acts fall under the Administrative law as well. The rendering of relevant SGEI shall be under close monitoring and supervision of the relevant public authority. The responsibility of the Public Authority does not dissolve instantly upon giving the license to licensee. There is always the possibility of being liable of service default on the side of relevant public authority.[92] There are plenty of examples to authorization regime in Turkey. The Energy Markets (electricity, oil, natural gas, LPG), private schools, private hospitals, public transport rendered by private enterprises within municipality borders, the broadcasting of TVs and radios, internet service providing, cargo-post shipment services are regulated under this regime. Aforementioned services (transportation, communication, education etc.) are services that are not organically 'public services' but they are services that are also named as "virtual public services", which are services that are conducted for the fulfilling of common, perpetual and mandatory needs of the public, and that are effectuated with the permit given to private persons that we encounter in relation to public property.[93]

As a matter of fact, authorization of SGEI to private enterprises via licensing has been an emerging trend within Turkey and Europe. This is indicated as a final level of an evolutionary process in public administration, where the public authorities gradually have refrained itself from actually regulating and rendering these services towards dedicating its capabilities on market shaping, regulation, inspection and supervision and letting private sector rendering the services. This approach to modern public administration is termed as

[92] GÖZLER, p.398-400.
[93] AKYILMAZ, B.; SEZGİNER, M.; KAYA, C., p.631

"Regulation Regime", and a wider look including comparative analysis between the EU and Turkey will be handled as a separate part further in this Chapter.

1.2.3.2. Authorization via a Mutual Contractual Relationship

In this mode, a bilateral authorization contract/Agreement between relevant Public Authority and private enterprise is concluded indicating both the rights and obligations. According to the type of the contract, there are various types within this mode such as: concession (*imtiyaz*), tax farming/tenancy (*iltizam*), joint governance (*müşterek emanet*), agency (*vekalet),* Build-Operate-Transfer-BOT (*Yapi-İşlet- Devret*), Public Private Partnership. This model is highly demanded by private enterprises, especially foreign investors. Because, in principle, both parties can decide the governing law for the dispute settlement. Even, the international arbitration could become an option. This way, both domestic and foreign investors, aim to reduce their risks of potential aggressive behaviour of the other party-public authority, using domestic laws as basis.

Concession method is when a public service is conducted by private legal persons on the basis of an 'administrative contact' where the funding, profit, damage and costs belongs to the concessed public service belongs to those private legal persons.[94] This method is usually used by public services that are in the qualification of monopolies.[95] When tax farming method is analyzed, we see that it is effectuated around an administrative contract made between a public entity and a legal person in order to "render a public service" established by a public authority in return for a specified lump sum return or in ratios of the incomes received". In this context, some authors believe BOTs are forms of tax-farming.[96] Joint governance method, which is not as applicable as it was in today's world, is when a public service is conducted by having it completed by a private legal person with the condition that the costs and damages are under the responsibility of the administration and that the legal person is given a payment from the profit made. Even though it is similar to the consession method, in this method the funds needed for the service is provided by the administration and the person conducting the service is not responsible for damages.[97]

[94] The Constitutional Court, 14.02.2013, E. 2011/50, K. 2013/30.
[95] AKYILMAZ, B.; SEZGİNER, M.; KAYA, C., p.632
[96] ÇAĞLAYAN, Ramazan, ***İdare Hukuku Dersleri,*** Adalet Yayınevi, 6. Baskı, Ankara, 2019, p.166
[97] ATAY, p. 634

In public-private partnerships, it is conducted by a *sui generis* contract which is perceived as a financial model with an emphasis on the administration quality. What differs this method from the others is that public-private partnerships are not merely limited to the construction process but it also continues during the operation process. In this context, public-private partnership models started to being used with energy projects in 1986, and contracts were signed with Build-Operate, Build-Operate-Transfer, Build-Lease, and Transfer of Operating Rightsmodels. Within this context, it is seen that B-O-T model which requires the most amount of funds, is used in sectors such as energy and infrastructure investments that require the most funds.[98]

Especially with Turgut Özal's liberalisation reforms in 1980, several Acts were passed to provide relevant public authorities such as Turkish Electric Institution and Turkish Road Transport Authority with the ability to conduct bilateral contracts with private enterprises on rendering certain SGEIs. Yet, on the other hand, due to public interest nature of the public service, Turkish judiciary held the view that, this kind of contracts shall be approved by the relevant Judicial bodies such as Council of State. So until 1999, various decisions held by the Constitutional Court and Council of State had blocked the introduction of private enterprises in the areas of public service under bilateral contractual model.[99] Most probably, the Judiciary thought that such bilateral contracts could be used to develop corruption or transfer of public funds to the proponents of political party in power where the implicit aim of this model was to curtail the judicial review. However, what the governments tried was to attract private sector and hopefully foreign investment into the major infrastructure projects. Overall, the political parties finally amended the Art. 47 (3) of the Constitution in 1999 explicitly letting public authorities to devise civil law contracts as well as authorize private enterprises for the rendering of PSs.[100]

This discussion, in a sense, is useful to understand the evolution of energy markets regulatory design in Turkey. Until the beginning of 2010s, the concession or BOT models were seen the only alternative for empowering private enterprises in the field of PSs. For example, before the conclusive date of 14 March 2013, the electricity market was also regulated in accordance with BOT model, beside the authorization model. With the

[98] Ibid., p. 648.
[99] For a detailed discussion see, GÖZLER, 2019, p.453-465.
[100] Ibid., p. 453-465

publishment of Act Nr.6446 on 14 March 2013, the electricity market was definitively decided to be fully regulated according to Regulation Regime or licensing. Similarly, the GSM service providing service was to be regulated as a result of concession contracts. Today, mostly projects of bridges and highways are still regulated under the BOT model, yet, the governance of markets is moving towards Regulation regime.

Coming back to the discussion on legal regime, it should be noted that there is anonymous consensus that these kind of contracts shall be regarded Administrative Contracts (*idari sözleşmeler*). So, as a rule, the legal regime concerning the governance of these bilateral agreements (if an international arbitration is not specified within) are the subject of Administrative Law.[101] However due to persistently negative stand of Turkish Judiciary against concession contracts, Art. 47 of the Constitution was amended in a way to let the option of choosing Civil law for the dispute resolution. So as a second rule, if both Parties decide the embodiment of civil law then the conflict can be resolved in General Courts. In both cases, there possibility of assigning an international arbitration clause, totally eliminating the option of domestic courts. Since the service providers are private entities, issues concerning their employees, assets, operations, responsibility and damages are handled within Civil law, with the exception of the activities as a result of public privilege.[102]

1.3. The Regulation Regime and the Development of Regulatory Public Authorities

Originated in the USA, the Regulation Regime refers to embodiment of private institutions as the operators in certain markets where the government mainly focus on monitoring and supervision activities. After 1980s, it spread all over the world since it demonstrated certain efficiencies in various utility markets. Heavily after 2001 economic crisis, Turkey initiated regulation regime and the Regulatory Public Authorities (RPA) as the relevant market supervisor.

[101] Administrative Procedure Act, Act Nr.2577, Art. 2/1-c: ”tahkim yoluyla öngörülen imtiyaz şartlaşma ve sözleşmelerinden doğan uyuşmazlıklar hariç, kamu hizmetlerinin birinin yürütülmesi için yapılan her türlü idari sözleşmelerden dolayı taraflar arasındaki çıkan uyuşmazlıklara dair davalar.”
[102] GÖZLER, 2019, p.398.

1.3.1. The Withdrawal of Public Sector from the Industrial, Commercial and Economic Public Services (SGEIs)

After the miseries of Great Depression and the positive impact of Public Spending/War Spending on the German and USA economies to fight with Great Depression, Keynesian intervention-welfare policies had become the norm in all free-market economies.[103] Thus, without an exception all economies have increased public sector presence within industrial-economic markets. Especially in Europe, where the social democrat governments had mostly in power after the WWII, public sector started to provide basic services such as education, health, public transportation and even mining and industrial production. Until the oil crisis of 1970s, Keynesian policies helped to recover from the remnants of WWII as well as leading to strong growth trajectories. However, the stagflation of 1970s due to oil supply shocks, which means that growing inflation with economics recession, was something new that Keynesian policies could not answer. So, the start of 1980s, with the Thatcher and Reagan administrations in UK and the USA, resulted to the embodiment of withdrawal of public sector from the markets as a player. The basic claim was that due political factors, public sector economic entities would not be as efficient and profitable as private sector entities, so government should stop intervening markets. Deregulation and privatization have become new darlings of the world economies and Washington Consensus,[104] the manifest of neo-liberal policies, was regarded the sacred Constitution for economic success. So from 1980s to the end of 2000s, in three decades, majority of the world economies including the EU and Turkey have realized neoliberal policies and in this respect have gradually shaped their internal markets (such as energy markets, trade and many other services) in a way that the role government-public was limited to regulation, supervision and inspection, but no way in production and rendering services

[103] The Classic Economists focussed only on Supply side and claimed that economy wouls self-correct any economic crisis. Any government intervention would lead to inefficiencies and free-market mechanism was capable of regulating the economy. The father of macroeconomics, Keynes, on the other hand argued that the demand side of the economy is more important and the government shall initiate fiscal policies to fight with depression. That is to say, governments should increase government spending and decrease taxation in order to stimulae the demand and in return the supply-production would follow the demand. The New Deal of Roosevelt administration used Keynesian policies and initiated huge infrastructure projects and in return the negative impacts of Great Depression was eliminated. So, government intervention either through government purcheases or by producing by itself was accepted as the "standard" macroeconomic policy until oil shocks of 1970s. Then Keynesian economic policies could not answer stagflation and in return Monetarists and Supply Side economists gained popularity.

[104] For a brief History and debates on Washington Consensus, see WILLIAMSON, J. "The Strange History of the Washington Consensus", *Journal of Post Keynesian Economics*, Vol. 27, No. 2 (Winter, 2004-2005), pp. 195- 206.

directly. This has of course some profound impacts on the understanding of public service[105] and state responsibility.

Similar to electricity, the natural gas services were certainly regarded a kind of PS, before this transformation of the markets. Because all the services pertaining to natural gas and/or electricity were directly handled by the public sector. With the start of the transformation, initially private sector players were permitted to function beside the public sector. Finally, in the final phase, we see total removal of public sector players (or service providers) from certain service fields leaving all players in the market as private, but government focusing on regulating the market via Regulatory Public Authorities, such as EMRA. It goes without saying that due to natural monopoly characteristics of some services (mostly transmission); public sector presence continued in some services but was forced to unbundling of its services in other service fields. These "independent" regulatory public bodies can be regarded as enforcement institutions and with this system; the regulator/supervisor branch of the public is separated from the service provider branch. As a result, using the authorization method, the relevant independent public regulators authorize certain private legal entities to perform certain SGEIs. Being a consequence of neoliberal approach, this type of governance, termed as Regulation (*Regülasyon*) is claimed the state-of-art governance and it will continue to grow not only industrial-commercial-economic public service areas, but also other public service areas.[106]

The original design of having Regulatory Public Authorities independent from the central governments is a USA legal design which later was adopted by the EU countries.[107] There are economic efficiency based assumptions for this approach. Normally, in free-markets that operate normally, equilibrium price and demand-supply mechanism are claimed to work perfectly in a way to efficiently allocate resources with the least cost possible. The social surplus (the sum of consumer surlus and producer surplus in economic terms) becomes maximum when this efficiency is achieved. The competition in the markets is the dynamo

[105] The Constitutional Court, 12.04.1990, E. 1990/4, K. 1990/6: "*Kamu hizmetleri ne suretle yürütülürse yürütülsün kamu kurum ve kuruluşlarının gözetim ve denetimleriyle hizmeti yönlendirme yetkileri var olduğu sürece, hizmet kamusal niteliğini korumuş olur*."

[106] ERGÜN, Çağdaş Evrim, *Elektrik Piyasalarinda Kamu Hizmeti Kavrami Ve Hukuki Rejimi,* PhD Thesis submitted to Ankara University, 2010, p.2.

[107] ÖZKAN, Ahmet Fatih, "Ekonomik Kamu Düzeni ve Ekonomik Kolluk Faaliyeti", ***Ankara Barosu Dergisi***, 67(4), 2009, p.85. Özkan claims *Interstate Commerce Commission* in the USA, established in 1887, as the first Regulator body in this kind.

for innovation, decreasing costs and thus increased welfare. So, in these kinds of markets it is better not to have state intervention. The Single Market understanding of the EU is based upon this basic economic understanding where the intervention and barriers are thrown out, the competition will lead to efficient allocation of resources. That is why we see Germans are making the best car while the French doing the best cosmetics and Italians the best designers.

However, not all markets can function properly, where there are some market failures evidently witnessed such as formation of monopolies, public goods, and negative externalities.[108] For example, if a monopoly occurs, it can easily hold other firms entering the market and via increasing the prices artificially, it can decrease the social surplus to the detriment of consumers. More than that, monopolies can negatively impact policies through lobbying and bribing politicians in a way to secure its monopoly status. Or in natural monopolies, the initial investment requirement is so high that being more than one player cannot economically justify the initial investment, so you need to limit the number of players in the market. Likewise, producers can spoil the environment in order not to meet some costs of production and if not regulated all society pays the price of environmental damage. Finally, some goods by nature have public good characteristics so it is possible to exclude the ones who did not pay for it. For example, security, defence and judiciary are kind of these goods. It does not matter a citizen or all citizens in the neighbourhood needs police security, when it is established everyone will get it. If you want to put a price for this service, there will always some people not paying the price but getting the service. It is not possible to exclude not payers, so free-ridership occurs. The most efficient way to realize public goods is to do it by the state via using taxes.[109]

So, in goods and services, where there are possibilities of market failures, the optimal way is to regulate it via regulatory bodies that will develop expertise on how to handle the issues pertaining to the specific market. In this way, it becomes more plausible to realize a balance between efficiency and public interest. That is why we have anti-trust legislation

[108] DEVİR, Kenan. *Türkiye Elektrik Enerjisi Piyasasi Ve Uygulamadaki Hukuki Esaslar,* M.A. Thesis submitted to
Özyeğin Üniversitesi, İstanbul, 2017, p. 55.
[109] For a detailed discussion on market failures and public good, see MANKIW, N. Gregory, *Principles of Economics,* 6th ed., Cengage Learning, 2012, pp.193-250, titled under Part IV: The Economics of the Public Sector.

and Competition Authority almost in every country to ensure the healthy operation of market competition. Natural gas market has structurally been one of the areas of market failures. Since, it needed huge investments up front, so was not that profitable as a market, it resembled to natural monopoly and/or public good qualities thus the state stepped in to establish the market. Furthermore, TPA within the established transmission network is crucially needed to ensure competition and consumer welfare, but such a thing cannot be realized without proper government intervention and regulation.[110] Finally, the asymmetric information between the parties in the natural gas market transaction necessitates the validity of the regulation and state intervention.[111]

Now, both the EU and Turkey has gradually made attempts to open these markets to private players in order to ensure the increase of efficiency as well as social surplus without losing the public interest. The Regulatory Public Authorities are so far the best solutions to converge the economic efficiency and public interest. The independency is to provide immunity from political manipulation.[112]

1.3.2. The Regulation Regime in Detail and the Regulatory Public Authorities (RPA): The Turkish Case

The supervision of the economy markets through Regulatory institutions of the state has resulted in the emergence of institutions named *Regulatory Public Authorities* (RPA) within the Turkish Administrative Organization. Taken successful examples in North America and Europe, RPAs are public institutions ensaiged as independent in terms of organization and operation which out of the regular administrative hierarchy and supervision, in a way to establish immunity from political manipulation which can lead to market inefficiencies. Even though they are not of judicatory qualifications, they are allowed to intervene swiftly on the activites pertaining to the scope of their field territory in a quick manner, before the issues are taken to the court, yet they cannot replace the Courts.[113]

[110] KOTLOWSKI, Aleksander: "Third -party Access Rights in the Energy Sector: A Competition Law Persective", *Utilities Law Review*, V. 16, nr. 3, 2007, p. 101.
[111] IŞIKSUNGUR, 2010, p. 52.
[112] DEVİR, 2017, p. 56.
[113] ERGÜN, Çağdaş Evrim. "Türkiye ve Avrupa Birliği'nde Enerji Alanindaki Bağımsız İdari Otoriteler" , *TBB Dergisi*, Nr. 50, 2004, p. 46.

First witnessed in Anglo-Saxon administrations, RPAs have been included in the governing structures of Continental Europe in 1970s. While the sectors regulated by RPAs were around 10% in the EU by the end of 1980, it has expanded to over 80% by the start of 2000s[114].

The oldest RPA witneesed in Turkish Administrative organization is Insurance Supervision Board (*Sigorta Murakabe Kurulu*) founded in 1959. This Board was responsible of inspecting private insurance companies.[115] Accordingly, especially after 1980s, many RPAs such as Capital Markets Board, Radio and Television Supreme Council, Competition Authority, EMRA have increasingly started to function within the Administrative organization.This followed the founding of various RPAs in different sectors such as broadcasting, telecommunications, energy, tobacco products, sugar, banking as well as not sector based horizontal RPAs such as the Competition Authority.

Besides, advisory functions, these institutions also have executory powers such as making regulatory oparations, inspecting and imposing administrative penalties. The activity areas of RPAs can be classified as below:

- Administrative Acts such as providing licence and permissions for the players in the supervised market.
- Regulatorr Activities (Issuance of Regulations and Directives),
- Inspection and Supervision,
- Imposing Sanctions.

The field and scope of RPAs vary depending on the structure of the sector. If the sector is in the monopoly of the government, RPAs should initially privatize the sector and exchange the public property with private property. When the sector is completely out of the control of the government, or government is reduced to the level of operator, RPAs make regulations about the public resources and public power that will be used within that market. In this context, for example, the activities of OFGEM (The Office of Gas and Electricity Markets-*Elektrik ve Gaz Piyasaları Ofisi*), authority of energy in England who has a completely liberalized electricity and oil market, is expected to have different activities than that of EMRA.[116]

[114] ÖZKAN, 2009, p.88.
[115] ERGÜN, 2004, p.48.
[116] ERGÜN, 2004, p.52.

The liberalization of energy markets movement in the EU essentially shaped by the Electricity and Gas Directives, intends to create a single integrated EU energy market and to ensure that free competition rules prevail in this market. These directives, have been included in the laws of the member countries. In this context, RPA model has been found appropriate for ensuring that the markets in question work according to competition, and most EU countries regulated their markets around this model. Similarly, in 2001, EMRA was founded in Turkey as a result of the efforts to liberalize energy markets.

RPAs all have separate public legal personalities from the state organization which is established via a founding Act. The Act not only provides the legal legitimacy required to enforce powers provided but also ensures the judicial reviewability. RPAs have both administrative and budgeting autonomy from central administration. They are not part of the central state organization, hence having separate and autonomous public legal personalities, yet as a result the integrative nature of the administration (*idarenin bütünlüğü ilkesi*) which is recorded in Art. 123 of the Constitution, they are part of the Administration.[117] Actually, they are termed as "relevant" or "related" (*ilişkili, ilgili kuruluş*) institution with a certain Ministry. The Ministry in question is responsible for policy and strategy design, while the relevant RPA is responsible for the regulation and supervision. For example, according Art.4 of the EMRA Law, the Energy and Natural Resources Ministry is the related (*ilişkili*) ministry for EMRA.[118] That is to say, to claim RPAs having a full autonomy from relevant Ministry can be too much but at least for the personnel regime and enforcing regulatory acts, RPAs can be claimed sustaining autonomy.[119] More than that, unlike classic central administrative organs, they are provided with powers to enact administrative law enforcement and dispute resolution.[120]

In doctrine it is claimed that, RPAs are Decentralized Public Institutions (*Yerinden Yönetim Kuruluşları*) similar to Higher Education Council (YÖK) since they cannot be

[117] See also The Constitutional Court, 21.09.2004, E.2002/100, K.2004/109, which The Constitutional Court regards Radio and Television Supreme Council-RTÜK as part of Administration. See also The Council of State, 10th Circuit, 25.11.1996, E.1995/6027, K.1996/7741 which regards Capital Markets Board as a public institution.

[118] Madde 4/(4): "*Kurumun merkezi Ankara'dadır. Kurumun ilişkili olduğu Bakanlık, Enerji ve Tabii Kaynaklar Bakanlığıdır. Kurum, dağıtım bölgelerinde müşteri ilişkilerini sağlamak üzere irtibat büroları kurabilir.*"

[119] For a detailed analysis on the autonomous status of RPAs, see ÇAKMAK, Zeynep,.*Bağımsız İdari Otorite Olarak Enerji Piyasasi Düzenleme Kurumu,* PhD Thesis submitted to Ankara University, 2011, pp. 57-98.

[120] DEVİR, 2017, p.58.

included parts of Central Administration.[121] A ruling of the Constitutional Court is in line with this understanding where Radio and Television Supreme Council (*RTÜK*) is regarded as a decentralized public institution by service (*Hizmet Bakımından yerinden yönetim kuruluşu*) and being a part of the Administration.[122] This approach is fuelled by a narrow interpretation of Art.123 of the Constitution which puts the framework for state administration.[123] Actually, it is claimed that RPAs shall not be regarded as Decentralized Public Institutions as the compulsory inference that they shall be either central administration institution or decentralized public institution, where the second is more proper. Because Turkish Radio and Television Institution (TRT) is also a decentralized public institution and legally it is not possible to accept a supervision power of another decentralized public institution, which is RTÜK in this case.[124] Thus, against the narrow interpretation of Art.123, Art.167 of the Constitution provides a comprehensive framework for the legal status of the RPAs.[125]

The legal status of RPAs is directly related with the key legal question whether RPAs can be regarded as part of (economic) police *(kolluk*) besides being part of public service. In the original innovator of the Regulation Regime, in the USA, the scope of Regulation covers both of them.[126] Normally, administrative police is an intense area of the administration compared to public service and all administrative activities are grouped under these two categories: public service or administrative police (*idari kolluk*). In classical terms, administrative police can be claimed administrative acts and administrative organization with the aim of ensuring public order and returning it when times of disorder.[127] The claim that the coverage of the *regulation regime or RPAs* are well beyond the scope of Public Service and hence delving into the scope of administrative police is crucially important to define/limit the borders of the state responsibility within the regulation regimes. In markets

[121] GÖZLER,Kemal., *İdare Hukuk Cilt I,* Ekin Basın Yayın Dağıtım, Bursa, 2019, pp..229-230.
[122] The Constitutional Court, 21.09.2004, E.2002/100, K.2004/109.
[123] "*İdarenin bütünlüğü ve kamu tüzelkişiliği, Madde 123 – İdare, kuruluş ve görevleriyle bir bütündür ve kanunla düzenlenir. İdarenin kuruluş ve görevleri, merkezden yönetim ve yerinden yönetim esaslarına dayanır. Kamu tüzelkişiliği, kanunla veya Cumhurbaşkanlığı kararnamesiyle kurulur*."
[124] KUTLU GÜRSEL, Meltem. "Sermaye Piyasasi Kurulu'nun Denetimi", *Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi*, 2005, 7 (0), p. 499.
[125] "*Madde 167 – Devlet, para, kredi, sermaye, mal ve hizmet piyasalarının sağlıklı ve düzenli işlemelerini sağlayıcı ve geliştirici tedbirleri alır; piyasalarda fiili veya anlaşma sonucu doğacak tekelleşme ve kartelleşmeyi önler."*
[126] ÇAKMAK, 2011, p. 19.
[127] ÖZCAN, Elvin Evrim. *İdare Hukuku Açısından Türkiye'de Elektrik Sektörünün Regülasyonu Ve Avrupa Birliği, Rusya, Çin Ve Güney Amerika Uygulamalari,* PhD. Thesis submitted to Gazi University, Ankara, 2009, p. 31.

where there are both public service providers (can be both public or private bodies) and private companies under management principles; a regulation regime bearing regulating, supervision and enforcement qualities cannot be exactly claimed as only public service or only administrative police. The activities on the private companies under management principles will resemble more on the police side whereas activities on public service will resemble to public service principles.[128] It is possible to distinguish these activities as follows: While the administration provides beneficial activities and services to the citizens through "public service", in administrative police, the administration aims to prevent public disorder and engage in activities to reinstate the broken down order back.[129]

Thus the Regulation Regime shall be regarded as *Public Service* activity including the administrative police services.[130] In this respect, for some scholars, the Regulation Regime or RPAs shall be regarded a special type of economic administrative enforcement or better be evaluated as "an administrative activity with a separate-special legal regime".[131] This special legal regime pertaining to RPAs or special place of RPAs within TAL is different from centralized and decentralized public institutions seem to be accepted by the official doctrine hence the Council of State has arranged a special Circuit, 13th Circuit to handle the cases of unique to RPAs.[132] In line with this argument, Art.167 of the Constitution provides executive, judiciary or legislative bodies with the rights to intervene in goods market within the framework of Regulation Regime and the type of administration responsible for this intervention is not strictly defined.[133] That is to say as it is claimed that RPAs shall be regarded as the third category of the public institutions other than central administration; besides provincial administration and the decentralized public institutions by service.[134] This seems a working and practical classification. When Art.123 and Art.167 of the Constitution taken together, the Regulation Regime can be established in any way either via central administration or a via *special type* of decentralized administration. In this regard, Capital Markets Board, Competition Authority, EMRA, Information Technologies and Communication Institution (BTK), RTÜK, Banking Regulation and Supervision Agency

[128] DEVİR, 2017, p.56.
[129] KARAHANOĞULLARI, p. 73
[130] ÇAKMAK, 2011, p. 19.
[131] TAN, Turgut, *Ekonomik Kamu Hukuku*, Türkiye Orta Doğu ve Amme İdaresi Enstitüsü Yayınları, Ankara, 1984, p.24: "a*yrı bir hukuki rejimi olan idari faaliyet".*
[132] ÖZKAN, 2009, p.86.
[133] ÇAKMAK, 2011, p. 130.
[134] ULUSOY, Ali, *Bağımsız İdari Otoriteler,* Ankara: Turhan Kitabevi, 2003, pp. 90-93.

(BDDK) and Public Procurement Authority (KİK) are considered as RPAs working under this special Regulation Regime.[135]

It can be claimed that the Regulation Regime and RPAs are donated with powers mixed of executive, legislative and judiciary. These extensive spectrum of powers are major difference from the classical central administration institutions. For example, the economic enforcement practices of RPAs include both "ex ante" and "ex post" measures, where administrative or judiciary enforcements could only benefit only one of them.[136] A survey on the literature and legislation of RPAs will indicate that an ordinary RPA will have following powers/authorities:

i) to make regulations and regulatory acts (most explicitly seen as giving license-permit or banning),

ii) inspection, auditing, monitoring, surveillance and supervision,

iii) imposing sanction (enforcement- *yaptırım uygulama*),

iv) Commenting, Advisory and Guidance,

v) dispute resolution.

While these authorities can be deducted from the Acts of the RPAs (as will be analysed for the EMRA below), in case law generally all these authorities are referred under two umbrella terms: *regulation and supervision* (*düzenleme ve denetleme*). In cases where the carrying out of public service is authorized to a private legal entity, the intense and *close supervision and surveillance* of the state shall persist.[137] Supervision (*denetim*) in most of the case used with complementary word *surveillance* (*gözetim*). According to Constitution, national education (Art.42), all universities (including foundation universities) (Art.130), the search and management of natural wealth and resources (Art.168), forests (Art.169) shall be under supervision and surveillance of the state.

Overall, The Regulation Regime and its umbrella public Authorities in Turkey, RPAs, are new to TAL and as rightly argued, they shall be evaluated under new kind of legal

[135] ÇAKMAK, 2011, p. 46. Çakmak omits similar institutions such as Turkish Patent Institute and/or Sugar Institution with the claim that they are not autonomous and put only the ones listed on the Annex III of the Public Fiscal Management and Control Act Nr..5018. Tobacco and Alcohol Regulation Authority was dissolved become a Department under the Ministry of Agriculture.

[136] ÖZKAN, 2009, p.83.

[137] The Council of State, 13th Circuit, 26.04.2006, E.2005/8007, K.2006/1971. For a detailed case survey within the Council of State and the Constitutional Court those used "supervision and surveillance" as the responsibility of the public institutions, see YAYLA, Ahmet, 2012, *Idarenin Doğal Gaz Piyasasini Düzenleme Faaliyeti,* PhD Thesis submitted to Marmara University, Istanbul, pp.159-162.

regime called Economy Law. This is naturally a mix of Civil Law and Administrative Law, where micro economy sides are to be handled via Civil Law and macro economy sides via Administrative Law.[138] The responsibility of the RPA is mostly related with the public service nature of the issues as well as about its effective supervision, enforcement and monitoring of the market. On the other hand, the individual issues of the service quality between the service provider and the consumer is to be shaped by the responsibility of the service provider under Civil Law.

1.4. The Evaluation on Turkish Natural Gas Legislation and the Framework for Public Service Regime for Natural Gas

So far, we have analysed the definition and requirements for PS in TAL. To open up the discussion, we have delved into various models where the PS is not essentially carried out by public legal bodies but through Regulation model (a model of many), which is the current model in Turkish natural gas market. Furthermore, RPAs, as the major requirement for well-functioning Regulation regimes are analysed with a special emphasis on Turkish case and EMRA, the RPA of the Turkish natural gas market. We have lied down the fundamental conceptual framework for PS in Turkish legislation from the perspective of natural gas market, now it is time to delve into a more targeted discussion on the practicalities of PS regime for Turkish natural gas market.

1.4.1. EMRA and its Umbrella Legislation:

The formation of energy markets and its close supervision by the state are actually public service obligations coming from the Constitutions. As per Art. 5 of the Constitution, one of the fundamental functions and obligations of the state is to getting rid of any social and economic limitations on citizens that are not compatible with social state and rule of law.

Likewise, in Art. 167, the state is also put under the obligation that it has to take all relevant measures for goods and services markets to perform healthy and regularly in a way to eliminate any monopoly and cartels within these markets. Finally, at Art.5, we see that the state is also responsible to protect the environment. Considering these public service

[138] KUTLU GÜRSEL, 2005, pp.494-495.

obligations, the state has to regulate and supervise natural gas markets, if not provide the relevant services by itself. The *Regulation Regime* has been chosen by the Turkish state per the appropriate system to regulate natural gas markets. EMRA was instituted with Law Nr. 4628 for that respect and Natural Gas Market Law Nr. 4646 was published as the proper legislation. It will be analysed in detail below, yet as a summary, it can be concluded that there is not any provision either in the Constitution or in the relevant Laws 4628 and 4646 that defines natural gas services as PS or SGEI. This would be the shortcut solution, to have a clear definitive provision in positive law. However, the case law as well as the practice of embodying Administrative Courts for certain conflicts with the private market operator indicates the PS nature of some natural gas services. In this respect, our conclusion is that production, transmission, storage and distribution services pertaining to natural gas bear PS-SGEI nature, whereas export, import, wholesale and LNG services seem to bear full market operations without any PS nature. These will be discussed below in detail.

As mentioned above, EMRA is one of the leading RPAs in Turkish economy legislation. It basically regulates and supervises the energy markets, namely electricity[139], natural gas[140], oil[141] and LPG[142] markets. EMRA resembles to its European/Western counterparts and was founded in 2001 by the establishment of Law Nr. 4628[143]. Even though EMRA's authorities and scope of regulatory/supervision activities are detailed in each energy market within market specific Laws, the umbrella Law Nr. 4628 provides a general framework for EMRA and its organisation. According to Art.4, EMRA is responsible and authorized to:

- determine the rights and obligations of the legal persons within the energy markets,
- prepare the relevant ongoing contracts regarding the transfer of operating rights in accordance with the Law,
-issue the regulation concerning the energy markets,
- monitor the performance of the markets
- inspect and supervise the execution of the regulations

[139] Regulated via Electricity Markets Law Nr. 6446
[140] Regulated via Natural Gas Market Law Nr. 4646.
[141] Regulated via Petroleum Market Law Nr. 5015.
[142] Regulated via LPG Market Law Nr. 5307.
[143] The original name of the Law was *Electricity Market Law*, it was later amended as *Law on the Organisation and Duties of the Energy Market Regulatory Authority*, on 14/03/2013. The name of the EMRA was previously as *Electricity Market Regulation Authority*, until the publication of Law Nr. 4628 and it was basically focusing only Electricity market. With this Law, EMRA's authority has been extended to four markets.

- determine the principles of pricing of energy products.

EMRA also has a top executive body, Energy Markets Regulation Board (EMRB), composed of seven members[144] that decide all important matters concerning energy markets such as giving out licenses, determining retail energy prices as well as decisions pertaining to conflicts in the markets (Art. 5). When the Natural Gas Market Law Nr. 4646 was issued on 18/04/2001, certain amendments were also done in Law Nr. 4628, to synchronize the duties and scope of EMRA concerning natural gas markets. In this regard, Art.5/A[145] defines the duties of the EMRB concerning natural gas market while Additional Article 1[146] and 2[147]

[144] Until the amendment of Law on 4/6/2016, there were nine members.

[145] "*Kurulun doğal gaz piyasası ile ilgili görevleri*
Madde 5/A – (Ek: 18/4/2001 - 4646/15 md.)
Enerji Piyasası Düzenleme Kurulu, doğal gaz piyasası ile ilgili olarak aşağıda belirtilen hususlardaki görevleri de yerine getirir:
a)Doğal gaz piyasa faaliyetlerine ilişkin plan, politika ve uygulamalarla ilgili Kurum görüş ve önerilerini belirlemek.
b) Doğal gaz piyasa faaliyetlerine ilişkin doğrudan taraf olunan uluslararası anlaşmalardan doğan hak ve yükümlülüklerin ifası için, Kuruma düşen görevlerin yapılmasını sağlamak.
c) Doğal Gaz Piyasası Kanunu ile Kuruma yetki verilen konularda, doğal gaz piyasa faaliyetlerine ilişkin her türlü düzenlemeleri onaylamak ve bunların yürütülmesini sağlamak.
d)Doğal Gaz Piyasası Kanununda yer alan lisans ve sertifikaların verilmesine ve bunların yürütülmesi ve iptaline ilişkin her türlü kararları almak ve uygulamak.
e)Doğal Gaz Piyasası Kanununda yer alan hükümler dahilinde özel hallerde uygulamaya konulabilecek sınırlama ve yükümlülüklerin tespiti ile fiyat belirlemesine yönelik kararları almak.
f)Doğal gaz piyasası içerisinde rekabetin hiç veya yeterince oluşmadığı alanlarda, fiyat ve tarife teşekkülüne ilişkin usul ve esasları düzenlemek.
g) Doğal Gaz Piyasası Kanununda belirlenen faaliyetlere ilişkin tarifeleri onaylamak veya tarife revizyonları hakkında karar almak.
h) Doğal gaz piyasası faaliyetleri ile ilgili denetleme, ön araştırma ve soruşturma işlemlerinin yürütülmesi, yetkisi dahilinde ceza ve yaptırımları uygulamak ve dava açmak da dahil olmak üzere her türlü adli ve idari makama başvuru kararlarını almak.
ı) Doğal Gaz Piyasası Kanununun uygulanması ile ilgili olarak tüzel kişiler veya tüzel kişiler ile tüketiciler arasında çıkacak ihtilafları çözmek.
i)Doğal Gaz Piyasası Kanununda gösterilen diğer görevleri yerine getirmek ve yetkileri kullanmak".

[146] "*Ek Madde 1 – (Ek: 18/4/2001 - 4646/20 md.)*
Enerji Piyasası Düzenleme Kurumu, bu Kanunun uygulanması ile birlikte, Doğal Gaz Piyasası Kanununu da uygulamakla yetkili ve sorumludur. Doğal gaz sektörü ile elektrik enerjisi sektörünün birbirinden farklı piyasalar olması nedeniyle Enerji Piyasası Düzenleme Kurumu ve Kurulu piyasalarla ilgili görev, yetki ve düzenlemeleri ayrı ayrı ve kendi kanunlarına göre yürütür."

[147] "*Ek Madde 2 – (Ek: 18/4/2001 - 4646/20 md.)*
Enerji Piyasası Düzenleme Kurumu, doğal gazın ithali, iletimi, dağıtımı, depolanması, ticareti ve ihracatı ile bu faaliyetlerine ilişkin tüm gerçek ve tüzel kişilerin hak ve yükümlülüklerini tanımlayan lisans ve sertifikaların verilmesinden, piyasa ve sistem işleyişinin incelenmesinden, dağıtım ve müşteri hizmetleri yönetmeliklerinin oluşturulmasından, tadilinden ve uygulattırılmasından, denetlenmesinden, maliyeti yansıtan fiyatların incelenmesinden ve piyasada Doğal Gaz Piyasası Kanununa uygun şekilde davranılmasını sağlamaktan yetkili ve sorumludur.
Doğal Gaz Piyasası Kanununun yürütülmesinde, gerçek ve tüzel kişilerin Kurumdan alacakları lisans veya sertifika kapsamında yapacağı faaliyetlerin denetimi, gözetimi, yönlendirilmesi, uyulacak usul ve esaslar ile bu lisans ve sertifikaların kapsamı, verilme kriterleri, süreleri, bedellerinin tespit şekli, çevre mevzuatı ile uyum sağlaması, sicil kayıtlarının tutulma usulü ile lisans ve sertifika sahiplerinin hak ve yükümlülükleri ve piyasanın düzenlenmesi ile ilgili gerek görülen diğer hususlar çıkarılacak yönetmeliklerle düzenlenir.

extends the scope of EMRA to include all matters pertaining to the regulation, giving out and cancelling of licenses, inspection, dispute resolution and supervision of natural gas market. The details of these duties are to be analysed in the following part, but at least it can be claimed that the umbrella Law Nr.4628 together with energy market specific legislations provide a very extensive scope of authority to the EMRA-EMRB. The remaining articles mostly describe the personnel regime, budgeting and organisational structure of the EMRA-EMRB, not directly relevant with the regulation of the markets.

An important aspect of EMRA's authorities is to put sanctions as well as act as dispute resolution body. Against the acts of EMRA-EMRB, the judicial review is possible and within TAL. Previously, the litigations against EMRA-EMRB were to be directly handled by the Council of State, yet with the amendment of Art. 12 in 2012 (as well as Art. 10 of the Natural Gas Law Nr. 4646) the litigations were put to start at lower level, from the Administrative Courts.

1.4.2. Survey on Turkish Case Law for defining "Natural Gas Services" as PS

As discussed before, the breadth of state liability in natural gas markets are directly related whether natural gas services are to be regarded as public service or only business activity. The main handicap is the determination of the presence of a "public interest" element in a given service, in a way to account is as a PS. At the end of the day, public authorities and the judiciary define a service as a PS and the straightforward rule in Turkish Administration Law is the presence of a legislation defining a service as PS. However, concerning natural gas services, there is not a general "definitive" legislation piece that "defines" the inherent PSs.

So a major problem occurs whether the state liability diminishes in the areas where the private legal entities are authorized to operate. A detailed analysis for each type of service within the natural gas market is needed to conclude on the matter. It is doubtful whether the relevant RPA, EMRA, continues to carry the primary responsibility of public service

Kurum, Kurul kararıyla Doğal Gaz Piyasası Kanunu hükümleri uyrınca çıkaracağı yönetmelikleri ve uzun vadeli programları piyasada faaliyet gösteren tüzel kişilerin ve ilgili kurum ve kuruluşların görüşlerini alarak hazırlar."

(*hizmetin asli sorumlusu*). One of the primary goals of this thesis is to provide a working answer for that question.

There is a great deal of cases within Turkish Constitutional Court, Council of State, Court of Jurisdictional Disputes and finally Court of Appeals that certain utilities are to be regarded as *essential* public services since they have "public interest" element and for meeting the shared necessities of the people in a continuous and organized way. Yet it should be noted that great majority of cases are about *electricity* since it was the first energy market tried to be privatized after an exhaustive process leading to many judicial decisions. But, there is enough number of cases to provide a direct analogy between electricity and natural gas services in order to determine their public service nature.

As early as 1974, the Constitutional Court decided that to meet the necessities of people such as water, electricity and natural gas shall be among *essential* public services.[148] In another case, the Court decides them as the *fundamental* public services.[149] But most importantly, the 8th Circuit of the Council of State decided that the *distribution of natural gas service* is a public service.[150]

In 1994, the Constitutional Court clarified that the services pertaining to electricity production, transmission and distribution are all public services.[151] Court of Jurisdictional Disputes reaffirms this understanding.[152] In line with this understanding, the Council of State

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[148] Turkish Constitutional Court, 26.3.1974, E.1973/32, K.1974/11. *"…kişilerin su, elektrik, havagazı gibi ihtiyaçlarının karşılanması önemli kamu hizmetlerindendir.*"

[149] Turkish Constitutional Court, 07.07.1994, E.1994/49, K.1994/45-2, *"…Elektrik, su, telekomünikasyon gibi temel kamu hizmeti üreten ve doğal tekel niteliği taşıyan ve stratejik yönden önemli olan kamu iktisadî teşebbüslerinin özelleştirilmesi önlem alınmadığında.."* In 1995, the Court mentions many infrasturucture services as public service since they are organized and continuous activities targeting public interest in a way to answer the common-shared necessities of the society, see, the Constitutional Court, 28.05.1995, E.1994/71, K.1995/23: *"köprü, tünel, baraj, içme ve kullanma suyu, arıtma tesisi, kanalizasyon, otoyol, demiryolu, deniz ve hava limanları yapımı ve işletilmesi ve benzeri etkinlikler kamu hizmetidir."*

[150] The Council of State, 8th Circuit, 3.12.1998, E. 1998/2595 K. 1998/4026. "…*Elektrik, su ve doğalgaz gibi bedeli karşılığında dağıtılan kamu hizmetlerinden abonman sözleşmesi ile faydalanılır...*"

[151] Turkish Constitutional Court, 29.12.1994, E.1194/43, K.1994/42-2: "*Elektrik üretimi, iletimi ve dağıtımı ile ilgili etkinlikler kamu hizmetidir. Çünkü bu etkinlikler, kamu yararına dönük, toplumun ortak gereksinmesinin karşılanmasına yönelik, düzenli ve sürekli etkinliklerdir*." In 28.9.1995, E: 1995/24, K: 1995/52, The Constitutional Court decides that the additional fund taken in electricity bills is kind of tax liability in order to realize public services: "…*elektrik enerjisi tarifelerinde yer alan fon payı[nın], kamu hizmetinin daha iyi görülebilmesi için kamu gücüne dayanılarak konulan vergi, resim, harç benzeri mali bir yükümlülük*…". See also 22.12.1994, E. 1994/70, K. 1994/65-2.

[152] Court of Jurisdictional Disputes, Legal Division, 29.9.2003, E. 2003/78, K. 2003/74, T. 29.9.2003.: "…*bir kamu hizmeti olduğu kuşkusuz bulunan elektrik üretim, iletim ve dağıtım hizmetleri…".* Other court decision accepting electricity as public service are, Legal Division 7.7.2008, E. 2007/538, K. 2008/193, T. 7.7.2008 :

increases the extend via defining the services of *all kinds of energy* production, energy transmission and energy distribution as public services.[153] In the lights of above survey on cases, it can be claimed that the activities of EMRA concerning natural gas activities are largely falling in the definition of public service. This being the main principle, we believe, there are some exceptions. Thus, we will realize a closer look into the different services of the natural gas sector and the relevant legislation.

1.4.3. The Services in Natural Gas Market and their Status within the Legislation

The Law on Natural Gas Market Nr. 4646 (dated 18.04.2001) (LNGM) defines the scope of services in the market. Before, the natural gas market was regulated via Decree-Law Nr. 397, which regarded the monopoly of BOTAŞ in natural gas market activities accept the distribution activities to be carried out by the municipalities. With the enforcement of LNGM, the unbundling in the market was established and the market became more liberalized via ensuring the authorization system where both public and private legal persons can operate. The basic motivation was to increase the competition and thus making consumers more protected. The strategy was to realize the process of unbundling and privatization (except transmission) until 2009. When the legislation is examined overall, it could be seen that companies operating in natural gas market, in general, are strictly subject to the legislation from the very beginning of their entrance to the market to their company structure and their operating principles. Due to the public related nature and potential strategical/security vulnerability of the market, companies operating in the market are also under the intense supervision/inspection of the EMRA-EMRB.

"*…bölgesel dağıtım şirketlerinden biri olan Çoruh Elektrik Dağıtım Anonim Şirketi'nin yaptığı hizmetin kamu hizmeti niteliğinde olduğu açıktır…"*; Legal Division, 29.9.1997, E.1997/45, K.1997/44; Legal Division, 15.11.1999, E.1999/29, K.1999/35; Legal Division, 27.3.2000, E. 2000/6, K. 2000/5; Legal Division, 6.12.1999, E. 1999/48, K. 1999/47;Legal Division 9.2.1998, E.1998/4, K. 1998/6.

[153] The Council of State, 10th Circuit, 18.11.2001, E. 1999/2273, K. 2001/3966: *"Enerji üretim, iletim ve dağıtım ile ilgili hizmetlerin kamu hizmeti olduğu, kamu hizmetinin ise toplumun ortak gereksinimlerini karşılamaya yönelik düzenli ve sürekli etkinliklerden bulunduğu dikkate alındığında…*". In another decision, the electricity production, transmission and distribution as well as trade by private legal persons under the supervision of Turkish Electricity Institution are deemed to be public service, the Council of State 10th Circuit, 29.4.1993, E. 1991/1, K. 1993/1752: *"233 sayılı Kamu İktisadi Teşebbüsleri Hakkında Kanun Hükmünde Kararnamenin 2. maddesi 3. bendine göre, Türkiye Elektrik Kurumu, bir kamu iktisadi kuruluşudur. Bu kurum tarafından veya bu kurumun gözetimi altında olan bir özel girişimci tarafından kamuya sağlanan, elektrik üretimi, iletimi, dağıtımı tesislerini kurmak ve işletmek, ticaretini yapmak şeklindeki hizmet, bir kamu hizmetidir."*The electricity transmission service is regarded as public services despite the service is to provide electricity for a private company, see the Council of State 6th Circuit, 27.4.1982, E. 1980/1042, K. 1982/1242. See ERGÜN, 2010, pp.98-99, for a detailed list of cases in the Council of State and Court of Appeals indicating the services of electricity as public service.

The objective of the LNGM, is defined in Art. 1 as to establish a financially sound, stable and transparent natural gas market through liberalization in order to ensure the supply of natural gas to consumers in a good quality, sustainable, low cost, competitive and environment-friendly manner and to ensure an independent regulation and supervison/audit in the market. According to Art. 2 and Art. 4.4, the services (needs licensing) in the market are *import, transmission, production, distribution, storage, trading (wholesale), exporting, LNG distribution and LNG transmission.* In all these areas, it is required to get authorization from EMRA and these eight service areas are defined in detail together with the obligations for each of them, especially under Art.4.4.

The important question is whether all these services under eight different authorizations shall be regarded having public service nature. Such a "one size fits all approach" is not valid. Actually, in the definitions part (Art. 3), the market activity is defined as having both services and trade activities. This can be interpreted as a sign that the legislators make a distinction between these eight licenses some of them having pure trade activity nature, some other having public service nature. It is provided that an important test applicable to determine the public service nature, derived from a Council of State, 13th Circuit decision. Concerning the petroleum market activities of TÜPRAŞ, the 13th Circuit decides that those activities need not to be under the close monitoring and supervision of the state since those activities are downstream activities which can be substituted with other players. TÜPRAŞ did not have upstream activities of search, exploration and production.[154] In areas where a substitution is not possible, those shall be regarded as public service.[155] In this regard, it is regarded only transmission, distribution and storage in natural gas market as the unsubstitutable thus having the public service quality.[156] Actually, the LNGM defines distribution activity as service (Art 4.4.g)[157], which is in line with the above point. Furthermore, despite it needs authorization, the *production* is defined as an activity which is

[154] The Council of State, 13th Circuit, 26.04.2006, E. 2005/8007, K. 2006/1971: *"... Bu düzenlemeler uyarınca, serbest ekonomi kuralları içerisinde cereyan eden petrol piyasası faaliyeti kapsamında yer alan, lisansa tabi rafinaj faaliyetlerinde bulunan TÜPRAŞ'ın petrol faaliyetleri ile ilgili ham petrol arama ve üretimini kapsayan "üst faaliyet grubu" içinde yer almadığı, ham petrolün rafinaj yöntemiyle ürün haline dönüştürülmesi ile petrol ürünlerinin dağıtımı faaliyetlerini kapsayan" alt faaliyet grubunda bulunduğu, yürüttüğü hizmetlerin yasa ile düzenlenen bir tekel olmadığı, sektörün tüm girişimcilere açık olduğu, petrol işlemenin, arama ve üretim gibi ikamesi mümkün olmayan bir faaliyet olmadığı, rafinaj faaliyetlerinin imtiyaza konu bir kamu hizmeti olarak değerlendirilemeyeceği nedeniyle, Devletin yakın gözetim ve denetiminde sürdürülmesi gerekliliği bulunmamaktadır…*".
[155] YAYLA, 2012, p.35.
[156] Ibid, p.36.
[157] "*Şehir içi doğal gaz dağıtım hizmeti*"

not part of the natural gas market (Art. 4.4.b)[158] and exploration and production activities need special permission.

In a similar analysis for electricity market, abother scholar concludes only electricity *transmission* and electricity *distribution* activities as the public service, whereas production and trade of electricity are not.[159] It should be noted that the *production* of natural gas and electricity are completely different area where the former cannot be substituted and *storage* is not possible in electricity. Ergün analyses the responsibility and duties for each authorization type together with the supervision level and sanctions by EMRA including the determining of the prices in order to justify the outcomes.

When analysed the eight authorization types in detail, in line with above comments, transmission, distribution and storage are definitively falling into the public service since these bear the need for an organized and continues supply to the society. Furthermore, while EMRA does not specify the prices in export, import and wholesale trade, but determine the tariffs for connection, transmission and storage (Art. 11). In distribution, there are special arrangements to ensure the continuation of services in case the license holder is sanctioned (Art 9, 4th paragraph). In *transmission*, there are additional obligations that the license holder shall not refrain providing transmission service to the others and also the contracts for transmission shall include the instant provisions required by the EMRA. In fact, there is one transmission licensor so far, which is BOTAŞ, a public company. For the case of *production*, it can be regarded as a public service as well, even though it does not bear a need for continuous service. It is a *public service* in the sense of unsubstitutability and Turkey's huge need for domestic natural gas.

Compared to electricity market, the import, export, wholesale trade in natural gas market have more obligations. That is to say, all importers, exporters and traders shall take measures to store compulsorily some share of the gas they provide. The importers also need to provide support to the transmission network (EMRA- Art. 4.4.a-4). Yet, transit trade is free from these obligations of storage and 20% threshold for total market share limit as well

[158] "*b) Üretim: Doğal gaz arama ve üretim faaliyetleri 6326 sayılı Petrol Kanununa göre yapılır. Arama ve işletme ruhsatları Petrol İşleri Genel Müdürlüğü tarafından verilir. Üretim faaliyeti, piyasa faaliyetinden sayılmaz.*"
[159] ERGÜN,2010, p.102.

as being not bound by the domestic transmission tariff schedule (Art. 11-2).[160] No single license holder in these areas can generate more than 20% of the total domestic usage. All these obligations are to secure natural gas supply, where Turkey has a fragile position and also to ensure the competion in the market. Can these obligations make these services also a kind of public service? We do not believe so. They are not strong obligations to change the trade activity nature of these activities. In overall, about eight license types, half of them are public service nature (production, transmission, storage and distribution), the other half are overwhelmingly trading activity nature (export, import, wholesale and LNG).

Now, as mentioned before, there is not a definition or classification by the relevant legislation which natural gas services are PS. We make analogies from relevant case law (especially in electricity market) and the qualities of PS discussed in previous parts. Overall, one of the key criteria for a service being regarded as PS-SGEI is whether the conflicts pertaining to it are to be handled by the Administrative Courts or not. We know that if a special concession pertaining to the state is to be given to a private institution, then the services concerning that concession shall be handled under the Administrative Law. Likewise, if a conflict pertaining to an issue is to be handled under the Administrative Court, we can conclude that it relates to PS. So, in the services of connection, transmission and storage, EMRA determines the tariffs (but not in export, import, wholesale). So, this indicates a concession issue and EMRA's act can be litigated under the Council of State. In transmission and distribution, there are other requirements where the breach of those leads to sanctioning of the license. Finally, the natural gas in domestic territory belongs to the state and the state shall produce it for the benefit of the public and here the public benefit (*kamu yararı*) natıre of the service makes it PS.

It can be reached to various conclusions based on this chapter's findings. First of all, if certain activities deemed as "public service" and "not essentially market activities", those activities will broaden the framework of certain state liability (to be discussed in Chapter 3), thus it is essentially important to determine whether a certain service is PS or not. That is to say, the liability of states resulting from "PS" defaults is principally under the judicial reviews of Administrative Law and Courts. So, determination of PS is also important to

[160] "*Kurum, transit doğal gaz iletiminin teşvik edilmesi amacıyla transit iletim tarifelerini yurt içi iletim tarifelerinden farklı usul ve esaslara göre tespit etme yetkisine sahiptir*."

appoint the proper venue of Court and legal norms[161]. Furthermore, it is determined that PS does not have a single definition within the Constitution or relevant legislation. Yet, it is used as a common term to describe certain activities-services that state has liability and obligation to undertake.

The case law is wide enough to constitute general principles for PSs under TAL as continuity, changeability/adaptation, equality, neutrality and impartiality. Once a service or activity is defined in a certain Law as "PS", it is conclusive; if not then the case law enhances the principles mentioned above. There is not a "definitive" provision in legislation to mention that any or all natural gas market services as "PS", yet concerning supply of natural gas to the citizens, there is a consensus on the case law, accepting those services as "PS". Yet this was mostly before the liberalization of markets, where there was monopoly of state-owned gas companies.

It should be emphasized that it is not a must for a "PS" to be carried out only by public legal bodies; it is possible that relevant public bodies can let private legal bodies to carry out those "PSs", but under its close supervision and monitoring. This does not necessarily dissolve the liability of state for those services. Especially after 1980s, many markets are being liberalized and leaving the carrying out of services to private legal bodies, an issue making it difficult to constitute an activity as "PS". Turkey has chosen Regulation Regime to liberalize its natural gas market. Under this regime, RPAs are central to govern and shape the organization of market. Despite all services in the natural gas market being realized by private legal bodies, some of them are "pure market activity", some of them are "PSs carried out by private legal bodies under the strict supervision and monitoring of the EMRA, relevant public authority". Since there is not a definitive definition in the Law which service belongs to these two groups, we have analysed case law, mostly on electricity market, to provide a working framework.

Our findings indicate that export, import, wholesale and LNG, are pure market activities despite the presence of certain obligations such as strategic storage and market share limitations. On the other hand activities carried out authorization under production, transmission, storage and distribution can be considered as PS or SGEI which can lead to

[161] AYBAY, Rona, ***An Introduction to Law,*** Der Publishing House, İstanbul, 2020, p.65

extended state liability. Especially, transmission services directly relates with natural gas pipelines. Now, we can move the discussion towards the details of state responsibility, to fully provide the picture for state responsibility concerning natural gas pipelines under EU legislation and international law, an issue to be handled in Chapter 2.

CHAPTER 2

THE EVALUATION OF STATE RESPONSIBILITY FOR TRANSIT NATURAL GAS PIPELINE UNDER EU LEGISLATION AND INTERNATIONAL LAW

This chapter mainly focuses the international sources of state responsibility, mainly the EU framework and certain international Agreements. It can be asked the validity of the EU framework for our topic, since Turkey is not bound with the EU legislation yet. We believe such an integrative outlook will increase the richness of the findings, besides, as will be seen, Turkey's natural gas market design and legislation is harmonious with the EU framework. At the end, in Chapter 2.3, we aim to put all things together to provide a working framework concerning state responsibility for transit natural gas pipelines. It should be noted that state responsibility is an umbrella term to cover state liability from domestic legislation as well as responsibility stemming from the international law.

2.1. The Energy Framework of the European Union

Similar to Turkey, the EU is a major energy importer and especially in natural gas is heavily dependent on source countries such as Russia. The EU imports 90% and 66% of its oil and natural gas consumption respectively.[162] Due to the inflexible pipeline system, the EU gas infrastructure is quite complex. The infrastructure was built gradually in the last 70 years and in a healthy position. In the 1960s, large gas fields in Holland, Groningen was found and together with Holland, Norway, Algeria and Russia have become the major source countries. There are major infrastructures shaped under Western and Eastern networks with very limited internal connections between. Eastern network is more dependent on sources from Russia, whereas Western network can utilize LNG sources through Benelux ports to some extent and can receive gas from Algeria through Tunisia and Italia as well as from Norway through UK. The EU network system compromises about 33,000 km pipeline, where the owners are joint venture transmission operators. Overall 85% of the natural gas is supplied via pipelines, where the natural gas infrastructure is subject to TPA which replaced the 'single buyer model' the dominant model of 1990s under natural monopoly approach.[163]

[162] AZARIA, D. "State responsibility and community interest in international energy law: European perspective." ***Cambridge Journal of International and Comparative Law***, 5(2), 2016, p.169.
[163] EUROPEAN PARLIAMENT,2009, p. 7-8.

So the primary duty of EU gas regulators is mainly to ensure the establishment of efficient operations of transmission network in terms of capacity allocation, pricing, storage and future investments. This needed major changes in the energy markets under the aggressive approach of the EU. After late 80s, the EU countries began to adopt USA and UK's regulation model in a way to replace state-controlled market structures with a gradually market oriented one. Under the guise of neoliberal economic approaches, it was thought that the increased competition would increase efficiency and reduce prices for customers. So, in the 1990s, the First Energy Package was adopted to reflect the carefully calculated initiation of the new mentality.[164] Followed a Second Energy Package came in 2003[165], with more ambitious goals and more detailed sector-specific provisions to ensure further liberalization such as unbundling and TPA.[166] The Second Package was ambitious but not sufficient enough so the Third Energy Package was adopted in 2009.[167] Founding of new EU-level energy authority, the Agency for the Cooperation of Energy Regulators (ACER) as well as market regulations targeting environmental aspects were the significant innovations.[168]

[164] This package included Directive 98/ 30/ EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas (OJ L 204, 21.7.1998, p. 1), and Directive 96/ 92/ EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity (OJ L 27, 30.1.1997, p. 20).

[165] This package included Directive 2003/ 55/ EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/ 30/ EC (OJ L 176, 15.7.2003, p. 57); Directive 2003/ 54/ EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/ 92/ EC (OJ L 176, 15.7.2003, p. 37); and Regulation (EC) No 1228/ 2003 of the European Parliament and of the Council of 26 June 2003 on conditions for access to the network for cross- border exchanges in electricity (OJ L 176, 15.7.2003, p. 1).

[166] TALUS, 2016, p. 4.

[167] Regulation (EC) No 713/ 2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators (OJ L 211, 14.8.2009, p. 1); Regulation (EC) No 714/ 2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the network for cross- border exchanges in electricity, repealing Regulation (EC) No 1228/ 2003 (OJ L 211, 14.8.2009, p. 15); Regulation (EC) No 715/ 2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural- gas transmission networks, repealing Regulation (EC) No 1775/ 2005 (OJ L 211, 14.8.2009, p. 36); Directive 2009/ 72/ EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/ 54/ EC (OJ L 211, 14.8.2009, p. 55); Directive 2009/ 73/ EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/ 55/ EC (OJ L 211, 14.8.2009, p. 94).

[168] From Directive 2010/ 75/ EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (OJ L 334, 12.12.2010, p. 17) and Directive 2009/ 29/ EC of the European Parliament and of the Council of 23 April 2009 amending directive 2003/ 87/ EC in order to improve and extend the greenhouse gas emission allowance trading scheme of the Community (OJ L 140, 5.6.2009, p. 63) to Directive 2006/ 21/ EC of the European Parliament and of the Council of 15 March 2006 on the management of waste from extractive industries, amending Directive 2004/ 35/ EC (OJ L 102, 11.4.2006, pp. 15– 34) and Directive 2008/ 98/ EC on waste (19 November 2008, OJ L 312, 22.11.2008, p. 3).

While TFEU provides a general framework of energy matters, the current legal regime for the regulation internal gas market as well as the intra natural gas pipelines is the Third Gas Directive (2009/73) as part of the Third Energy Package, being the most important secondary legislation.[169] However, external pipelines from third countries are not explicitly regulated in Third Gas Directive, an area described as 'legal void' where while the extension in the EU part of the pipeline is under the Directive but the other end is questionable.[170] The Nord Stream 2 project, owned largely by Russian Gazprom and coming through 1200 kms of the Exclusive Economic Zones Finland, Sweden, Denmark and Germany, increased the debates on this seemingly not properly regulated area. Finally in 2017, the EU Commission claimed that Nord Stream 2 was not to be regulated under the Gas Directive so Intergovernmental Agreement between the Commission and the Russia was claimed to be a better option to remedy any conflict of laws.[171] A full picture of state responsibility concerning natural gas pipelines in the EU framework seems to relate TFEU, Third Gas Directive and potential international law matters.

2.1.1. The Design of Energy Framework Under Treaty on Functioning of European Union (TFEU)

TFEU is the umbrella agreement of the EU indicating which areas are to be primarily governed by the EU legislation (EU competences) and which areas domestic legislation can take upper hand. In general, TFEU defines the EU's exclusive competence and for the areas that do not fall in the exclusive areas and if there are shared competences the principles of subsidiary and proportionality gets involved. The subsidiary principle means that TFEU indicates the objectives, member countries apply those objectives in their domestic legislation and if the EU may act only if the objective cannot be achieved by the relevant Member sufficiently.[172]

Art. 3 of TFEU mentions the 5 areas that the EU has exclusivity competence where energy is not included.[173] Yet "energy" and "internal market" are included within the areas

[169]BATZELLA, Francesca, ***The Dynamics of EU External Energy Relations,*** 2018, Routledge, p.4.
[170] GRAGL, 2019, p.125.
[171] Ibid, p.127.
[172] TALUS, 2016, p.8.
[173] These are: 1. customs union, 2. the establishing of the competition rules necessary for the functioning of the internal market, 3. monetary policy for the Member States whose currency is the euro, 4. the conservation of marine biological resources under the common fisheries policy, and 5. common commercial policy. TALUS, 2016, p.9.

for "shared competences" mentioned in Art. 4 (2).[174] Thus, before Lisbon Treaty in December 2009 that modified TFEU, the design of the energy sector via Energy Packet Directives (Third Gas Directive was on July 2009) were not legally dependent on primary EU law. Since there was not a direct reference to shaping of the energy market in TFEU, Art. 114 which described internal market competence was used basis for the aggressive regulatory framework. But with Lisbon Treaty, finally the primary and specific legal basis for the energy sector was adopted as a new Title XXI: Energy and separate Art 194 (1) of TFEU via Lisbon Treaty which states that the establishment and functioning internal market shall be done in a way to preserve and protect environment thus the Energy policy of the Union shall ensure the functioning of the energy market as well as security of energy supply in a way to promote energy efficiency and the interconnection of energy networks.[175] So besides, ensuring the functioning market and promote interconnection of energy networks (objectives which were evident before), now the EU has additional objectives of ensuring supply security[176] and promoting energy efficiency via renewables.[177]

While Art.194 definitely strengthened the legal basis for a more integrated internal energy market, it is not coercive in the sense that Members can chose which energy sources

[174] These are: 1. the internal market; 2. social policy, for the aspects defined in the TFEU; 3. economic, social, and territorial cohesion; 4. agriculture and fisheries, excluding the conservation of marine biological resources; 5. the environment; 6. consumer protection; 7. transport; 8. trans- European networks; 9. energy; 10. the area of freedom, security, and justice; 11. common safety concerns in public- health matters, for the aspects. TALUS, 2016, p. 9-10.

[175] "*TITLE XXI, ENERG, Article 194:*
1. In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to:
(a) ensure the functioning of the energy market;
(b) ensure security of energy supply in the Union;
(c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and
(d) promote the interconnection of energy networks.
2. Without prejudice to the application of other provisions of the Treaties, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish the measures necessary to achieve the objectives in paragraph 1. Such measures shall be adopted after consultation of the Economic and Social Committee and the Committee of the Regions.
Such measures shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192(2)(c).
3. By way of derogation from paragraph 2, the Council, acting in accordance with a special legislative procedure, shall unanimously and after consulting the European Parliament, establish the measures referred to therein when they are primarily of a fiscal nature."

[176] Regulation (EU) No 994/ 2010 (the 'Gas Security Regulation') of 2010 is based on this. Later this was replaced with 2017 Regulation on the Security of Gas Supply.

[177] Directive 2012/ 27/ EU (the 'Energy Efficiency Directive') is based on this. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32012L0027

they want to use for energy generation.[178] In that sense market integration is not that controlled as, for example, Agricultural markets under Common Agricultural policy. Especially for renewable energy sources and environmental issues concerning energy matters can also be based upon Art. 191 of TFEU (Title XX: Environment), as another primary legal source.[179]

Overall, the design of EU constitutional order of energy centred on Art.194 is a great leap forward to enable an integrated uniform legislation among the Members, but still it can be claimed that the design does not let the shaping of a comprehensive harmonization of a common policy over energy.[180] In any case, seeing energy as an essential public good, the Energy Framework under the European Union seems to assume full responsibility for sustainable and affordable supply to the customers via central and decentral regulations that strikes a fine balance between social state requirements and liberalized market practices.

Besides, since energy products are considered goods under the EU legislation, natural gas also fall under the scope of free-movement of goods provisions. In this respect, some other key provisions of TFEU becomes relevant for natural gas market such as elimination custom duties between Member States and establishing common Customs tariffs to third parties (Articles 28 to 33); the prohibitions of quantitative restrictions on imports and exports between Member States (Articles 34 and 35); the adjustment of state trading monopolies in a way to ensure national treatment policies for all Member origin goods (Art. 37); prohibiting all restrictions on the move of capital (Art. 63) and right to take up and pursue business on the same conditions (Art. 49) between member States. Yet, it should be noted that, the energy sector has certain special characteristics that can justify certain derogations from the principle of free movement of goods and capital, being these derogations few and interpreted narrowly under the principle of proportionality.[181]

[178] GRAGL, 2019, p.126.
[179] TALUS, 2016, p.14.
[180] ROEBEN, V., ***Towards a European Energy Union: European Energy Strategy in International Law*** .Cambridge: Cambridge University Press, 2018, pp 117-120.
[181] TALUS, 2016, p.55.

2.1.2. The Third Gas Directive

As mentioned before, the basic fundamental aim of the EU Energy policy is to establish well-functioning markets in a way to ensure secure energy supplies at competitive prices. In order to reach that target, the EU legislation has gradually sought to open up the European gas markets to competition which would ultimately create a single European gas market. The main policies for that aspect have been the breaking up of national monopolies, removing barriers to cross-border gas supply, ensuring third-party access to transport infrastructure and the establishment of uniform conditions throughout the EU.[182] The key elements of EU gas market legislation can be listed as:

• Directive 94/22/EC of 30 May 1994 on the conditions for granting and using authorisations for the prospection, exploration and production of hydrocarbons (the Hydrocarbon Licensing Directive);

• Directive 2008/92/EC of 22 October 2008 concerning the transparency of gas prices charged to industrial end users; and

• Directive 2009/73/EC of 13 July 2009 concerning common rules for the internal market in gas (the Third Gas Directive-TGD).

Among these, the TGD is the most important one and the EU Commission has issued a number of explanatory notes concerning the issues handled by the Directive such as (i) the unbundling regime; (ii) third-party access; (iii) retail markets; (iv) the role of regulatory authorities; (v) exemptions and finally (vi) public service obligations.[183]

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[182] FILIPPITSCH,Christian and SEUSTER Max, "European Union", *Norton Rose Fulbright*, 2019, https://s3.amazonaws.com/documents.lexology.com/7f85853a-f0de-4ea2-8419-639c215f8d26.pdf?AWSAccessKeyId=AKIAVYILUYJ754JTDY6T&Expires=1609270392&Signature=YCyzWlu2hElgytbKEleqxym7cGY%3D

[183] FILIPPITSCH and SEUSTER, 2019. Further key elements of EU sector-specific legislation for natural gas are as follows: "• *Regulation 715/2009/EC of 13 July 2009 on conditions for access to the natural gas transmission networks (the Gas Regulation). The Gas Regulation is supplemented by Regulation 312/2014 of 26 March 2014 establishing a Network Code on Gas Balancing of Transmission Networks (the Network Code on Gas Balancing); Regulation 2017/459 of 16 March 2017 establishing a Network Code on Capacity Allocation Mechanisms in Gas Transmission Systems (the Network Code on CAM); Commission Decision of 30 April 2015 and Commission Decision of 24 August 2012 on conditions and procedures to reduce congestion in European gas transmission pipelines; Regulation 2015/703 of 30 April 2015 establishing a Network Code on Interoperability and Data Exchange Rules (the Network Code on Interoperability); and Regulation 2017/460 of 16 March 2017 establishing a Network Code on Harmonised Transmission Tariff Structures for Gas (the Network Code on Rules regarding Harmonised Transmission Tariff Structures for Gas). In addition, non-binding Commission guidance on*
congestion management procedures in natural gas transmission networks was published in July 2014. The EU Agency for the Cooperation of Energy Regulators (ACER) has also issued non-binding framework guidelines on capacity allocation mechanisms, balancing rules, interoperability and data exchange, and harmonised gas transmission tariff structures; and a number of opinions and recommendations on draft network codes;

Being the most important piece of gas market legislation Third Gas Directive has preceded The Second Gas Directive (Directive 2003/55/EC of 26 June 2003) and the First Gas Directive (Directive 98/30/EC of 22 June 1998). It represents the final step in the formation of integrated single gas market in the EU. Compared to previous Directives, TGD provides the effective seperation of production and supply activities from transmission networks which is termed as unbundling. TGD foresees 3 unbundling models and any transmission operator which will be established after 3 September 2009 must comply with ownership bundling model.[184] Secondly, the formation of ACER and effective cooperation between national regulatory bodies is enhanced. Finally, the new tools for non-discriminatory tariffs, third party access and transparency requirements were introduced.[185]

An important legal gap was whether TGD was applicable to pipelines to and from third countries to the EU. This had a severe discussion on the status of Nord-Stream 2. EU Commission has proposed an amendmend to remedy the legal gap on 8 November 2017, finally TGD was amended by the approval of European Parliament on 4 April 2019. The objective was to to ensure that the rules governing the EU's internal gas market apply to gas transmission lines between a member state and a third country, up to the border of the member state's territory and territorial sea.[186]

It will be useful once again to remember the specificities natural gas market, as discussed at the beginning of Chapter 1. It should be noted due to high initial investments costs of the natural gas pipelines, the transmission operator companies sign long-term

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• Regulation 713/2009 of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators (ACER Regulation), regarding which the Commission has
issued an explanatory note on the possibility of non-EU neighbouring countries and their TSOs to participate in the ACER and the European Network of Transmission System Operators for Gas (ENTSOG) (a recast ACER Regulation was proposed by the Commission in November 2016 reflecting the changed and enhanced tasks that have been conferred to ACER since its establishment);
• Regulation 1227/2011 of 25 October 2011 on wholesale energy market integrity and transparency (REMIT) prohibiting the use of inside information or other market manipulation in energy wholesale markets (Commission Implementing Regulation 13 48/2014 of 17 December 2014 (the REMIT Implementing Regulation) further sets out the details of wholesale energy products and fundamental data that must be reported to ACER and establishes appropriate channelsfor data reporting); and
• Regulation (EU) 2017/1938 of 25 October 2017 concerning measures to safeguard the security of gas supply (the Security of Supply Regulation) (re pealing Regulation (EU) No. 994/2010 of 20 October 2010).”
[184] FILIPPITSCH and SEUSTER, 2019
[185] FILIPPITSCH and SEUSTER, 2019
[186]RETTIG, Katharina, “Council adopts gas directive amendment: EU rules extended to pipelines to and from third countries” *Council of the European Union*, 15 April 2019, https://www.consilium.europa.eu/en/press/press-releases/2019/04/15/council-adopts-gas-directive-amendment-eu-rules-extended-to-pipelines-to-and-from-third-countries/#

capacity contracts for certain monopoly like deals in a way to secure their initial investment, which ultimately lets very limited capacities of the cross-border pipelines to new entrants. This market structure together with the lack of transparency about these long-term deals leads to inherent inefficiencies that puts end consumers at risk. 2014 dated annual report of the EU Commission on internal energy market indicates the slower integration of natural-gas markets compared to other energy markets such as electricity. The functioning of natural gas markets is hindered the long-term contracts and price indexation to oil prices where the market is generally still concentrated around a few key players.[187]

So the inbuilt monopoly character of the natural gas market still prevails in the EU. Three important mechanisms to deter the monopoly nature of the transmission network services are TPA which is regulated under Art.32, unbundling mechanisms regulated under Art. 9 and finally tariffs for the transmission networks regulated under Art.41. Besides, TGD establish common rules for transmission, distribution, supply, storage for natural gas as well as public service and environmental concerns. In this regard, certain important features of TGD is to be analyzed through a thematic approach under several main topics.

2.1.2.1. Public Service Responsibility under TGD

TGD provides important guides for public service obligations. Article 3 is key here, yet, before it in the premise part of the Directive certain principles concerning the public service obligations are mentioned. In paragraph 43, certain requirements to ensure consumer protection as part of high standards of public service is described yet, the consumer protection and the rights of small-medium sized companies in a way to let them benefit from competition and fair prices are stressed in detail in paragraph 47.[188] In paragraph 44,

[187] Ibid., p.18.

[188] *(43) In order to ensure the maintenance of high standards of public service in the Community, all measures taken by Member States to achieve the objectives of this Directive should be regularly notified to the Commission. The Commission should regularly publish a report analysing measures taken at national level to achieve public service objectives and comparing their effectiveness, with a view to making recommendations as regards measures to be taken at national level to achieve high public service standards. Member States should ensure that when they are connected to the gas system customers are informed about their rights to be supplied with natural gas of a specified quality at reasonable prices. Measures taken by Member States to protect final customers may differ according to whether they are aimed at household customers or small and medium-sized enterprises.*

(47) The public service requirements and the common minimum standards that follow from them need to be further strengthened to make sure that all consumers, especially vulnerable ones, can benefit from competition and fair prices. The public service requirements should be defined at national level, taking into account national circumstances; Community law should, however, be respected by the Member States. The citizens of the Union and, where Member States deem it to be appropriate, small enterprises, should be able

especially environmental protection and fair competition are procliamed as the fundamental requirements for public service requirements to be respeced by Member states.[189]

Other than these, the major public service responsibility/obligation concerning natural gas market is clarified in Article 3(2) where Member States are provided authority to impose severel understakings for the gas market that mayt relate to security, including security of supply, regularity, quality and price of supplies, and environmental protection, including energy efficiency, energy from renewable sources and climate protection.[190] These

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to enjoy public service obligations, in particular with regard to security of supply and reasonable tariffs. A key aspect in supplying customers is access to objective and transparent consumption data. Thus, consumers should have access to their consumption data and associated prices and services costs so that they can invite competitors to make an offer based on those data. Consumers should also have the right to be properly informed about their energy consumption. Prepayments should reflect the likely consumption of natural gas and different payment systems should be non-discriminatory. Information on energy costs provided to consumers frequently enough will create incentives for energy savings because it will give customers direct feedback on the effects of investment in energy efficiency and change of behaviour.
https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32009L0073

[189] *(44) Respect for the public service requirements is a fundamental requirement of this Directive, and it is important that common minimum standards, respected by all Member States, are specified in this Directive, which take into account the objectives of common protection, security of supply, environmental protection and equivalent levels of competition in all Member States. It is important that the public service requirements can be interpreted on a national basis, taking into account national circumstances and subject to the respect of Community law.*

[190] "*Article 3: Public service obligations and customer protection*

1. Member States shall ensure, on the basis of their institutional organisation and with due regard to the principle of subsidiarity, that, without prejudice to paragraph 2, natural gas undertakings are operated in accordance with the principles of this Directive with a view to achieving a competitive, secure and environmentally sustainable market in natural gas, and shall not discriminate between those undertakings as regards their rights or obligations.

2. Having full regard to the relevant provisions of the Treaty, in particular Article 86 thereof, Member States may impose on undertakings operating in the gas sector, in the general economic interest, public service obligations which may relate to security, including security of supply, regularity, quality and price of supplies, and environmental protection, including energy efficiency, energy from renewable sources and climate protection. Such obligations shall be clearly defined, transparent, non-discriminatory, verifiable and shall guarantee equality of access for natural gas undertakings of the Community to national consumers. In relation to security of supply, energy efficiency/demand-side management and for the fulfilment of environmental goals and goals for energy from renewable sources, as referred to in this paragraph, Member States may introduce the implementation of long-term planning, taking into account the possibility of third parties seeking access to the system.

3. Member States shall take appropriate measures to protect final customers, and shall, in particular, ensure that there are adequate safeguards to protect vulnerable customers. In this context, each Member State shall define the concept of vulnerable customers which may refer to energy poverty and, inter alia, to the prohibition of disconnection of gas to such customers in critical times. Member States shall ensure that rights and obligations linked to vulnerable customers are applied. In particular, they shall take appropriate measures to protect final customers in remote areas who are connected to the gas system. Member States may appoint a supplier of last resort for customers connected to the gas system. They shall ensure high levels of consumer protection, particularly with respect to transparency regarding contractual terms and conditions, general information and dispute settlement mechanisms. Member States shall ensure that the eligible customer is in fact able easily to switch to a new supplier. As regards at least household customers those measures shall include those set out in Annex I.

4. Member States shall take appropriate measures, such as formulating national energy action plans, providing social security benefits to ensure the necessary gas supply to vulnerable customers, or providing for support for energy efficiency improvements, to address energy poverty where identified, including in the

public service requirements, classified as services of general economic interest are to be interpreted on national basis[191] and members are given flexibilities in their domestic regulation. When the national practice of members for public service kind of obligations

broader context of poverty. Such measures shall not impede the effective opening of the market set out in Article 37 and market functioning and shall be notified to the Commission, where relevant, in accordance with paragraph 11 of this Article. Such notification shall not include measures taken within the general social security system.

5. Member States shall ensure that all customers connected to the gas network are entitled to have their gas provided by a supplier, subject to the supplier's agreement, regardless of the Member State in which the supplier is registered, as long as the supplier follows the applicable trading and balancing rules and subject to security off supply requirements. In this regard, Member States shall take all measures necessary to ensure that administrative procedures do not constitute a barrier for supply undertakings already registered in another Member State.

6. Member States shall ensure that:

(a) where a customer, while respecting the contractual conditions, wishes to change supplier, the change is effected by the operator(s) concerned within three weeks; and

(b) customers are entitled to receive all relevant consumption data.

Member States shall ensure that the rights referred to in points (a) and (b) of the first subparagraph are granted to customers in a non-discriminatory manner as regards cost, effort or time.

7. Member States shall implement appropriate measures to achieve the objectives of social and economic cohesion and environmental protection, which may include means to combat climate change, and security of supply. Such measures may include, in particular, the provision of adequate economic incentives, using, where appropriate, all existing national and Community tools, for the maintenance and construction of necessary network infrastructure, including interconnection capacity.

8. In order to promote energy efficiency, Member States or, where a Member State has so provided, the regulatory authority shall strongly recommend that natural gas undertakings optimise the use of gas, for example by providing energy management services, developing innovative pricing formulas or introducing intelligent metering systems or smart grids where appropriate.

9. Member States shall ensure the provision of single points of contact to provide consumers with all necessary information concerning their rights, current legislation and the means of dispute settlement available to them in the event of a dispute. Such contact points may be part of general consumer information points.

Member States shall ensure that an independent mechanism such as an energy ombudsman or a consumer body is in place in order to ensure efficient treatment of complaints and out-of-court dispute settlements.

10. Member States may decide not to apply the provisions of Article 4 with respect to distribution insofar as their application would obstruct, in law or in fact, the performance of the obligations imposed on natural gas undertakings in the general economic interest and insofar as the development of trade would not be affected to such an extent as would be contrary to the interests of the Community. The interests of the Community include, inter alia, competition with regard to eligible customers in accordance with this Directive and Article 86 of the Treaty.

11. Member States shall, upon implementation of this Directive, inform the Commission of all measures adopted to fulfil public service obligations, including consumer and environmental protection, and their possible effect on national and international competition, whether or not such measures require a derogation from the provisions of this Directive. They shall notify the Commission subsequently every two years of any changes to such measures, whether or not they require a derogation from this Directive.

12. The Commission shall establish, in consultation with relevant stakeholders, including Member States, the national regulatory authorities, consumer organisations and natural gas undertakings, a clear and concise energy consumer checklist of practical information relating to energy consumer rights. Member States shall ensure that gas suppliers or distribution system operators, in cooperation with the regulatory authority, take the necessary steps to provide their consumers with a copy of the energy consumer checklist and ensure that it is made publicly available."

https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32009L0073&from=EN#d1e641-94-1

[191] Which is reflected in Court of Justice of the European Union (CJEU) rulings, see C- 439/ 06, *Citiworks AG Flughafen Leipzig v Halle GmbH, Bundesnetzagentur* [2008] ECR I- 3913, para. 59

analysed, in the most limited sense, these include certain public service schemes designed to achieve security of supply and regulated prices for natural gas in twelve members.[192]

In sub parapgraphs 3 to 6 of Article, we see that TGD urges members to take certain measures in a way to protect the consumers, especially vulnerable customers and customers will have right to change their supplier. In this respect, a customer may get supply from a suppliers in another member state. Withouts a doubt, the provisions of Article 3 display wide public service obligations to member states increasing the power of end users within the gas markets. In Second Gas Directive, Article 3 titled the same but having only 6 of the current 12 sub paragraphs with a limited scope.193 In this regard, sub-paragraphs 4, 5, 6, 8, 9, 12 are new in TGD and these parts are mostly related to change of supplier, customer being able to reach additional information about the services dn their consumption, national energy action plans and energy efficiency issues.

2.1.2.2. Third Party Access

As discussed, TPA is contrary to the interest of the transmission network, especially vertically integrated ones, thus the energy market regulator shall closely monitor how TPA is facilitated (Art. 32)[194] through calculating, regulating or approving tariffs (Art. 41) for services beforehand. TGD, only provides a very general framework for members, just urging then to ensure a functioning TPA regime. At second level, members issue detailed regulations governing access to networks where tariffs and TPA conditions are to be applied

[192] Commission staff working document, 'Energy Prices and Costs Report', Brussels, 17 March 2014 (SWD(2014) 20 final/ 2). CJEU ruled that as long as certain conditions are met, price regulation are Acceptable as public service obligations, see C- 265/ 08, *Federutility and Others* [2010] ECR, p. I- 03377. See also C- 36/ 14, *Commission v Poland* [2015] (ECLI:EU:C:2015:570).

[193] See Second Gas Directive at https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32003L0055

[194] *Article 32:* ***Third-party access:*** *1. Member States shall ensure the implementation of a system of third party access to the transmission and distribution system, and LNG facilities based on published tariffs, applicable to all eligible customers, including supply undertakings, and applied objectively and without discrimination between system users. Member States shall ensure that those tariffs, or the methodologies underlying their calculation are approved prior to their entry into force in accordance with Article 41 by a regulatory authority referred to in Article 39(1) and that those tariffs — and the methodologies, where only methodologies are approved — are published prior to their entry into force.*
2. Transmission system operators shall, if necessary for the purpose of carrying out their functions including in relation to cross-border transmission, have access to the network of other transmission system operators.
3. The provisions of this Directive shall not prevent the conclusion of long-term contracts in so far as they comply with Community competition rules."

in a non-discriminatory manner. At the most detailed third level network codes including capacity allocations and congestion management are adopted in line with the regulations.[195]

Yet, taking into the consideration of high initial capital costs of building a natural gas pipeline, it is still possible to provide an exception of TPA (as well as exemption from tariff controls and unbundling) for a newly constructed pipeline with certain qualifications for a defined period of time, indicated in Art. 36(1)[196], where the EU Commission decides on this matter (Art. 36(9)). Another exemption for TPA is the refusal of access due to lack of capacity and serious financial obligations, regulated in Art.35, but to be decided case by case basis.[197]

2.1.2.3. Unbundling

Another mechanism besides TPA to ensure increased competition in natural gas market is unbundling. Basically unbundling can be defined as an undertaking's network activities to keep separate from other activities such as natural gas production versus trade by means of different legislative obligations.[198] Unbundling of transmission network is regulated under Art.9, basically provides that the same persons are not allowed '*directly or indirectly to exercise control over an undertaking performing any of the functions of generation or supply, and directly or indirectly to exercise control or exercise any right over a transmission system operator or over a transmission system*' (Art 9.1.(b)). Originally only the model of full ownership unbundling was planned to be introduced, but in order for some Members to adopt their markets, Member states left free to choose between several models. If the transmission network was still part of vertically integrated company as of 3 September 2009, Member states could designate either independent system operator (ISO) or independent transmission operation (ITO), less severe models compared to full ownership

[195] TALUS, 2016, p.21.

[196] "*Art 36(1) : (a) the investment must enhance competition in gas supply and enhance security of supply;,*
(b)the level of risk attached to the investment must be such that the investment would not take place unless an exemption was granted;
(c)the infrastructure must be owned by a natural or legal person which is separate at least in terms of its legal form from the system operators in whose systems that infrastructure will be built;
(d) charges must be levied on users of that infrastructure; and
(e)the exemption must not be detrimental to competition or the effective functioning of the internal market in natural gas, or the efficient functioning of the regulated system to which the infrastructure is connected."

[197] PORINS, 2016, p. 31.

[198] TALUS, 2016, p.24.

unbundling that both do not require the sale of transmission system. In ISO model the transmission network is leased out this ISO, where in ITO system operator stays within the same vertical structure and only legal unbundling and ring-fencing of the ITO is required.[199]

2.1.2.4. Environmental Concerns

The responsibility of environmental protection and energy efficiency are well reflected under the general public service responsibility under Art.3. Besides both transmission operators (Art. 13 and 34) and distributions (Art. 25) are obligated to take environmental protection measures for their operations. Member states' regulatory agencies (Art.40) and the EU Commission (Art.52) are also forced to supervise and monitor environmental protection within natural gas market operations.

The pipeline routes and network connections are aimed to be shaped in accordance with environmental protection principles.[200] The EU Nature Legislation mainly composed of the Birds[201] and the Habitats[202] Directives are taken into consideration for the new pipeline infrastructure projects within the EU, where pipeline projects need approval and being compliance with these Directives.[203]

2.1.2.5. Energy Trade

Energy trade within the EU largely falls the free-movement of goods handled under the mostly internal market requirements being handled at primary legislation level under TFEU. That is why wholesale trade of energy markets are not principally regulated under TGD, yet there are certain Regulations enforced to sustain a sector-specific legal framework for the monitoring of wholesale energy markets in a way to ensure market integrity and

[199] Ibid., p.26.
[200] EUROPEAN COMMISSION, 2018, p.10. In November 2010, the European Commission published the communication *'Energy infrastructure priorities for 2020 and beyond - A Blueprint for an integrated European energy network*'. It calls for a significant increase in energy transmission infrastructures in order to ensure a safe, sustainable and affordable energy supply across Europe, whilst, at the same time, reducing C02 emissions.
[201] Directive 2009/147/EC Council (codified version of Council Directive 79/409/EEC on the conservation of wild birds, as amended) – see http://ec.europa.eu/environment/nature/legislation/index_en.htm
[202] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, consolidated version 01.01.2007 - http://ec.europa.eu/environment/nature/legislation/index_en.htm
[203] EUROPEAN COMMISSION, 2018, p.8.

transparency within the market.[204] Concerning wholesale trade, Turkish LNGM seems more demanding and including requirements compared to the TGD.

2.1.2.6. Strategic Storage

Storage facilities are regarded similar to transmission network. That is why many requirements concerning transmission such as TPA and unbundling are also valid for the storage facilities and storage service operators. Compared to Turkish LNGM, the TGD provides more detailed requirements. Principally each Member states shall designate and shall require each having own storage facilities as well as sufficient cross-border capacity to integrate European transmission infrastructure in a way let third parties to access to the transmission network (Art.13).[205] Access to storage, similar to TPA for transmission network, is separately regulated under Art.33 where non discriminatory practices are enhanced.[206]

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[204] Regulation (EU) No 1227/ 2011 ('REMIT')84

[205] "*Article 13: Tasks of transmission, storage and/or LNG system operators*

1. Each transmission, storage and/or LNG system operator shall:

(a) operate, maintain and develop under economic conditions secure, reliable and efficient transmission, storage and/or LNG facilities to secure an open market, with due regard to the environment, ensure adequate means to meet service obligations;

(b) refrain from discriminating between system users or classes of system users, particularly in favour of its related undertakings;

(c) provide any other transmission system operator, any other storage system operator, any other LNG system operator and/or any distribution system operator, sufficient information to ensure that the transport and storage of natural gas may take place in a manner compatible with the secure and efficient operation of the interconnected system; and

(d) provide system users with the information they need for efficient access to the system.

2. Each transmission system operator shall build sufficient cross-border capacity to integrate European transmission infrastructure accommodating all economically reasonable and technically feasible demands for capacity and taking into account security of gas supply.

3. Rules adopted by transmission system operators for balancing the gas transmission system shall be objective, transparent and non-discriminatory, including rules for the charging of system users of their networks for energy imbalance. Terms and conditions, including rules and tariffs, for the provision of such services by transmission system operators shall be established pursuant to a methodology compatible with Article 41(6) in a non-discriminatory and cost-reflective way and shall be published.

4. The regulatory authorities where Member States have so provided or Member States may require transmission system operators to comply with minimum standards for the maintenance and development of the transmission system, including interconnection capacity.

5. Transmission system operators shall procure the energy they use for the carrying out of their functions according to transparent, non-discriminatory and market based procedures.

[206] *Article 33: Access to storage*

1. For the organisation of access to storage facilities and linepack when technically and/or economically necessary for providing efficient access to the system for the supply of customers, as well as for the organisation of access to ancillary services, Member States may choose either or both of the procedures referred to in paragraphs 3 and 4. Those procedures shall operate in accordance with objective, transparent and non-discriminatory criteria.

The regulatory authorities where Member States have so provided or Member States shall define and publish criteria according to which the access regime applicable to storage facilities and linepack may be determined.

2.1.2.7. National Authorities

The regulatory Activities as well as National Regulation Agencies are handled in Chapter VII (Titled "National Regulatory Authorities) under Articles 39 to 44. These are regulatory bodies having similar functions that EMRA has for Turkey. They are the principal agents for establishing a competitively functioning gas market in their national jurisdiction. A major principle is the "independence" of National Regulatory Authorities legally, functionally and motivationally from any other public or private entity as well as market interest (Art. 39).[207] Previous examples indicated seemingly a poor coordination between

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They shall make public, or oblige storage and transmission system operators to make public, which storage facilities, or which parts of those storage facilities, and which linepack is offered under the different procedures referred to in paragraphs 3 and 4.
The obligation referred to in the second sentence of the second subparagraph shall be without prejudice to the right of choice granted to Member States in the first subparagraph.
2. The provisions of paragraph 1 shall not apply to ancillary services and temporary storage that are related to LNG facilities and are necessary for the re-gasification process and subsequent delivery to the transmission system.
3. In the case of negotiated access, Member States or, where Member States have so provided, the regulatory authorities shall take the necessary measures for natural gas undertakings and eligible customers either inside or outside the territory covered by the interconnected system to be able to negotiate access to storage facilities and linepack, when technically and/or economically necessary for providing efficient access to the system, as well as for the organisation of access to other ancillary services. The parties shall be obliged to negotiate access to storage, linepack and other ancillary services in good faith.
Contracts for access to storage, linepack and other ancillary services shall be negotiated with the relevant storage system operator or natural gas undertakings. The regulatory authorities where Member States have so provided or Member States shall require storage system operators and natural gas undertakings to publish their main commercial conditions for the use of storage, linepack and other ancillary services by 1 January 2005 and on an annual basis every year thereafter.
When developing the conditions referred to in the second subparagraph, storage operators and natural gas undertakings shall consult system users.
4. In the case of regulated access, the regulatory authorities where Member States have so provided or Member States shall take the necessary measures to give natural gas undertakings and eligible customers either inside or outside the territory covered by the interconnected system a right to access to storage, linepack and other ancillary services, on the basis of published tariffs and/or other terms and obligations for use of that storage and linepack, when technically and/or economically necessary for providing efficient access to the system, as well as for the organisation of access to other ancillary services. The regulatory authorities where Member States have so provided or Member States shall consult system users when developing those tariffs or the methodologies for those tariffs. The right of access for eligible customers may be given by enabling them to enter into supply contracts with competing natural gas undertakings other than the owner and/or operator of the system or a related undertaking."

[207] *"Article 39:* ***Designation and independence of regulatory authorities***
1. Each Member State shall designate a single national regulatory authority at national level.
2. Paragraph 1 of this Article shall be without prejudice to the designation of other regulatory authorities at regional level within Member States, provided that there is one senior representative for representation and contact purposes at Community level within the Board of Regulators of the Agency in accordance with Article 14(1) of Regulation (EC) No 713/2009.
3. By way of derogation from paragraph 1 of this Article, a Member State may designate regulatory authorities for small systems on a geographically separate region whose consumption, in 2008, accounted for less than 3 % of the total consumption of the Member State of which it is part. That derogation shall be without prejudice to the appointment of one senior representative for representation and contact purposes at Community level within the Board of Regulators of the Agency in compliance with Article 14(1) of Regulation (EC) No 713/2009.

national authorities, if this independent characteristics are not ultimately constituted.[208] On the other the EU Commission is also responsible for monitoring how natural gas markets function (Art.52) and if needed via through an established Committee (Art.51).

2.1.2.8. Other Issues for Pipeline Transmission

An important area for further clarification is the applicability of TGD provisions for cross-border pipelines between EU members and third parties, which was a heated topic between members concerning the Nord Stream 2 project between Germany and Russia, which was harshly criticized by some members like Poland (since it was cutting out of Poland and Ukraine route). Before April 2019, in Art. 2(17), an interconnector pipeline is defined as "*means a transmission line which crosses or spans a border between Member States for the sole purpose of connecting the national transmission systems of those Member States*" where argued to make Nord Stream 2 pipeline being within this definition. A very forced interpretation might lead to that claiming the part of Nord Stream 2 in Germany is an interconnector pipeline, but how likely to extend the scope further from Germany borders to the heart of Siberia? It is claimed that that was not the case and Nord Stream 2 is not under the regulation/jurisdiction of TGD.[209] Yet as we described above, the EU Commission has amended TGD in a way to clear any ambiguities and legal gaps on this matter. And this provision Art 2(17) has been amended as "*interconnector" means a transmission line which*

4. Member States shall guarantee the independence of the regulatory authority and shall ensure that it exercises its powers impartially and transparently. For this purpose, Member States shall ensure that, when carrying out the regulatory tasks conferred upon it by this Directive and related legislation, the regulatory authority:

(a) is legally distinct and functionally independent from any other public or private entity;

(b)ensures that its staff and the persons responsible for its management:

(i) act independently from any market interest; and

(ii)do not seek or take direct instructions from any government or other public or private entity when carrying out the regulatory tasks. That requirement is without prejudice to close cooperation, as appropriate, with other relevant national authorities or to general policy guidelines issued by the government not related to the regulatory powers and duties under Article 41.

5. In order to protect the independence of the regulatory authority, Member States shall in particular ensure that:

(a)the regulatory authority can take autonomous decisions, independently from any political body, and has separate annual budget allocations, with autonomy in the implementation of the allocated budget, and adequate human and financial resources to carry out its duties; and

(b)the members of the board of the regulatory authority or, in the absence of a board, the regulatory authority's top management are appointed for a fixed term of five up to seven years, renewable once.

In regard to point (b) of the first subparagraph, Member States shall ensure an appropriate rotation scheme for the board or the top management. The members of the board or, in the absence of a board, members of the top management may be relieved from office during their term only if they no longer fulfil the conditions set out in this Article or have been guilty of misconduct under national law."

[208] TALUS, 2016, p.50.

[209] GRAGL, 2019, p.147.

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;"[210]

This heated discussion seems to move towards a more conclusive outcome that that the cross-border pipelines will be under the TGD's jurisdiction from physical territory to the offshore until the end of Exclusive Economic Zone. Despite the widespread opinions between the Members, the new amendmend seem to provide a consensus on this matter. It sets the tone that any member initiating a cross-border pipeline with a non-member shall make it certain that that pipeline will be bound by TGD and matters such as unbundling and Third Party Access will intanstly be provided. That's a great achievement but, the 2019 amendment provides a derogation process for the current established croıss-border lines such as Nord Stream 2. According to newly added Article 49a, a twenty year temporary period is envisaged for the already handled investments to eneable the recovery of investments.[211] That is to say, TGD has move towards more comprehensive and integrative character.

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[210] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019L0692 .

[211] "*'Article 49a:* ***Derogations in relation to transmission lines to and from third countries***

1. In respect of gas transmission lines between a Member State and a third country completed before 23 May 2019, the Member State where the first connection point of such a transmission line with a Member State's network is located may decide to derogate from Articles 9, 10, 11 and 32 and Article 41(6), (8) and (10) for the sections of such gas transmission line located in its territory and territorial sea, for objective reasons such as to enable the recovery of the investment made or for reasons of security of supply, provided that the derogation would not be detrimental to competition on or the effective functioning of the internal market in natural gas, or to security of supply in the Union.

The derogation shall be limited in time up to 20 years based on objective justification, renewable if justified and may be subject to conditions which contribute to the achievement of the above conditions.

Such derogations shall not apply to transmission lines between a Member State and a third country which has the obligation to transpose this Directive and which effectively implements this Directive in its legal order under an agreement concluded with the Union.

2. Where the transmission line concerned is located in the territory of more than one Member State, the Member State in the territory of which the first connection point with the Member States' network is located shall decide whether to grant a derogation for that transmission line after consulting all the Member States concerned.

Upon request by the Member States concerned, the Commission may decide to act as an observer in the consultation between the Member State in the territory of which the first connection point is located and the third country concerning the consistent application of this Directive in the territory and territorial sea of the Member State where the first interconnection point is located, including the granting of derogations for such transmission lines.

3. Decisions pursuant to paragraphs 1 and 2 shall be adopted by 24 May 2020. Member States shall notify any such decisions to the Commission and shall publish them.'' https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019L0692

2.1.3. Evaluation of the EU Legislation on Natural Gas

Without a doubt, TGD has been a great leap forward in order to establish a working competent single European gas market. Are we there yet? Not of course, but the framework and the road to that goal have been clearly drafted. Especially with the latest amendment in 2019, it can be claimed that the weak spot in the legislation, ensuring jurisdiction over transmission networks between members and non-members has also been handled. Compared to the second directive, the consumers are given more right to inspect the activities of the operators. The national regulators are given more room to play around but at the same time more obligations to enhance Third Party Access, transpğarency and non-discriminatory practices.

Overall, it can be claimed that the substantial amount of EU-level energy regulation has been utilized under the effective use of TPA and unbundling principles. However, on the policy level, especially securing supply from third parties, a generally accepted policy framework is needed. The 2019 amendment of Art 2(17) has been such a development to help to increase breadth of cross-border pipelines under the EU-level legislation. Yet, it needs further improvement in terms of supply security matters.

2.2. The Cross- Border Energy Transfer under International Law

Other than fundamental issues of capacity, price and technical issues, the jurisdiction of transit and cross-border pipeline projects include various problems such as the ownership of the pipeline, land and environment issues, gas transport through (including TPA) and finally taxation.[212] These all have relevant responsibility and obligations under domestic legislations of the countries which the pipeline project covers. So, a legal regime or an umbrella jurisdiction is needed to meet the problems and disputes arising. However, there is not an internationally agreed multilateral agreement specifically governs natural gas pipelines with international character. Yet there are some 'international regimes' established for similar situations such as the one for international rivers, where ultimately "*1921 Barcelona Convention and Statute on the Regime of Navigable Waterways of International*

[212] DULANEY & MERRICK, 2005, p.247.

Concern"[213] has been established and the one for international railways, *1923 Convention and Statute on the International Regime of Railways, the Elect*ricity Transit. Analogues to the universal right of use of high seas , the regime for international rivers foresaw rights for the parties that are not adjacent to the international river in question.[214]

Another analogy could be claimed between international canals such Suez and Panama and natural gas pipelines, in the sense that they are all artificially constructed. However, the basic difference is that by nature international canals are arranged to assist transit trade, whereas pipeline projects are principally motivated by the trade between the states at the both ends of the pipeline. To make things complicated, transit pipelines only through overland (including territorial waters) and through sea (off shore) differs in terms of the international rules engaged. Both can have certain limitations whereas in offshore to lay the pipelines on high sees are subject to the rights' of the coastal states arising from continental shelf.[215]

So, the absence of a full-fledged international regime concerning pipelines, leads to patch-work kind of solutions, if not special pipeline treaties signed between the relevant interested states of the pipeline project, where always include negligence of some issues such as third party access which could be important for the non-participating countries. The patchwork solutions mostly refer to WTO Agreements and Energy Charter Treaty (ECT), the former being general to trade of goods and services but having a more binding multilateral character, the latter being more direct to the energy trade through pipelines but having less multilateral nature, given that Russia refrained from the ratification.[216] As a matter of fact, both Agreements pursue mechanisms of dispute settlement to provide a coherent guidance for shaping the course of doing way of things, yet as exemplified in 2009-10 gas crisis between Russia and Ukraine, major players do not want to risk their monopoly power opening to questions through these mechanisms.[217] So, the major international agreements will be analysed to picture the patch-work regime of the natural gas pipelines.

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[213] On the same Conference *The* ***Barcelona Convention and Statute on Freedom of Transit*** was signed simultaneously.
[214] AZARIA, Danae. ***Treaties on Transit of Energy via Pipelines and Countermeasures.*** Oxford: Oxford University Press, 2015, p.43.
[215] Ibid., p.58.
[216] STEVENS, Paul. ***Transit Troubles Pipelines as a Source of Conflict***., Chatham House Report, 2009, p.25. < https://www.chathamhouse.org/publications/papers/view/108992 >.
[217] AZARIA, 2016, p.172.

In order words, due to lack of enforceable mulitaleral international conventions on natural gas (for example Law of the Sea is an enforceable one or WTO), most of the time the issues concerning cross-border pipelines are being handled by special agreements between the parties which seem to neglect secondary issues but could be important to the third party countries.

2.2.1. WTO Agreements

Despite energy trade being a significant portion of the international trade, the General Agreements on Tariffs and Trade (GATT) originally did not envisage the inclusion of energy trade for its mandate. As a compromise, the members originally exclude this sensitive issue out of the table. Yet, as the membership expanded to include more energy importers-exporters as well as the expansion of the scope of the Agreements to turn into WTO, now, there is an increasing emphasis that WTO regime can and shall govern energy trades as well.

As explained in Chapter I, electricity and natural gas are regarded as goods in WTO Agreements (albeit implicitly through Harmonic Systems nomenclature), so there is not an explicit provision, why gas trade through natural gas pipelines cannot be regarded as international or transit trade of goods and services pertaining to energy trade under GATS. In this respect, the most relevant GATT 1994 articles about natural gas pipelines are Article V-freedom of transit[218] and Article XI-the prohibition of import and export restrictions.

[218] *"Article V: Freedom of Transit*
1. Goods (including baggage), and also vessels and other means of transport, shall be deemed to be in transit across the territory of a contracting party when the passage across such territory, with or without trans-shipment, warehousing, breaking bulk, or change in the mode of transport, is only a portion of a complete journey beginning and terminating beyond the frontier of the contracting party across whose territory the traffic passes. Traffic of this nature is termed in this article "traffic in transit".
2. There shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties. No distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or of other means of transport.
3. Any contracting party may require that traffic in transit through its territory be entered at the proper custom house, but, except in cases of failure to comply with applicable customs laws and regulations, such traffic coming from or going to the territory of other contracting parties shall not be subject to any unnecessary delays or restrictions and shall be exempt from customs duties and from all transit duties or other charges imposed in respect of transit, except charges for transportation or those commensurate with administrative expenses entailed by transit or with the cost of services rendered.
4. All charges and regulations imposed by contracting parties on traffic in transit to or from the territories of other contracting parties shall be reasonable, having regard to the conditions of the traffic.
5. With respect to all charges, regulations and formalities in connection with transit, each contracting party shall accord to traffic in transit to or from the territory of any other contracting party treatment no less favourable than the treatment accorded to traffic in transit to or from any third country.

Furthermore, it is possible to bring disputes resulting from energy trade to the Dispute Settlement Understanding (DSU) within the WTO, where some initial proceedings under DSU can be witnessed.[219]

A closer look at the wording of Article V-freedom of transit will indicate two important principles for "traffic in transit": the routes for most convenient for international transit shall not be exempted for any member and the measure about traffic in transit shall be non-discriminatory. No disputes in energy trade about this Article is witnessed yet, but two important cases *Colombia – Ports of Entry* and *Russia – Traffic in Transit.* In the first one, certain textile products imported from Panama to reach to Equator through Colombia were forced to come through only Bogota airport or Barranquilla seaport, which the Panel found against the principles of freedom of transit. In more recent *Russia – Traffic in Transit,* Ukraine complained Russia's restrictions of Ukraine's use of Crimea as transit route to reach Kazakhstan. This was during the Crimea crisis between Russia and Ukraine, the Panel recommended that Russia could exercise the exemption of security measures under Article XXI, not to provide freedom of transit.[220] That is to say, it is possible to benefit from certain exceptions under this Article. If there is an agreement for a party to benefit transit trade through pipelines, and this is either not permitted for the country in between (like Ukraine no permitting Russian gas to Europe), this may be analysed under Article V of the WTO within DSU. In general, WTO framework seems to provide a very limited framework and mostly related bilateral obligations, not community wide obligations such as freedom of use of high sees principle that anyone can bring.

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6. Each contracting party shall accord to products which have been in transit through the territory of any other contracting party treatment no less favourable than that which would have been accorded to such products had they been transported from their place of origin to their destination without going through the territory of such other contracting party. Any contracting party shall, however, be free to maintain its requirements of direct consignment existing on the date of this Agreement, in respect of any goods in regard to which such direct consignment is a requisite condition of eligibility for entry of the goods at preferential rates of duty or has relation to the contracting party's prescribed method of valuation for duty purposes.

7. The provisions of this Article shall not apply to the operation of aircraft in transit, but shall apply to air transit of goods (including baggage)."

[219] Appellate Body Report, *US— Standards for Reformulated and Conventional Gasoline*, WTO Doc. WT/ DS2/ AB/ R (adopted May 20, 1996); Appellate Body Report, *Canada— Certain Measures Affecting the Renewable Energy Generation Sector*, WTO Doc. WT/ DS412/ AB/ R (May 24, 2013); Request for Consultations, *EU and certain Member States— Certain Measures Affecting the Renewable Energy Generation Sector*, WTO Doc. WT/ DS452/ 1 (Nov. 5, 2012).

[220] WTO Analytical Index, 2020, https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art5_jur.pdf

2.2.2. Energy Charter Treaty (ECT)

ECT can be claimed is the first and still only energy sector specific multilateral treaty. The dissolution of the Soviet Union has led to uncertainties about the energy trade between Eastern European and Western European countries, where the former ones were source or transit countries whereas the latter were the recipients. Originally started as a EU-Russia cooperation, the geographical application of the ECT has expanded over the years.[221] The main motivation was to provide a working legal investment and supply security framework for the new energy corridor investments under the principles of open, competitive markets and sustainable development, a unique framework under International law.[222] As a result, ECT was signed on December 1994 (entered into force April 1998) and currently there are 53 member states, where Turkey is a founding member.

ECT mainly focuses on four areas: the conservation of foreign investment; ensuring non-discriminatory conditions in energy sector; the settlement of problems between the states and investors and host states; the advancement in energy efficiency, and decreasing the environmental collisions of energy generation and use.

2.2.2.1. Compliance with WTO-GATT Regime:

A significant aspect of ECT was to provide coherent trade and investment with WTO-GATT. In this respect, in areas where WTO-GATT provision overlaps with ECT, Article 4, (Non Derogation From GATT and Related Instruments), ensures that WTO-GATT provisions prevails. This is to provide coherence between GATT and ECT with the expectation that sooner or later WTO would become the more proper ground for such kind of deals, which unfortunately have not proved to be yet. Article 5 (Trade-Related Investment Measures) foresees trade-related investment measures compatible with national treatment (GATT, Art III) and elimination of quota restrictions (GATT, Art XI). Thus, ECT makes GATT disciplines for trade in goods applicable to energy products also via deepening the market access through the binding of tariffs for imports and exports by prohibiting quotas.[223]

[221] TALUS, 2016, p.146.
[222] SÖKMEN, Serhat. ***The European Union Energy Law And Policy And The Harmonization of Turkish Legislation To Those Politics.*** LLM Thesis, Bahçeşehir University. Istanbul, 2009, p.45-47.
[223] SÖKMEN, 2009, p50.

2.2.2.2. Major State Responsibility Emerged:

Other than following national treatment and elimination of quota restriction mentioned above, ECT brings certain responsibility to contracting members, largely about energy investments in their territories.

Article 6 (Competition)[224] urges signatories to enhance competence measures in their domestic legislation, but without any refer to specific measure such as TPA and unbundling which can be termed as competition responsibility. Maybe the most important aspect of the ECT is its very detailed provision on Transit (Article 7)[225] where freedom of transit is

[224] "*Article 6: Competition*
(a) The unilateral and concerted anti-competitive conduct referred to in Article 6(2) are to be defined by each Contracting Party in accordance with its laws and may include exploitative abuses. b) "Enforcement" and "enforces" include action under the competition laws of a Contracting Party by way of investigation, legal proceeding, or administrative 47 Energy Charter Treaty action as well as by way of any decision or further law granting or continuing an authorisation.](1) Each Contracting Party shall work to alleviate market distortions and barriers to competition in Economic Activity in the Energy Sector. (2) Each Contracting Party shall ensure that within its jurisdiction it has and enforces such laws as are necessary and appropriate to address unilateral and concerted anti-competitive conduct in Economic Activity in the Energy Sector. (3) Contracting Parties with experience in applying competition rules shall give full consideration to providing, upon request and within available resources, technical assistance on the development and implementation of competition rules to other Contracting Parties. (4) Contracting Parties may cooperate in the enforcement of their competition rules by consulting and exchanging information. (5) If a Contracting Party considers that any specified anti-competitive conduct carried out within the Area of another Contracting Party is adversely affecting an important interest relevant to the purposes identified in this Article, the Contracting Party may notify the other Contracting Party and may request that its competition authorities initiate appropriate enforcement action. The notifying Contracting Party shall include in such notification sufficient information to permit the notified Contracting Party to identify the anti-competitive conduct that is the subject of the notification and shall include an offer of such further information and cooperation as the notifying Contracting Party is able to provide. The notified Contracting Party or, as the case may be, the relevant competition authorities may consult with the competition authorities of the notifying Contracting Party and shall accord full consideration to the request of the notifying Contracting Party in deciding whether or not to initiate enforcement action with respect to the alleged anti-competitive conduct identified in the notification. The notified Contracting Party shall inform the notifying Contracting Party of its decision or the decision of the relevant competition authorities and may if it wishes inform the notifying Contracting Party of the grounds for the decision. If enforcement action is initiated, the notified Contracting Party shall advise the notifying Contracting Party of its outcome and, to the extent possible, of any significant interim development. (6) Nothing in this Article shall require the provision of information by a Contracting Party contrary to its laws regarding disclosure of information, confidentiality or business secrecy. (7) The procedures set forth in paragraph (5) and Article 27(1) shall be the exclusive means within this Treaty of resolving any disputes that may arise over the implementation or interpretation of this Article."
[225] "*Article 7: Transit*
(1) Each Contracting Party shall take the necessary measures to facilitate the Transit of Energy Materials and Products consistent with the principle of freedom of transit and without distinction as to the origin, destination or ownership of such Energy Materials and Products or discrimination as to pricing on the basis of such distinctions, and without imposing any unreasonable delays, restrictions or charges. (2) Contracting Parties shall encourage relevant entities to cooperate in: (a) modernising Energy Transport Facilities necessary to the Transit of Energy Materials and Products; (b) the development and operation of Energy Transport Facilities serving the Areas of more than one Contracting Party; (c) measures to mitigate the effects of interruptions in the supply of Energy Materials and Products; (d) facilitating the interconnection of Energy Transport Facilities. (3) Each Contracting Party undertakes that its provisions relating to transport of Energy Materials and Products and the use of Energy Transport Facilities shall treat Energy Materials and Products

ensured and cannot be restricted due to origin, destination or ownership of the energy products as well as due to pricing. Freedom of Transit approach here is in line with Article

in Transit in no less favourable a manner than its provisions treat such materials and products originating in or destined for its own Area, unless an existing international agreement provides otherwise. (4) In the event that Transit of Energy Materials and Products cannot be achieved on commercial terms by means of Energy Transport Facilities the Contracting Parties shall not place obstacles in the way of new capacity being established, except as may be otherwise provided in applicable legislation which is consistent with paragraph (1). (5) A Contracting Party through whose Area Energy Materials and Products may transit shall not be obliged to (a) permit the construction or modification of Energy Transport Facilities; or (b) permit new or additional Transit through existing Energy Transport Facilities, which it demonstrates to the other Contracting Parties concerned would endanger the security or efficiency of its energy systems, including the security of supply. Contracting Parties shall, subject to paragraphs (6) and (7), secure established flows of Energy Materials and Products to, from or between the Areas of other Contracting Parties. (6) A Contracting Party through whose Area Energy Materials and Products transit shall not, in the event of a dispute over any matter arising from that Transit, interrupt or reduce, permit any entity subject to its control to interrupt or reduce, or require any entity subject to its jurisdiction to interrupt or reduce the existing flow of Energy Materials and Products prior to the conclusion of the dispute resolution procedures set out in paragraph (7), except where this is specifically provided for in a contract or other agreement governing such Transit or permitted in accordance with the conciliator's decision. (7) The following provisions shall apply to a dispute described in paragraph (6), but only following the exhaustion of all relevant contractual or other dispute resolution remedies previously agreed between the Contracting Parties party to the dispute or between any entity referred to in paragraph (6) and an entity of another Contracting Party party to the dispute: (a) A Contracting Party party to the dispute may refer it to the Secretary General by a notification summarising the matters in dispute. The Secretary General shall notify all Contracting Parties of any such referral. (b) Within 30 days of receipt of such a notification, the Secretary General, in consultation with the parties to the dispute and the other Contracting Parties concerned, shall appoint a conciliator. Such a conciliator shall have experience in the matters subject to dispute and shall not be a national or citizen of or permanently resident in a party to the dispute or one of the other Contracting Parties concerned. (c) The conciliator shall seek the agreement of the parties to the dispute to a resolution thereof or upon a procedure to achieve such resolution. If within 90 days of his appointment he has failed to secure such agreement, he shall recommend a resolution to the dispute or a procedure to achieve such resolution and shall decide the interim tariffs and other terms and conditions to be observed for Transit from a date which he shall specify until the dispute is resolved. (d) The Contracting Parties undertake to observe and ensure that the entities under their control or jurisdiction observe any interim decision under subparagraph (c) on tariffs, terms and conditions for 12 months following the conciliator's decision or until resolution of the dispute, whichever is earlier. (e) Notwithstanding subparagraph (b) the Secretary General may elect not to appoint a conciliator if in his judgement the dispute concerns Transit that is or has been the subject of the dispute resolution procedures set out in subparagraphs (a) to (d) and those proceedings have not resulted in a resolution of the dispute. (f) The Charter Conference shall adopt standard provisions concerning the conduct of conciliation and the compensation of conciliators. (8) Nothing in this Article shall derogate from a Contracting Party's rights and obligations under international law including customary international law, existing bilateral or multilateral agreements, including rules concerning submarine cables and pipelines. (9) This Article shall not be so interpreted as to oblige any Contracting Party which does not have a certain type of Energy Transport Facilities used for Transit to take any measure under this Article with respect to that type of Energy Transport Facilities. Such a Contracting Party is, however, obliged to comply with paragraph (4). (10) For the purposes of this Article: (a) "Transit" means (i) the carriage through the Area of a Contracting Party, or to or from port facilities in its Area for loading or unloading, of Energy Materials and Products originating in the Area of another state and destined for the Area of a third state, so long as either the other state or the third state is a Contracting Party; or (ii) the carriage through the Area of a Contracting Party of Energy Materials and Products originating in the Area of another Contracting Party and destined for the Area of that other Contracting Party, unless the two Contracting Parties concerned decide otherwise and record their decision by a joint entry in Annex N. The two Contracting Parties may delete their listing in Annex N by delivering a joint written notification of their intentions to the Secretariat, which shall transmit that notification to all other Contracting Parties. The deletion shall take effect four weeks after such former notification. (b) "Energy Transport Facilities" consist of high-pressure gas transmission pipelines, high-voltage electricity transmission grids and lines, crude oil transmission pipelines, coal slurry pipelines, oil product pipelines, and other fixed facilities specifically for handling Energy Materials and Products." https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2427/

V of the GATT on "traffic in transit". The Article 7 also provides a dispute settlement for transit trade, through an elaborate conciliation procedure. Article 10, another long article similar to Article 7, is focusing on providing a favourable investment climate and protection of investments. ECT also includes a so-called umbrella clause, which states that each contracting party must observe any obligations it has entered into with an investor or an investment of an investor of any other contracting party, which basically refers to the internationally accepted legal principle of *pacta sunt servanda*: agreements must be kept.[226] Investments shall not be expropriated or nationalized except certain limited conditions (Article 13).[227] Article 12 (Compensation for Losses)[228] puts Contracting Parties under state responsibility and liability for compensation for damages of investors that happen as results of war, armed conflict, national emergence, civil disturbance and similar situations. Environmental matters constitute a large place, mostly under Article 19. Basically contracting members are obliged to take measures not to pollute and harm environment, more than necessary to realize operations. They have a readily obligation to take into account

[226] TALUS, 2016, p.148.

[227] "*ARTICLE 13 EXPROPRIATION (1) Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation (hereinafter referred to as "Expropriation") except where such Expropriation is: (a) for a purpose which is in the public interest; (b) not discriminatory; (c) carried out under due process of law; and (d) accompanied by the payment of prompt, adequate and effective compensation. Such compensation shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation or impending Expropriation became known in such a way as to affect the value of the Investment (hereinafter referred to as the "Valuation Date"). Such fair market value shall at the request of the Investor be expressed in a Freely Convertible Currency on the basis of the market rate of exchange existing for that currency on the Valuation Date. Compensation shall also include interest at a commercial rate established on a market basis from the date of Expropriation until the date of payment. (2) The Investor affected shall have a right to prompt review, under the law of the Contracting Party making the Expropriation, by a judicial or other competent and independent authority of that Contracting Party, of its case, of the valuation of its Investment, and of the payment of compensation, in accordance with the principles set out in paragraph (1). (3) For the avoidance of doubt, Expropriation shall include situations where a Contracting Party expropriates the assets of a company or enterprise in its Area in which an Investor of any other Contracting Party has an Investment, including through the ownership of shares."* https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2427/

[228] "*ARTICLE 12 COMPENSATION FOR LOSSES (1) Except where Article 13 applies, an Investor of any Contracting Party which suffers a loss with respect to any Investment in the Area of another Contracting Party owing to war or other armed conflict, state of national emergency, civil disturbance, or other similar event in that Area, shall be accorded by the latter Contracting Party, as regards restitution, indemnification, compensation or other settlement, treatment which is the most favourable of that which that Contracting Party accords to any other Investor, whether its own Investor, the Investor of any other Contracting Party, or the Investor of any third state. (2) Without prejudice to paragraph (1), an Investor of a Contracting Party which, in any of the situations referred to in that paragraph, suffers a loss in the Area of another Contracting Party resulting from (a) requisitioning of its Investment or part thereof by the latter's forces or authorities; or (b) destruction of its Investment or part thereof by the latter's forces or authorities, which was not required by the necessity of the situation, shall be accorded restitution or compensation which in either case shall be prompt, adequate and effective."* https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2427/

environmental concerns. Article 20[229] foresees the embodiment transparency whereas Article 21 aims to shape a non-discriminatory taxation environment for investors, which could be counted as two other state reponsabilities. Finally, Articles 22[230] &23[231] together ensure that states are responsible and have risk liability for the activities of any state enterprise or any other enterprise with privileged status.[232] That is to say, states are responsible for the contracts and activities of state owned enterprises, like BOTAŞ in Turkey. This is one side of the coin. Other side of the coin is that contracting parties are under obligation to provide regulatory framework that state owned enterprises shall obey and shall have no exclusive, special and or privileged rights to similar investors in that country.

[229] "*ARTICLE 20 TRANSPARENCY (1) Laws, regulations, judicial decisions and administrative rulings of general application which affect trade in Energy Materials and Products are, in accordance with Article 29(2)(a), among the measures subject to the transparency disciplines of the GATT and relevant Related Instruments. (2) Laws, regulations, judicial decisions and administrative rulings of general application made effective by any Contracting Party, and agreements in force between Contracting Parties, which affect other matters covered by this Treaty shall also be published promptly in such a manner as to enable Contracting Parties and Investors to become acquainted with them. The provisions of this paragraph shall not require any Contracting Party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of any Investor. (3) Each Contracting Party shall designate one or more enquiry points to which requests for information about the above mentioned laws, regulations, judicial decisions and administrative 45 rulings may be addressed and shall communicate promptly such designation to the Secretariat which shall make it available on request."*

[230] "*ARTICLE 22 STATE AND PRIVILEGED ENTERPRISES33 (1) Each Contracting Party shall ensure that any state enterprise which it maintains or establishes shall conduct its activities in relation to the sale or provision of goods and services in its Area in a manner consistent with the Contracting Party's obligations under Part III of this Treaty.34 (2) No Contracting Party shall encourage or require such a state enterprise to conduct its activities in its Area in a manner inconsistent with the Contracting Party's obligations under other provisions of this Treaty. (3) Each Contracting Party shall ensure that if it establishes or maintains an entity and entrusts the entity with regulatory, administrative or other governmental authority, such entity shall exercise that authority in a manner consistent with the Contracting Party's obligations under this Treaty.35 (4) No Contracting Party shall encourage or require any entity to which it grants exclusive or special privileges to conduct its activities in its Area in a manner inconsistent with the Contracting Party's obligations under this Treaty. (5) For the purposes of this Article, "entity" includes any enterprise, agency or other organization or individual.*" https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2427/

[231] "*ARTICLE 23 OBSERVANCE BY SUB-NATIONAL AUTHORITIES36 (1) Each Contracting Party is fully responsible under this Treaty for the observance of all provisions of the Treaty, and shall take such reasonable measures as may be available to it to ensure such observance by regional and local governments and authorities within its Area. (2) The dispute settlement provisions in Parts II, IV and V of this Treaty may be invoked in respect of measures affecting the observance of the Treaty by a Contracting Party which have been taken by regional or local governments or authorities within the Area of the Contracting Party."* https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2427/

[232] GRIGORIADIS, T. "State Responsibility and Antitrust in the Energy Charter Treaty: Socialization vs. Liberalization in Bilateral Investment Relations", ***Texas International Law Journal*** 44: 2008, p.48.

2.2.2.3. Dispute Settlement Mechanism:

A Dispute Settlement Mechanism (DSM) is established under Part V (Articles 27 to 29). When a dispute arises between the investor and the Contracting Party, the Contracting Party shall permit an international arbitration method such as ICSID in accordance with UNICITRAL. A DSM between Contracting members is also envisaged via a panel of three members, one from each party and third one where both parties accept. It can be claimed that DSM of ECT has been extensively used in the seemingly short period of time.[233] Some disputes under ECT that Turkey or Turkish companies are part of are *Libananco Holdings Co. Limited* (Cyprus) *v Republic of Turkey; Barmek Holding A.S.* (Turkey) *v Azerbaijan, Cementownia; 'Nowa Huta' S.A.* (Poland) *v Republic of Turkey; Europe Cement Investment and Trade S.A.* (Poland) *v Republic of Turkey; Türkiye Petrolleri Anonim Ortaklığı* (Turkey) *v Kazakhstan.*

ECT aims to develop a striking balance between legal certainty and space for dynamic regulation for legitimate purposes. ECT aims to protect economic activity of investors through the standards of Articles 10 and 13. Various models are offered to assists tribunals. The wrongful application of a contract or contract-assumed statute by the host State falls under the umbrella clause.[234]

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[233] See, for instance, the following cases: *AES Summit Generation Ltd* (UK subsidiary of US- based AES Corporation) *v Hungary, Nykomb Synergetics Technology Holding AB* (Sweden) *v Latvia, Plama Consortium Ltd.* (Cyprus) *v Bulgaria, Petrobart Ltd.* (Gibraltar) *v Kyrgyzstan, Alstom Power Italia SpA, Alstom SpA* (Italy) *v Mongolia, Yukos Universal Ltd.* (UK— Isle of Man) *v Russian Federation, Hulley Enterprises Ltd.* (Cyprus) *v Russian Federation, Veteran Petroleum Trust* (Cyprus) *v Russian Federation, Ioannis Kardassopoulos* (Greece) *v Georgia, Amto* (Latvia) *v Ukraine, Hrvatska Elektropriveda d.d.* (*HEP*) (Croatia) *v Republic of Slovenia, Libananco Holdings Co. Limited* (Cyprus) *v Republic of Turkey, Azpetrol International Holdings B.V., Azpetrol Group B.V. and Azpetrol Oil Services Group B.V.* (the Netherlands) *v Azerbaijan, Barmek Holding A.S.* (Turkey) *v Azerbaijan, Cementownia 'Nowa Huta' S.A.* (Poland) *v Republic of Turkey, Europe Cement Investment and Trade S.A.* (Poland) *v Republic of Turkey, Liman Caspian Oil B.V.* (the Netherlands) *and NCL Dutch Investment B.V.* (the Netherlands) *v Republic of Kazakhstan, Electrabel S.A.* (Belgium) *v Republic of Hungary, AES Summit Generation Limited and AES- Tisza Erőmű Kft*. (UK) *v Republic of Hungary, Mohammad Ammar Al- Bahloul* (Austria) *v Tajikistan, Mercuria Energy Group Ltd.* (Cyprus) *v Republic of Poland, Alapli Elektrik B.V.* (the Netherlands) *v Republic of Turkey, Remington Worldwide Limited* (UK) *v Ukraine, Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG & Co. KG* (Sweden) *v Federal Republic of Germany, EDF International S.A.* (France) *v Republic of Hungary, EVN AG* (Austria) *v The Former Yugoslav Republic of Macedonia, AES Corporation and Tau Power B.V.* (the Netherlands) *v Kazakhstan, Ascom S.A.* (Moldova) *v Kazakhstan, Khan Resources B.V.* (the Netherlands) *v Mongolia, Türkiye Petrolleri Anonim Ortaklığı* (Turkey) *v Kazakhstan, The PV Investors v Spain, Slovak Gas Holding B.V.* (the Netherlands) et al *v Slovak Republic, Vattenfall AB* (Sweden) et al *v Germany.*

[234] ROEBEN, 2018, p.56.

2.2.2.4. Evaluation of ECT:

First of all, we have nothing more tangible but ECT on the international/multilateral framework. It is still work in progress and Russia's in 2009 and now in 2016 Italy's withdrawals are discouraging, but it is wtill the most proper international for a to conclude a full-fledged international framework for cross-border pipelines. Its modal HGA-IGA agreements, at least, provide standardized special international agreements, a palliative solution to contemporary problems.

Certain state responsibility such as i) freedom of transit, ii) protection of investments, iii) compensation for investor's losses, iv) risk liability for state-owned transmission operators, and v) obeying international arbitration resolution create the concept of major state responsibility stemming from largely ECT (enhanced with WTO-GATT). The freedom of transit can be used to ensure third party access, a fundamental factor to make gas markets more competitive.

On the other hand, ensuring i) TPA, ii) unbundling, iii) strategic storage, iv) supply security, v) internal market competition, vi) low-cost supply seem to constitute fundamental public service obligations as the liability of the state, mainly coming either domestic legislation or EU level legislation.

So far, protection of environment seems to be most overarching state responsibility that is found both in domestic-EU level and international law level.

2.2.2.5. Special Bilateral Agreements

Even though, ECT provides a general framework for natural gas pipeline projects, it also advices the signing of special bilateral agreements between the related governments and investors to shape the umbrella legal framework, to make it certain. There are two modal international Agreements, Intergovernmental Agreements (IGA model) and Host Government Agreements (HGA model). While IGA is realized between state to state, HGA is signed between host government and the investor company, as mostly annex of the IGAs. IGAs are there to increase the binding nature of state responsibility under HGA, since now it is from governments to governments. It should be noted that, being international treaties,

these agreements are beyond constitutional challenge once they have been ratified by the Grand National Assembly and are equal to the Acts, according to Art. 90 of Turkish Constitution.

IGA-HGAs indicate specific legal regime of the project which basically includes exemptions (such as preferential taxes), streamlined property condemnation procedures; and pared-down environmental restrictions as well as conflict of resolution methods. Baku-Tbilisi-Ceyhan Petroleum Pipeline Project (BTC Project) has been the first project in Turkey where the IGA model was implemented. BTC Project involves Turkey, Azerbaijan and Georgia and IGA-HGA were signed in 1999 and the pipeline is operative since 2006. The Articles 8 and 9 of BTC HGA provides tax exemptions and land right grants, also includes special provisions where Article 9 shall at all times prevail over conflicting provisions of Turkish law.[235] Similarly, TANAP Project IGA was firstly signed between Turkey and Azerbaijan in 2012 and its appendix HGA later amended and signed on May 2014.[236]

As seen, Special IGA-HGA Bilateral Agreements materialize the general state responsibility into specific binding state responsibility with practical outcomes.

2.3. Evaluation of State Responsibility for Transit Natural Gas Pipelines in Turkey

In this Chapter, so far, the potential state liability areas and state responsibility stemming from other than domestic legislation are tried to be analysed. For Turkish case, the obligations derived from EU-level legislation do not seem to provide significant addition to the state liability deriving from the domestic legislation. On the other hand, international law framework under WTO-ECT-Special Bilateral Treaties seem to provide certain outline for state responsibility. So, an overall evaluation to go over once again about certain state responsibility, as well as their legislative roots (whether domestic-EU-international) will be useful. Yet, the discussion will be concise not to reiterate the same information, already provided in previous parts.

[235]ÖZEKE, Hergüner Bilge. "Intergovernmental Legal Regime for Large-Scale Projects Case Study: IGA-HGA in the Recent Nuclear Energy and BTC Pipeline Projects", ***Lexicology.com,*** 2018, https://www.lexology.com/library/detail.aspx?g=b20e4cbc-e005-4e02-9180-0e8dfb70008f

[236] KAYA, İslam Safa Evaluation of Tanap Agreements in Terms of International Law and Expropriation Law. ***Bilig.*** (83), 2017, p.100.

2.3.1. Third Party Access to Transmission Network

Third Party Access has been an important market feature both in Turkey and the EU. Together with unbundling, the transmission network is aimed to provide service for companies other than the operator. This is obviously an internal market regulation and Turkish domestic legislation is harmonized with the EU level legislation. That is to say, state or EMRA has liability to ensure a functioning TPA for the demanding companies. But, can we say it as a state responsibility stemming from international law? Obviously not. A similar state responsibility seems "ensuring freedom of transit". Freedom of Transit is both described as a fundamental rights of states under WTO and ECT, thus leading to a state responsibility of transit countries to ensure freedom of transit. The question arises whether a WTO member may violate GATT Article V or Article 7 of ECT as a result of the conduct of transit pipeline operators which can be private entities or state owned enterprises. According to ECT, since risk liability by states is envisaged for state owned enterprises or private entities with privileges, this answer can be yes. But if the states in question are not party to the ECT, it is difficult to shape a 100% direct link between pipeline operator's liability and state responsibility, under the law of international responsibility. Therefore, it is difficult to automatically claim that Turkey has a state responsibility to provide freedom of transit from its pipelines to third parties. This can be responsibility for the relevant parties in accordance with IGA-HGAs, but not a responsibility towards any country.

2.3.2. Unbundling and Risk Liability for State-owned Transmission Operators

Unbundling is the major element within the process of liberalization of the state owned enterprises in the natural gas market. Other than transmission network (due to natural monopoly –high initial investment), the liberalization is mostly achieved. Unbundling is foreseen in both domestic and EU-level legislation. In WTO-GATT, there is Article XVII titled as State Trading Enterprises, basically urges members not to provide special privileges for these types of companies. However, it is not so binding and urging an unbundling in the natural gas market. What has more international roots as a state responsibility regarding the transmission operators is the risk liability of states for the breaches of state-owned transmissions operators, as indicated in Art. 22 of ECT. That is to say, Turkish Administration may not have any obligation from international law to unbundle BOTAŞ

(only from domestic legislation), but it may face liability claims if BOTAŞ breaches contractual obligations says in BTC or TANAP.

2.3.3. Consumer Protection, Low Cost Supply and Internal Market Competence

These three areas of state liability are both in depth mentioned within domestic legislation and EU-level legislation. On the other hand, ECT refers to competition and energy efficiency as principles. Competence is referred as a broad concept, yet energy efficiency-low cost is referred to energy product produces, not Turkey. So, this part of the liability is definitely only coming from domestic and EU-level legislation, indicating a high level of harmonization here.

2.3.4. Public Service Rendering, Regulation and Supervision, Protection of Investments and Arbitration

A major focus of this research has been on how "Public Service" is defined in Turkish and EU frameworks. Despite being differences in the course of practice as general, when it comes to the services pertaining to natural gas market; certain services distribution, transmission, storage and production are more or less describes as kinds of public service in both legislations and administrations are expected to provide these services whichever way they choose.

Regulation and supervision, on the other hand, a state responsibility is both derived from domestic-EU level legislation and international law. Especially, as a contracting party of the ECT Turkey commits to arrange its regulations properly to inspect and control activities of state owned enterprises.

Protection of investments and arbitration, in principle, are areas that have place within domestic legislation and Constitution, if not specifically in Natural Gas Law. On the other hand, while domestic legislation binds the Administration to protect investments (both Turkish and FDI) as a part of rule of law, it does not necessarily prevent the Administration from realizing nationalization or forcing a state institution to conduct contracts with enforced

international arbitrations. That is to say, ECT incurs more to the point state responsibility in terms of protection of energy investments.

2.3.5. Strategic Storage and Security of Supply

Interestingly, strategic storage liability is stronger in domestic legislation compared to the EU level legislation. It does not have any binding nature coming from international law. On the other hand, security of supply is a responsibility described more in EU-level legislation. That makes sense, given that, it is a concept more related to more than one countries, needed to coordinate the course of future pipeline projects.

2.3.6. Risk Liability and Compensation of Losses

Risk liability and compensation of losses are potential areas of risk liability for the governments. Risk liability is a new concept entered into Turkish Civil Law, making natural gas operations being under risk liability. That is to say, in Turkey, victims of natural gas pipeline accidents can either sue the operator or the state. State cannot claim that it is not liable, since as a public service, natural gas pipeline operations need to be under strict supervision of the state. Compensation of losses is a specific state responsibility, that contracting parties commit under ECT. Compensation of losses can also be realized not directly by state activities but via state owned enterprises. As discussed above, states have risk liability for state owned enterprises under ECT.

2.3.7. Protection of Environment

Similar to regulation and supervision, protection of environment is a state responsibility that has sources from the domestic legislation, EU-level legislation and international legislation. Furthermore, the international law roots coming not only from ECT but many other international Treaties. Environmental protection together with consumer protection is an area that has horizontal state responsibility, irrespective from sector specific arrangements, almost evident in all sectors.

2.3.8 Tax Emptions and Land Privileges

These are project specific state responsibility, only provided within IGAs-HGAs, they do not have any domestic, EU-level or binding multilateral international law roots.

Overall, state liability and responsibility for natural gas pipelines might be widespread, some having pure domestic law basis, some have domestic, EU and international law basis altogether. In order to determine the content of them, specific IGAs-HGAs shall also be taken into consideration. As a rule of thumb, as of the current design of legislations, it does not need to delve into EU-level legislation requirements, since quite largely they seem to be transposed within the domestic legislation.

CHAPTER 3

STATE LIABILITY UNDER DOMESTIC LAW CONCERNING NATURAL GAS MARKET

The concept of liability is a very broad concept touching civil law (torts, contracts), criminal law and administrative law. First, we will try to provide a very brief but holistic survey on the concept of liability in Turkish civil and administrative laws (we will not review criminal liability). This will be followed by a relatively more detailed discussion on the types and content of liability of state. Finally, we will try to elaborate the dynamics of liability of state concerning the Turkish Natural Gas Market. The discussion in this Chapter aims to provide reader with up to date knowledge and competence about the specific areas of liability of the states regarding the natural gas pipelines under the domestic law, in a way to review the traces of EU legislation and international law which has been discussed in the previous chapter.

The difficulty in legal terminology between English translation and Turkish original terms has discussed at the introduction. In Common law countries, contrary to Continental Europe, since there is not a clear distinction between civil law and Administrative law, usually one term, "civil liability" is enough to reflect to cover various types of liability other than criminal liability. On the other hand, the civil law and administrative law distinction does not allow the term "civil liability" to be able to fully cover "state liability" (*idari sorumluluk*) properly in Turkish legal terminology. A term to cover both "civil liability" deriving from civil law and "state liability" deriving from Administrative law is needed and it is "*mali sorumluluk*" in Turkish language ("*responsabilite patrimoniale*" in French) without a proper English translation. The issues pertaining to civil liability are rendered within Civil Law and are part of Civil Courts while state liability is handled within Administrative Courts. However, as an exception, state organs can have certain contractual obligations to private legal persons which can obviously fall in the coverage of "civil liability" and be litigated under Civil Law, an issue discussed more detail in Chapter 1.2.1.2.

Even though, civil liability and state liability are two separate legal regimes in Turkish legislation, the "liability" and its conditions in Civil Law are quite often used to establish the ground rules for state liability processed under Administration law. So, the

principles for liability described in Turkish Law of Obligations (TLO) (*Türk Borçlar Kanunu*) are applicable to illuminate the situation for state liability. That is why, we will start with describing the principles for civil liability to lay the framework for a more detailed discussion concerning state liability.

In its widest sense a civil liability can occur in four various ways: due to statutory provisions, due to contracts, due to tort(*haksız fiil)* and finally due to unjust enrichment (*sebebsiz zenginleşme*). The contractual liability is an area mostly related to the contracts and its provisions, which is not a principal area that will cover liability arising out of public services in the natural gas sector. While these four areas constitute the possible boundaries of any potential liability, the law of liability (*sorumluluk hukuku*) in Turkey directly refers to the liability arising from tort or non-contractual liability (*sözleşme dışı sorumluluk*), which is described under the Articles 64-80 of TLO (First Chapter, Second Part). In this respect the law of liability is divided into two: i) subjective liability or tort liability as a result of the existence of a tort (*kusur sorumluluğu*); ii) objective liability or causality liability (*kusursuz sorumluluk -sebep sorumluluğu*) where the existence of tort is not needed, only a causal link to the act is enough to establish a liability. TLO mentions three subcategory of objective liability (*kusursuz sorumluluk*), liability in accordance with equity (*hakkaniyet sorumluluğu*), liability of due care (*özen sorumluluğu*) and finally risk liability (*tehlike sorumluluğu*). So, risk liability is defined as the strictest area of the law of liability, indicating the presence of liability without a further need of other factors.

The compensation of the damaged party is required in Turkish liability law. The level of damage has broad and limited versions. In limited version, the damage refers to attributable the physical damage (*maddi zarar*). Physical damage is defined as the decrease in someone's wealth (*mal varlığı*) without the will of that person. In doctrine, physical damage is classified as de facto damage against. being deprived of profit (*yoksun kalınan kar*); direct damage against. indirect damage; positive damage (*müspet zarar*) against negative damage (*menfi zarar*); explicit damage against implicit damage; damage to person –damage to property- damage to other things.[237] The broad version also includes the non-pecuniary loss (*manevi zarar*) as a result of the act. Non-pecuniary loss is the distress and sadness due to loss of personal values. The judges can take into consideration for both

[237] EREN, Fikret: ***Borçlar Hukuku Genel Hükümler***, Ankara 2018, s.515.

physical and emotional damage on deciding the level compensation. There is not a maximum threshold for compensation envisaged in Turkish law.

State liability often follows the same principles described above. For contracts other than administrative contracts where a public institution is a party, the valid place is the civil law and civil liability principles are employed. Similarly, the issues between consumers of public economic enterprises shall mostly fall in the civil law.[238] However, the state liability is largely part of the administrative Law which is autonomous from Civil Courts. Furthermore, there are certain immunities of the state from any liability. For example, any liability occurring due to the legislative acts of the state is deemed inappropriate.[239] Similarly, any deemed liability as a result of final jurisdiction function is not regarded a liability of the state.[240] That is to say, a final decision of a higher court cannot be claimed as invalid and leading to a liability of the state. Finally, certain acts of the government (*hükümet tasarrufu*) cannot be subject of a litigation, thus not bearing a liability.[241]

3.1. Subjective Liability of the State

In tort liability or subjective liability, a liability occurs due to a faulty activity of one party leading to a damage to another party. So the damage shall be compensated by the faulty side and as the result of the "*Casum sentit dominus*" principle.[242] So, in order for tort liability to occur, the presence of fault, damage and the causal link between fault and damage are needed. The burden of proof is on the damaged party, he shall proof the level of damage as well as the fault of the damaging party (Article 50 of TLO). A faulty act cannot be deemed as illegal under certain conditions such as being a result of a legal authority, being realized under the explicit approval of the damaged party, being result of a justified self-defence or necessity and finally being realized in accordance with public interest (Article 63 of TLO).

[238] See for a detailed list of various cases, GÖZLER, 2019, p.1053-54.
[239] Ibid., p.1065.
[240] Ibid., p.1069
[241] Gözler provides a detailed list of 36 items of these types of acts of government, see. Ibid., pp.1080-81.
[242] EREN, 2018, p.521.

The subjective liability of the state is defined in the Constitution. According to Article 40/3, the state is liable to compensate any tort delivered by the officials.[243] In line with this article, the Article 125/7 claims that the administration is liable to compensate any damage realized as a result of its own activities and operations.[244] Finally in Article 129, where the duties and responsibility of civil servants (*memur*) are described, the fifth paragraph mentions that the tort of the civil servants during their duty shall be reflected directly to the administration.[245] So, in the lights of these discussions, the tort or deeds of the state institutions or civil servants during their duties shall be compensated by the State and the proper litigation place for these are the Administrative Courts.

For claimant to pursue his claim against subjective liability of state, there shall be a tort or deed, the damage shall be countable and there shall be a causal link between the tort of the state and the damage. The burden of responsibility is on claimant. Since, the acts of state rendered by officials who are also individuals, there needs to determine a clear separation whether the tort in question happens due to the public service act or personal motives. If the latter is the case then, this is not state liability, but civil liability of the civil servants in question and the litigation is subject of the Civil courts. So we, need to dig down for the situations where the tort is attributed to the state.

The term that defines the tort being due to public service duty is "service fault" (*hizmet kusuru*). Service fault means the service being rendered badly, or late or not rendered at all.[246] The state administration is responsible to render the public services that it has deemed undertaken. In most of the case, service fault is decided by the Turkish Courts[247], in the way of that the service being carried out badly. For a public service not

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[243] "*XV. Temel hak ve hürriyetlerin korunması* **Madde 40** *–… Kişinin, Resmî görevliler tarafından vaki haksız işlemler sonucu uğradığı zarar da, kanuna göre, Devletçe tazmin edilir. Devletin sorumlu olan ilgili görevliye rücu hakkı saklıdır.*"

[244] "*B. Yargı Yolu: Madde 125- ...."İdare, kendi eylem ve işlemlerinden doğan zararı ödemekle yükümlüdür."*

[245] *"2. Görev ve sorumlulukları, disiplin kovuşturulmasında güvence Madde 129 – ...Memurlar ve diğer kamu görevlilerinin yetkilerini kullanırken işledikleri kusurlardan doğan tazminat davaları, kendilerine rücu edilmek kaydıyla ve kanunun gösterdiği şekil ve şartlara uygun olarak, ancak idare aleyhine açılabilir.*"

[246] YAYLA, 2012, p.14 and GÖZÜBÜYÜK and TAN, 2016, p.287. See also the definition in the Military Administrative Court decision, 3rd Circuit, 29.11.1979, E.1979/428, K.1979/460, "*...hizmet kusuru; hizmetin kötü işlemesi, hizmetin işlememesi, hizmetin geç işlemesi şeklinde tecelli eden idari işlem veya eylemlerdir...Hizmet kusuru kuramının uygulanması yönünden idarenin sahip olduğu olanaklar da önemli bir unsur teşkil eder. İdarenin sahip olduğu olanaklar değerlendirilirken; bir yandan hizmetin nitelik ve niceliğinin, diğer yandan bu hizmete ilişkin mevzuat, idari faaliyet, teşkilat, tesis, araç, gereç, personel ve ödenek durumlarının göz önünde bulundurulması gerekir...",*

[247] The Council of State defines *service fault* in one of its decision as: "Danıştay bir kararında hizmet kusurunu şu şekilde tanımlamıştır: "*İdare hukuku ilkelerine göre bir olayda hizmet kusurunun varlığından söz*

being carried out badly, the Administration shall provide adequate equipment and personnel for that service, the personnel shall be educated and trained properly to accommodate the service. If the employed officials or agents are not good enough to carry out the service properly, this is not an excuse. Besides, the administration shall appropriately monitor and supervise the course of the services.[248] Of course there is not a concrete measure to determine that a certain "service" is rendered at fault, but the Courts assess it according to general level of modernization. If the tort is deemed as a result of service fault, then the civil servants in question is not personally liable for the damage; but the administration.

There are two important emphases on the subjective liability of state. Concerning the tort, to be liable, it does not need the act being illegal. Even the acts rendered within the law can lead to liability. However, for the tortious deeds of the administration, the deed should be definitely against the law.[249] Secondly, Turkish Council of State employs a classification of light fault-severe fault distinction and unfortunately, the finding of light fault may be used to administration refraining from liability.[250] The severe faults are regarded severe cases happened mostly in jails, mental asylums, medical interventions, emergency rescue, fire brigade and similar. This unfair dissection is under attack and being less employed by the Council of State.

Finally, the distinction of tort as the subject of civil liability or state liability deserves attention. Normally, a civil servant can put his individual motive to realize a damage against another citizen. This can be either pure an individual motive irrespective from his duty, such as breaking the window of a neighbour, or in an implicit way using the public authority. For the second way, we can give an example of a civil servant not giving a service to a citizen since he does not like that citizen. Normally, for such personally motivated ill acts, it should be possible for the damaged party to claim compensation directly to that official as a person in the civil courts. However, according to Articles 40/3, 125/7 and 129/5 of the Constitution, even the tort of the civil servants during their duty, are motivated by personal ill motives,

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edilebilmesi için idarenin yürütmekle yükümlü bulunduğu kamu hizmetinde, kuruluş, işleyiş ya da persomel açısından emir ve talimatların verilmemesi, denetimin yetersiz olması, hizmete tahsis edilen araç ve gereçlerin uygun ve yeterli olmaması, gereken tedbirlerin alınmaması veya geç ve zamansız alınması gibi nedenlerle bir aksaklık, bozukluk, düzensizlik, eksik veya sakatlık meydana gelmiş ve oluştuğu ileri sürülen zararın da bundan kaynaklanmış olması gerekmektedir." The Council of State, 10th Circuit,17.10.1983, E.83/185, K. 83/1984,

[248] İSPARTALI, Bedriye Şenol, ***Askeri Idari Eylemden Doğan Mali Sorumluluk,*** Ph.D Thesis submitted to Dokuz Eylül Üniversity, 2009, İzmir, p.28-29

[249] GÖZLER, 2019, p. 1127.

[250] Ibid., p.1129.

still the state is liable for the damage and the litigation shall be directed at relevant public institution at the Administration Court. The Administration may return to the official in question for reparation.

The Administration Courts are free to determine the level of compensation for the damages. Yet, after the entering force of the new law of obligations in June 2012, concerning the compensation for death and injuries, the provisions of the TOL are binding for subjective state liability.[251]

3.2. Objective Liability of the State:

It is called the objective liability of the administration when the damages caused by the operations or actions under the authority of the administration are compensated without seeking service fault, either in accordance with the concept of risk in general or in accordance with the principle of equality against public burden (*kamu külfeti karşısında eşitlik ilkesi*).[252] The major difference between subjective liability-tort liability and objective liability is that in the second, there does not an obligation of a presence of a tortuous act of the damaging party. That is to say, irrespective from being faulty or not, due to the nature of the work undertaken, there occurs a liability of the first party against the damaged one. So, the damaged party does not have a burden of proof to prove the faultiness of the act of the damaging party. The only thing he is required to prove is the causal link between the act of the first party and the damage. That being the rule, there are some special additional principal for various conditions.

For state liability, the objective liability is still an exception and the subjective liability is the norm.[253] This instance, considered as one of the characteristics of objective liability, explained in doctrine as the objective responsibility having subsidiary quality.[254]

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[251] See article 55/2 of TOL: "*Bu Kanun hükümleri, her türlü idari eylem ve işlemler ile idarenin sorumlu olduğu diğer sebeplerin yol açtığı vücut bütünlüğünün kısmen veya tamamen yitirilmesine ya da kişinin ölümüne bağlı zararlara ilişkin istem ve davalarda da uygulanır."*

[252] ATAY, p. 759; GÜNDAY, p. 378; ÇAĞLAYAN, p. 330. In line with this definition, the Council of State came to this conclusion on objective liability: "*Amme hzimetlerinin ifası sırasında husule gelen zararların bir veya birkaç kişite yükletilmesi ne eşitlik esası ve ne de hakkaniyet ve nefaset kuralları mesağ vermemesine binaen olayda idareye atfı mümkün bir hizmet kusuru bulunmasa dahi objektif sorumluluk esasına zararın hizmetin sahibi idarelerce tazmini gerekir.*" The Council of State, 12th Circuit, 25.09.1968, E. 67/1268, K. 68/1667.

[253] İSPARTALI, 2009, p.32.

[254] ÇAĞLAYAN, p. 330

Thus objective liability of state is generally interpreted in limited sense by the Courts in Turkey. In cases if there is doubt whether the presence of service fault or objective liability of state is applicable, according to the Council of State, firstly the service fault shall be examined from directly jumping to objective liability of state.[255] Objective liability is used special conditions and for special cases in which the damage shall be abnormal, special or having a risk nature.[256] Yet, the decisions of the Constitutional Court, in most of the case, are more inclusive than the limited practice of the Council of State, basing the objective liability as the norm rather than exception.[257]

The basis for objective liability of state depends on Article 125/7 of the Constitution. The leading two principles for the use of objective liability of state are the risk (social risk) and the liability of equality before public charges principles. The first one is a part of risk liability of the state while the latter is a subject of the state liability of equity and justice. These are in parallel with the two of the subcategories of objective liability in civil law. The other one, which is the major subcategory in civil law is the normal objective liability or due liability. This last one is not found as a practice in the Administrative Law for state liability, yet we will mention that as well to provide a holistic picture of objective liability in Turkish law.

3.2.1. Normal Objective Liability or Due Care Liability

The major subcategory of objective liability, sometimes even termed as "normal objective liability"[258], is the liability of due care which is mainly defined in Articles 65-70 of the TOL. In this type of liability, a special kind of plant, company or activity is not defined, rather a general due care liability framework is mentioned with special emphasis to certain situations. These certain due care liability situations are pertaining to employer (TLO-Art. 66), to animal keeper (TLO-Art.67-68), to head of the family (Civil Law-

[255] Council of State, 10th Circuit, 10.04.1996., E.1995/53, K.1996/1913: "*...İdare mahkemesince, davalı İdarenin tazmin sorumluluğu belirlenirken hem hizmet kusuru ilkesine hem de kusursuz sorumluluk ilkesine dayanılmıştır. Oysa hem kusur, hem de kusursuz sorumluluk ilkesine dayanılarak idarenin tazmin sorumluluğuna gidilmesi hukuken mümkün değildir. Olayın oluşumu ve zararın niteliği irdelenip, önce hizmet kusuru araştırılarak hizmet kusuru yoksa kusursuz sorumluluk ilkesinin uygulanıp uygulanamayacağı incelenmek suretiyle tazmin sorumluluğunun belirlenmesi gerekmektedir."* For a similar decision also see Council of State, 10th Circuit, 18.03.1998., E.1996/10292, K.1998/1190.
[256] GOZLER, 2019, p.1191.
[257] For a detailed list of Constitutional Courts decisions in that respect, see İSPARTALI, 2009, p. 35.
[258] EREN, 2018, p.675.

Art.369), to owner of building (TLO-Art. 69-70), to owner of immovable estate (Civil Law-Art.730) and to product seller (product liability, The Protection of Customer Law, Art.4).

In due care liability, the absence of due care (or presence of negligence) is enough to constitute the liability for the damage. The party responsible for due care of damage is the party that owns or that benefits of the subject matter that has causal links with the damage. Here, even, the party in question does not have a fault for the act resulting to the damage, he is still responsible for the damage, because it is against equity and justice that while he benefits from the results of that activity, the party damaged will end up paying the damage. In this regard, it can be claimed that there is a difference in the severity of liability under normal objective liability. Some of them are regarded light liability where if the liable party provides the proof that he conducted the relevant due care, he can be refrained from liability. These are the liabilities of the first three conditions mentioned above, namely, pertaining to the employer, to the animal keeper and to the head of the family.

The remaining conditions are regarded having severe liability, close to risk liability to be discussed as second type of objective liability below, where even the liable party proves that he conducted the relevant due care, he is still deemed to be liable. These are the remaining latter three conditions mentioned above, namely, pertaining to owner of building, to owner of immovable estate and to product seller. They bear a "danger or risk" quality in themselves, as a major difference from the lighter versions. Yet, this "danger quality is not at the forefront compared to other qualities as it is the case for risk liability, which makes its difference from risk liability.[259] In these severe conditions, the only way that the liable party can be refrained from liability is that he can proof there is not any causal link between the damage and the act in question.

3.2.2. Risk Liability of the State

The second type of objective liability, *the risk liability* or *absolute objective liability* is termed as *tehlike sorumluluğu* ("danger liability" or "risk liability" word to word

[259] İNAL, Arda, ***Nükleer enerji alanında üçüncü şahıslara karşı hukuki sorumluluğa ilişkin Paris Sözleşmesi ve Paris Sözleşmesi'ni değiştiren 2004 Protokolü'nün Türk Hukukuna Uygulanması,*** unpublished Expert Thesis by Turkish Atomic Energy Institution, 2017, Ankara, p.56 and BAŞOĞLU, Başak, (2015) "Sözleşme Dışı Kusursuz Sorumluluk Hukuku ve Özellikle Tehlike Sorumluluğuna İlişkin Değerlendirmeler", *İnönü Üniversitesi Hukuk Fakültesi Dergisi,* vol.2, no. 2,, p.35.

translation) in Turkish Obligations Law which does not have a proper English translation. The term aims to emphasize the risk-danger nature of the liability stemming from the nature of certain businesses. Indeed, this terminology was introduced in 2012 with the introduction of new Turkish Law of Obligations and the aim was to differentiate this type of risk liability from the severe normal objective liability described above.[260] Risk liability is defined in Art.71[261] and the damage shall occur due to the activities of an enterprise having *an important level of danger*. For the same article, *an enterprise having an important level of danger* can be assessed according to the equipment, vehicles or powers used to generate operations and the risk of grave danger even due care is realized by the relevant experts. In certain businesses, there is the great potential for fatal and severe damage, even if the operator has taken due care. Yet, these businesses are needed by the public, so they shall be operated. So, in order to protect the customers or third party individuals, the risk liability of the operators have been introduced, to strike the balance between the risks and benefits derived from the business.[262] The businesses or services pertaining to motored land vehicles, railway, airway and sea transportation, nuclear energy are among the well-known examples. Enterprises having an important level of dangers can be either mentioned in other laws[263], if not, can be determined in accordance with the general framework laid down in Art 71. One important point is that the owner and operator are jointly liable (*müteselsilen*) for the damage.

The risk principle constitutes the basis for risk liability of the state within the Administrative Law. In general, the Courts considered various situations leading the risk

[260] Ibid., p.57.

[261] "*MADDE 71- Önemli ölçüde tehlike arzeden bir işletmenin faaliyetinden zarar doğduğu takdirde, bu zarardan işletme sahibi ve varsa işleten müteselsilen sorumludur. Bir işletmenin, mahiyeti veya faaliyette kullanılan malzeme, araçlar ya da güçler göz önünde tutulduğunda, bu işlerde uzman bir kişiden beklenen tüm özenin gösterilmesi durumunda bile sıkça veya ağır zararlar doğurmaya elverişli olduğu sonucuna varılırsa, bunun önemli ölçüde tehlike arzeden bir işletme olduğu kabul edilir. Özellikle, herhangi bir kanunda benzeri tehlikeler arzeden işletmeler için özel bir tehlike sorumluluğu öngörülmüşse, bu işletme de önemli ölçüde tehlike arzeden işletme sayılır. Belirli bir tehlike hâli için öngörülen özel sorumluluk hükümleri saklıdır. Önemli ölçüde tehlike arzeden bir işletmenin bu tür faaliyetine hukuk düzenince izin verilmiş olsa bile, zarar görenler, bu işletmenin faaliyetinin sebep olduğu zararlarının uygun bir bedelle denkleştirilmesini isteyebilirler*."

[262] BAŞOĞLU, 2015, p.33.

[263] Some special legislations in Turkish laws: the risk liability of civil aircraft operators in Turkish Civil Aviation Law Nr:2920 dated, the risk liability of motor vehicle operators in Road Traffic Law Nr:2918, risk liability for environment pollution in Law Nr.5312 dated 03/03/2005 (Deniz Çevresinin Petrol ve Diğer Zararlı maddelerle Kirlenmesinde Acil Durumlarda Müdahale ve Zararların Tazmini Esaslarına Dair Kanun), risk liability for environment pollution in Environment Law Nr 2872 dated 09/08/1983, risk liability for military operations in National Defence Responsibilities Law Nr:3634 and risk liability in Nuclear poaer Plants Law Nr. 5710.

liability. These are services with risky things such as explosive products, firearms, blood products, dangerous vehicles and dangerous public works; services having dangerous methods such as training of criminal juveniles and/or mental disorderly people; dangerous situations such as fighting with pandemies; risks due to the nature of public service vocations such as military service.[264]

3.2.3. The State Liability of Equity and Justice

The final subcategory of objective liability is liability in accordance with equity which is described under Article 65 of TLO. This principle gives right to judge to come with an equitable solution (which is 50-50 of sharing the damage) for the liability even if the damaged has no fault at all. In civil law, this happens only if the economic situation of the damaged party is good enough compared to the faulty side who does not have the capacity of discernment.

In Administrative law, this principle leads to the liability of equality before public charges (*fedakarlıkların denkleştirilmesi sorumluluğu*) of the state. If a party faces a substantial damage due to a legal and proper act of the Administration whereas the majority of the population receives a benefit, the equity and justice (*hakkaniyet-nesafet*) indicates the compensation of the damaged party from the ones that benefit from it. For example, the administration makes a new road in front of your building and the scenery of the first floor gets closed, the value of the flat dramatically decreases; so your loss shall be compensated by the people use the road, but that is practically impossible to realize so the Administration compensates for the sake of the society. This type of liability is mostly seen in the damages due to public works. This principle is also applied in areas pertaining to public order.[265]

The case of natural gas pipelines is mostly falling into the category of public works. The damages and state liability pertaining to public works are dispersed in subjective liability and the two subcategories of objective liability: risk liability and state liability of equity. The nature of these liabilities pertaining to natural gas pipelines and natural gas market will be analysed in the following part after the presentation of conceptual framework.[266]

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[264] GÖZLER, 2019, pp.1193- 1250.
[265] İSPARTALI, 2009, p.39.
[266] Other than these liabilities discussed there is a special category of liability of unjust enrichment in civil law, which is handled Articles 77-82 of TOL. This type of liability is not related with our topic but basically it

3.2.4. The Conditions that Break the Liability of the State

The causality link is defined as the cause and effect relationship between the act and the damage.[267] There are various theories on evaluating the causal link between the act and the damage. A generally accepted theory in Turkish law, as well as in German and Swiss laws, is the "Appropriate Causality Link" theory (*uygun nedensellik bağı*). When the regular course of events and life experiences are undertaken, the condition that seems the most appropriate in realizing the damage is regarded as the causal link.[268]

In risk liability, only the conditions that rule out the conditionality link can refrain the relevant party from liability. The three main types of conditions that rule out causality links are force majeure, the severe fault of the damaged party and the severe fault of the third party. In Administrative Law, a fourth condition, *the unexpected situation* (*beklenmeyen hal),* is also regarded a condition to cut causality link.[269] Force majeure is the most known example, where events that cannot be envisaged such as natural disasters or Acts of God. These events shall be exogenous from the actors, cannot be foreseen anyhow and cannot be resistible in order to be counted as force majeure. [270] However, it should be noted that not all cases pertaining to the natural disasters automatically results into force majeure condition. For example, Turkey lies in an earthquake area and if the buildings are not prepared resistible to the expected levels of earthquakes, then damages pertaining to the ill constructed buildings cannot be refrained from the liability due to force majeure conditions.[271]

The second condition, unexpected situation is very close to force majeure, but definitely different and unique to the administrative law. In this situation, the event still carries the unforeseeable and irresistible nature but different from force majeure it also

occurs when a party gets enriched via the other party's wealth without having a just and proper reason to justify. In such a case, that enrichment has to be given back to the original owner.

[267] GÖZLER, 2019, p.1338.

[268] EREN, 2018. p.675

[269] GÖZLER, 2019, p.1355.

[270] Ibid., p.1349.

[271] See Council of State, Administrative Case Circuits General Council, 17.01.1997, E.1995/752, K.1997/57, where the building chosen as public housing was not strong enough to resist the eart quake and the Administration who bought the building without proper inspection was deemed faulty and liable for the damage.

includes endogenous quality. Thus, because unexpected situations eliminate the possibility misconduct of the administration, if there is a liability based on misconduct, then the responsibility of the administration is eliminated. However, the fact that there is an unexpected situation, does not affect the level of risk liability of the administration, if the conditionsn pesrsist.[272] For example, the unexpected explosion of the ammunities in the military barracks or the explosion of a dam without a known reason. It should be noted that, if these kinds of events occur due to negligence of the administration, those are not deemed to be unexpected events, but service faults of the administration. The unexpected event happens even the administration takes adequate measures.

The third condition is the acts of the damaged party, in which if the damage was realized as a direct result of the damaged party, then this cuts the causal link for the liability of the state.[273] A known example is a person committing suicide by throwing himself in front of a train. Here, the administration's act is indirect cause and the damaged person's act is the direct cause. If there is a direct cause other than administration's act, then the causal link is broken regardless from whether the damaged person act in fault or not. For this example, that person could throw himself to the train due to a heart attack, which does not make the train machinist liable either. If the damage is increased by the misconduct of the one that is damaged, the administration is partially responsible. The decrease in the responsibility of the authority has to do with the increase of the amount of the misconduct by the damaged.[274] In the fourth case, the causality link of the administration is broken due to act of the third party. To make it more visible, we can continue the previous example, which in this case the damaged person is thrown on the rails by another person. So, the liability is not on the train machinist but on the third party.[275]

Evaluating these four conditions that cut the causal link between the damage and the act of the administration, it should be noted that only force majeure and the act of the damaged party break all kinds of liability of the state. However, the remaining two conditions, unexpected condition and third party's fault can break the link for the subjective liability of the state. In areas where there is risk liability, they do not eliminate the risk

[272] GÜNDAY, p. 385
[273] ATAY, p. 780, ÇAĞLAYAN, p.349, GÜNDAY, p.385
[274] GÜNDAY, p. 385
[275] For a survey of Constitutional Court decisions on these two conditions see İSPARTALI, 2009, pp..51-54.

liability of the state since by nature of the risk liability, the administration shall be held liable for the damage as the result of risk principle.[276]

3.3. Evaluating the Liability of State under Turkish Natural Gas Market

In the previous part we have realized a general survey on state liability concept within Turkish law. In the lights of these discussions, in natural gas market services, in general terms, state liability can occur either in the form *service faults* or under *risk liability* due to the dangerous nature of the public works rendered. So, we will start with a discussion to determine the kind of risk liability concerning natural gas services. On the other hand, how and in what conditions can a natural gas service be regarded *at fault*, needs further elaboration in the lights of state responsibility mentioned in the relevant legislation.

3.3.1. The Risk Liability Nature of the Natural Gas Services

In Turkish law, damages due to public works (*bayındırlık eserleri*) constitute a large place since as a developing country Turkey faces many deaths and injuries due to ill rendered public works. Normally, Turkish law differentiates the case of state's liability whether the damaged person is a *user* of a public work or a third party. If he is a user, then the state liability is considered as a *subjective liability* with the presumption that the administration shall provide burden of proof for not being faulty and an inquiry whether the administration has realized due care is investigated.[277] This lessens the burden of the state. However, for the third parties, state's liability is always an *objective liability.*[278] This being the general rule for public works, there is an established precedence that the public works of *water, natural gas and electricity* are considered as dangerous-risky public works and *objective liability* is directly applied in these areas for all cases regardless of any distinction such as user vs. third party. So, in these areas, even the relevant administration does not have any fault for the damage, it is still liable for the damage. For example, on 22 January 1979 police official Musa Aydemir got permanently disabled due to exposure to poisonous natural gas during a rescue work of the natural gas workers in Ankara. As a result, the 10th Circuit of the Council of State decided that there is objective liability in this case and the

[276] GÖZLER, 2019, p.1372.
[277] Normally, in subjective liability, the burden of proof on the claimantf, but in cases of public Works damage, as a precedent, it is deemed that the administration is at fault. See, GÖZLER, 2019, p.1233.
[278] Ibid., p.1233-34.

damaged person, Musa Aydemir, shall be compensated as a result of equity principle.[279] In this case, the Court has decided liability of equity, as one of the three subcategories of objective liability. However, that may not be the case. It should be remembered that this case happened well before he introduction of *risk liability* principle in TLO and the Court might have been obliged to refer the *liability of equity* as the last resort. A closer look is needed on which subcategories of objective liability is mostly applied under what conditions.

Here, the established precedents on electricity service cases might be helpful, since the overwhelming majority of the cases are on the damage realized through electricity networks and on service fault concerning electricity. With analogy, the precedent on electricity service can be applicable for the natural gas service as well. It should be mentioned that as the energy markets liberalized and privatized, the operators-distributers of the service began to be handled by private legal persons as discussed in Chapter 1. Thus, the liability cases, especially if there is an injury or death so including a criminal liability nature as well, could be put through civil courts and Supreme Court of Appeals accept these kind of cases. Öcal Apaydın provides a detailed survey on the precedent of Supreme of Appeals on liability emerged damages from electricity transmission networks.[280] While, in Germany, Switzerland and Italy has established special laws about damages concerning electricity transmission, Turkey does not have a special legislation on that. These three countries have applied the *risk liability* for these kinds of damages.[281] For Turkey the case is complicated. Which subcategory of the objective liability is to be applied is unclear. Before the publication of risk liability principle in Art 71 of TLO in 2012, Supreme Court of Appeals has depended on the due care *liability of owner of building* (*yapı malikinin sorumluluğu*) which is now defined in Art.69 of TLO. As we discussed, while this type of *due care liability* is a severe type of due care liability, yet it does not bear as high liability level as risk liability. With the adoption of Article 71, now Supreme Court of Appeals has relevant grounds to employ risk liability for these types of cases. For the cases after 2012,

[279] The Council of State, 10th Circuit, 24.11.1982, E.1982/469, K.1982/2357: "*Kamu hizmetlerinin görülmesi sırasında bir görevle ilgili olarak genel külfetler dışında fertlere ve ferdi mülkiyete verilen zararların, eylem ile zararlı sonuç arasında nedensellik bağının bulunması koşuluyla* ***objektif sorumluluk esaslarına*** *göre ayrıca idarenin kusuru aranmadan hizmetin sahibi idarece tazmin edilmesi hukukun genel ilkeleri* ***ile hakkaniyet ve nesafet kuralları*** *gereğid*ir."

[280] ÖCAL APAYDIN, Bahar, "Elektrik Enerjisi Nakil Hatlarının Yol Açtığı Zarardan Sorumluluk", ***Selçuk Üniversitesi Hukuk Fakültesi Dergisi***, 27 (2), pp:307-344.

[281] Ibid., pp.311-316.

Supreme Court of Appeals has started to refer just Article 71 and thus risk liability in some cases; and Article 71 together with article 69 in some other cases; and finally in some minor cases only referred Article 69.[282] The trend is emphasizing the dangerous nature of the services and for the sake of risk liability.

In the lights of survey on the Turkish case law, it can be concluded that as a general principle, the damages having a causal link to the natural gas market services fall under *objective liability* where the fault of the service provider is not investigated. Case law provides the examples of the embodiment of the three subcategories of objective liability for the basis of court decisions. Yet, the trend if moving towards risk liability, where the service provider is liable at all terms to compensate the damage. The only defence for not being liable is the conditions that break the causal link, namely force majeure, unexpected condition, the fault of the damaged party and the fault of the third party.

3.3.2. The General Framework for State Liability under the EU Legislation

At this point, before delving into a detailed analysis through Turkish natural gas market legislation for special examples/cases of state liability, it may be helpful to provide a general approach on the EU's state liability framework for the rights of individuals, since we have partly analysed German-Swiss-Italian laws establishing the risk liability concerning the damages from electricity transmission.

Normally, TFEU and EU Treaty is the top legislation to lay down areas for the EU legislation. The Regulations, then come, which have a direct effect both vertically and horizontally upon with the EU members. That is to say, for the provision of the Regulation are applicable for the disputes between an individual and any member state (vertically) or between any two individual legal entities (horizontally). For both EU Treaties and Regulations, the fundamental applicability of vertical and horizontal direct effect has been established under a strong precedent by EU case law. In *Van Gen den Loss* (1963)[283], European Court of Justice (ECJ) decided that if there is a conflict between the EU Treaty and national legislation and the area in question is principally by governed by the Treaty then and the conditions of the situation are clear and unambiguous, unconditional and not dependent on further action, then the EU Treaty has a direct effect on the national

[282] For a detailed discussion on the survey of various Supreme Court of Appeals cases, see Ibid., pp.331-333.
[283] Case 26/62 Van Gend en Loos [1963] ECR 1.

legislation, thus the provision of the EU Treaty has upper hand.[284] *Van Gen den Loss* was case concerning dispute between an individual and the member state (vertical), but in *Defrenne v. Sabena* (1976)[285] this time a dispute occurred between an individual (Miss Defrenne) and a private company (Sabena Airlines) about the breach of equal pay between males and females (which was compatible in domestic regulations but against the EU Treaty), where ECJ ruled that an individual can litigate another individual relying on the EU Treaties (horizontally).[286]

Yet, in most instances, the principals laid down in second level legislation, under Directives, which are to be applied by Member States under a certain deadline, in whichever way they would like to. In other words, the Third Gas Directive, which provides the major principal that the member countries shall be transposed within their national-domestic legislation by each member. So in Directives, the damages of individuals can be reflected against state (or public bodies) under the principal of vertical direct effect. However, the disputes between the individuals are expected to be handled via domestic legislation since the issues in the Directives are expected to be transposed within the domestic law thus the damages can be demanded between individuals according to national legislation.

This being the case, ECJ has developed innovative precedents, to increase the liability of states, to a *risk liability,* even for individual v. individual disputes to ensure the state taking relevant measures to provide relevant protection for the citizens. For example, in *Foster v British Gas* (1990)[287], ECJ claimed that irrespective from its legal form, the liability of a public service under the control of the State shall lead to the liability of State:*"…a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State*

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[284] EJC Ruling *"[It] contains a clear and unconditional prohibition which is not a positive but a negative obligation. This obligation, moreover, is not qualified by any reservation on the part of states which would make its implementation conditional upon a positive legislative measure enacted under national law. The very nature of this prohibition makes it ideally adapted to produce direct effects in the legal relationship between MS and their subjects...[EU] law not only imposes obligations on individuals but it is also intended to confer on them rights which national courts must protect. "* https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61962CJ0026:EN:PDF

[285] Case 43/75 DEFRENNE v SABENA [1976] ECR 455.

[286] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61975CJ0043 . See also Case 93/71 Leonesio v Italian Ministry of Agriculture and Forestry [1972] ECR 287 for the direct effect applicability on Regulations, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61971CJ0093.

[287] C-188/89 Foster v British Gas [1990] ECR I-3313, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A61989CJ0188

and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals is included in any event among the bodies against which the provisions of a directive capable of having direct effect may be relied on."[288] The case is indicative to regard a public service under a Directive, leading to liability of state, even if the party leads to damage is not a public body.

This precedent has later extended to the areas where the two parties were individuals and the relation between them was not per se a public service; yet under the control of the state. This principle called "state liability" to keep State liable for the damages that cannot be compensated from the damaging party. For example in *Francovich v Italy* (1991)[289], according to Directive 80/987, each member states had to establish a Fund (until a specific deadline) in which employees could recover their wages in cases of their private employer becomes insolvent. Italy failed to establish the so-called Fund until deadline, and certain employees could not receive their benefits from the employer since it went to bankrupt. ECJ held that Italy state was liable against the workers since it did not establish the funds, the state has to meet the damages of the workers: **"***It must be held that the full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain compensation when their rights are infringed by a breach of Community law for which a Member State can be held responsibl*e."[290] This is an objective liability of the State and three essential conditions have to be met in order for "State Liability" to arise: a) The conferral upon an individual of specific rights, b) the content of which must be identifiable under the directive, c) a causal link between the State's breach and the damage suffered to the individual.[291]

As a conclusion, in principle, the issues pertaining to public service or SGEI any Directives, if not properly transposed in the domestic legislation, can lead to the ruling of ECJ and making the State liable, especially the member state fails to take measures for the well-functioning of the Directive. Since Turkey is not a full member of the EU, this principle

[288] Ibid.
[289] C-6 & 9/90 Francovich v Italy [1991] ECR I-5357, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61990CJ0006
[290] Ibid.
[291] See also C-46/93 Brasserie du Pecheur v Germany and C-48/93 R v Secretary of State for Transport ex parte Factortame (No.3) [1996] ECR I-1029, and R v Secretary of State for Transport, ex parte Factortame Ltd (No.5) [1998] 1 CMLR 1353, as for other case examples of the establishment of "State Liability" principle by the ECJ.

is not fully applicable to Turkish case, yet it shed light as providing a valid comparison to Turkish practice of state liability.

3.3.3. Specific Liability of State under Turkish Natural Gas Market

The above discussions provide a general framework of liability, especially pertaining to the physical network of natural gas market. Yet, the natural gas legislation and relevant legislation provides a series of liability[292]; firstly to EMRA, as the regulator of the market, and secondly to the service providers in the market. These liabilities may not be as concrete as the ones in public works, and may be related with "*service fault*", if the proper service is poor realized or not realized at all. For example, a consumer having an expensive bill than normal price does not fall into the category of *objective liability*, but most properly into "*service fault*". So, in this part, the main focus will be on distinguishing specific liabilities mentioned within the scope of relevant legislation. If appropriate, a discussion on the nature of the liability, whether being "service fault" and thus being subjective liability or being objective liability will be tried to be evaluated. But this is a secondary concern.

The first articles of the LNGM lay the major state liabilities concerning the Natural Gas Market[293].The Turkish original version is more expressive, yet, the wording indicates below liabilities:

- To establish a financially sound, stable and transparent natural gas market
- To ensure supply of natural gas to consumers in a good quality, sustainable, low-cost way;
- To ensure regulation and supervision of the market
- To protect environment
- To ensure competition in the market

The wording, in the light of details of the LNGM provision, also implicitly refers below liabilities:

- To carry out relevant public services, (related with establishing natural gas market)

[292] These can be termed as obligations or responsibility, yet as discussed before, in order to stick with a proper terminology, the term "liability" is to cover all obligations and responsibilities based on domestic legislation.

[293] ***"Objective***

Article 1.– *The objective of this Law is to establish a financially sound, stable and transparent natural gas market through liberalization in order to ensure the supply of natural gas to consumers in a good quality, sustainable, low cost, competitive and environment-friendly manner and to ensure an independent regulation and audit in the market."*

- To establish public interest (related with establishing natural gas market)
- To ensure third party access to network (related with to ensure competion)
- To protect consumer (related with to supply of natural gas to consumers in a good quality, sustainable, low-cost way);
- To ensure unbundling (related with to ensure competion)
- To realize strategic storage (related with to ensure supply of natural gas)
- To secure supply security (related with to ensure supply of natural gas)
- To ensure reliable construction of public works

According to Article 2 of LNGM, these liabilities are for all legal and real persons taking place in the natural gas market. We will try to delve into each of them.

3.3.3.1. The Liability of Carrying Out Public Services Pertaining to Natural Gas

In Chapter 1, a detailed discussion is evaluated on the Public Service nature of natural gas market services. To recall, both domestic legislation and the EU legislation foresees certain services of the natural gas market as the *Services of General Economic Interest (SGEI)* that the state/administration has obligation/liability to render for the purpose of ensuring public interest. And as a result of in depth analysis on the services within the natural gas market in Chapter 1.4, four services in the market are considered to contain public service of SGEI character, namely *production, transmission, distribution and storage*. That is to say in widest sense the administration, in brief sense EMRA, has liability of carrying out these four services of natural gas market either by itself or via other legal persons.

3.3.3.2. The Liability of Ensuring Consumer Protection

The basic liability is the supply of the natural gas to end users. This liability falls both on the shoulders of transmission operator and the distributors. In addition, compatible with the EU energy directives, to ensure consumer protection, the supply shall be sustainable, low-cost and in good quality.[294] In LNGM, the consumers are classified into two: eligible customer (*serbest tüketici*), non-eligible customer (*serbet olmayan tüketici*) where the only first type is eligible to select its own the supplier-distributer. These are corporate clients. The regular in house subscribers are non-eligible customers who cannot

[294] IŞIKSUNGUR, 2010, p. 214.

choose a distributor but to stick with the local natural gas distributer monopoly. They are more appropriate in representing the regular customer. The issues pertaining to consumers are also handled in the Natural Gas Customer Relations Regulation.

To ensure sustainable supply, the transmission operator is obligated to arrange all technical infrastructure in an efficient and with the least cost.[295] The wholesalers are obliged to provide natural gas supply to the eligible customers within the described limits and they shall take relevant measure for storing the compulsory storage quantities in a way to secure sustainable supply.[296]

Customers have right to receive natural gas from the local distributor and the distributor has liability to provide transparent, equal and neutral service to the customers and also has liability to inform customers about the usage and safety issues.[297] In principle, the distributers are liable to provide connection for customers (within the improved land (*imarlı alan*) of the municipalities)[298], yet this liability can be pardoned due to capability concerns and absence of the adequate measures taken by the consumer in question, only with the permission of EMRA.[299] The price charges of the distributers are strictly controlled by

[295] LNGM Art. 4 (4) (c) (5) "*5) İletim şirketleri, doğal gazın akışı ve sistemin işlemesi için gerekli ayarlama ve diğer her türlü hizmetlerin yerine getirilmesi hususunda kendilerinin sahip olduğu kısımdan sorumludur. Ayrıca, iletim şirketleri kendi sorumlu olduğu hatlarda, gaz iletiminin güvenli bir biçimde, verimli ve en az maliyet ile gerçekleştirilmesine yönelik her türlü tedbiri almaya ve bu Kanunda öngörülen diğer hususları yerine getirmeye mecburdur.*"

[296] LNGM Art. 4 (4) (e) (2) and (3) : "*2) Serbest tüketicilere toptan gaz satışı yapan tüzel kişiler, bu Kanunun yürürlüğe girmesini müteakip müşterilerine mevsimlik, günlük ve saatlik esneklik limitleri dahilinde gaz girişini sağlamak mecburiyetindedir. Toptan satıcıların gerekli arz ve depolama kapasitelerine ulaşması zorunlu olup, ayrıca lisansın verildiği tarihten itibaren beş yıllık bir süre içinde gerekli depolama tedbirlerini almak zorundadır. Bu amaçla depolama şirketleri ile yapacakları kira sözleşmelerini Kuruma ibraz ederler. Bu süre, ülkedeki depolama tesislerinin yeterli düzeye ulaşmaması halinde uzatılabilir.* 3*) Doğal gaz toptan satışı yapan tüzel kişiler, Kurum tarafından öngörülen süre içerisinde beklenen talebi karşılayabilecek iletim, depolama ve sistemi dengeleyici kapasiteleri sağlamak zorundadır*."

[297] Natural Gas Custormer Regulation, Art.55.

[298] LNGM Art. 4 (4) (g) (5): "5) *Doğal gaz dağıtım şirketleri, lisanslarında belirtilen dağıtım bölgesi kapsamında doğal gaz dağıtım faaliyeti yapmakla yetkili olup, dağıtım bölgesi kapsamında bulunan şehirlerin imarlı alanlar bütününde dağıtım faaliyeti yapmakla yükümlüdür."*

[299] LNGM Art. 4 (4) (g) (2) and (3): "2) *Dağıtım şirketleri sorumluluk alanlarında bulunan tüketicilerin talep etmesi halinde, bu tüketicileri sisteme bağlamakla yükümlüdür. Ancak bağlantı yapma yükümlülüğü, şirketin tasarrufu altındaki sistemin bağlantı yapmaya imkan veren kapasitede olmasına ve tüketicinin de kendi üzerine düşen ve dağıtım yönetmeliğinde öngörülen işlemleri yapmasına ve belirleyeceği usul ve esaslara göre, bağlantının teknik ve ekonomik olarak gerçekleşmesinin mümkün olmasına bağlıdır. Bu konuda ihtilaf olması halinde bağlantının teknik ve ekonomik olup olmadığına Kurul karar verir.*
3) Bağlama talebi reddedilen kullanıcı durumu Kuruma bildirir. Kurul dağıtım şirketinin konu hakkındaki savunmasını aldıktan sonra, bu maddede belirtilen esasların ihlal edildiğinin tespit edilmesi halinde, şirket Kurulun konu hakkında vereceği karara uymak zorundadır." See also Natural Gas Custormer Regulation, Art.36.

EMRA and they can charge in accordance with tariff schedule approved by EMRA.[300] The distributors are also obligated to establish functioning customer complaints centres and return complaints as fast as possible. In any case, consumers have right to apply to EMRA for any unresolved issues about natural gas service and payments.[301]

It can be claimed that the relevant natural gas legislation provider general principles for the consumer protection but does not bear detailed provisions on the protection of the consumer and non-eligible consumers are not designed as active players in the market. For example, the issues pertaining to defect good (*ayıplı mal*) are not mentioned at all. Yet, there is not a limitation that the consumers can apply for compensation under the Law on the Protection of Consumers Nr.6502.

3.3.3.3. The Liability of Regulation and Supervision of the Natural Gas Market

In Chapter 1, while discussing the Regulation model for the carrying out public services, we have provided a detailed discussion on the regulation and supervision liability of the relevant public institution in the lights of case law. Referring to those discussions, we can conclude that, despite being private legal players in the market for carrying out certain services, the regulation and supervision liability is an area that cannot be delegated and EMRA is principally liable for the rendering of regulation and supervision.

3.3.3.4. The Liability of Ensuring Competition in the Market

One of the most important liability of the state is to institute an effective competition in the market. There is a special detailed Article (Art.7.)[302] dedicated for this principle in

[300] LNGM Art. 11 (4): "4) *Perakende Satış Tarifesi: Dağıtım şirketleri en ucuz kaynaktan gaz temin ettiklerini, verimli ve güvenli işletmecilik yaptıklarını ispat etmek zorunda olup, lisans süresi içerisinde de bu yükümlülüğe uymak zorundadır. Dağıtım şirketinin birim gaz alım fiyatı, birim hizmet bedeli, amortisman bedelleri ve diğer faktörlerden meydana gelecek olan perakende satış fiyatları ve tarife esasları Kurumca belirlenir. Belirlenen perakende satış fiyatının dışında tüketicilerden herhangi bir ad altında ücret talep edilemez. Perakende satış tarifeleri enflasyon ve diğer hususlar göz önüne alınarak, dağıtım şirketlerinin Kuruma başvurması halinde yeniden tespit edilebilir. Kurum bu fiyatların tespitinde hizmet maliyeti, yatırıma imkân sağlayacak makul ölçüde kârlılık ve piyasada cari olan doğal gaz alış fiyatlarını ve benzeri durumları dikkate alır. Kurulun onayladığı tarifelerin hüküm ve şartları, bu tarifelere tâbi olan tüm gerçek ve tüzel kişileri bağlar*."

[301] LNGM Art. 10.

[302] LNGM Art. 7.: *Rekabetin korunması ve geliştirilmesi, bilgi verme ve hesap ayrışımı*
Madde 7 – a) Rekabetin korunması ve geliştirilmesine ilişkin esaslar aşağıda belirtilmiştir:

the LNGM. The first principle is not let any player receiving more than 20% share of the market. No player can sell more than 20% of the total consumption. There is unbundling principle applied in the design of the market and any player in the market cannot establish another company to function in another service area. At most it can invest with minority share in another legal person functioning in the market other than its own service area.[303] BOTAŞ's situation is an exception, it is given permission to continue without unbundling until 2009 and BOTAŞ was to be organized in accordance with unbundling principle then. Another provision to institute the competition is not to permit distributers buying more than 50% of its supply from a certain supplier. Yet, EMRA has authority to increase and decrease this percentage.[304]

3.3.3.5. The Liability of Ensuring Third Party Access to Network

TPA is seen as the most important element in achieving competition and low-cost in the market. Being a part of liability of ensuring competition, due to its importance, we are discussing it under a separate title. TPA was partly discussed in Chapter 1. The transmission

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1) 7.12.1994 tarihli ve 4054 sayılı Rekabetin Korunması Hakkında Kanunda öngörülen rekabet özgürlüğü, hakim durumun kötüye kullanılmaması, birleşme ve devir almaya ilişkin hususlar, doğal gaz piyasasında faaliyet gösterecek tüzel kişilere de uygulanır.

2) Türkiye'deki üretim şirketleri hariç olmak kaydıyla hiçbir tüzel kişi, Kurumun cari yıla ait olarak belirlediği ulusal doğal gaz tüketim tahmininin yüzde yirmisinden fazlasını satamaz. Bu oran, kayıplar düşüldükten sonra kalan net ulusal tüketim miktarından şirketin doğrudan doğruya veya sermayesinin yarısından fazlası kendisine ait şirketler vasıtasıyla tükettiği gaz miktarı tenzil edilerek bulunur. Bu oranın aşılması halinde Kurum tarafından gerekli önlemler alınır.

3) (Değişik : 9/7/2008-5784/17 md.) Doğal gaz piyasa faaliyeti yapan herhangi bir tüzel kişi, kendi faaliyet alanı dışında faaliyet gösteren tüzel kişilerden sadece birine iştirak edebilir; ancak ayrı bir şirket kuramaz. İştirak ettiği tüzel kişi üzerinde doğrudan veya dolaylı olarak o tüzel kişinin sermayesinin veya ticari mal varlığının yarısından fazlasını veya oy haklarının yarısından fazlasını kullanma hakkına ya da denetim kurulu, yönetim kurulu veya tüzel kişiyi temsile yetkili organların üyelerinin yarıdan fazlasını atama hakkına ya da işlerini idare etme hakkına sahip olamaz. Kendi faaliyet alanında, faaliyet gösteren hiçbir tüzel kişiye iştirak edemez ve şirket kuramaz. BOTAŞ'ın mevcut iştirakleri, uluslararası projeler için kurulacak şirketleri ve gerçekleştireceği iştirakleri için bu madde hükmü uygulanmaz.

(Ek paragraf: 4/6/2016-6719/10 md.) Ancak, belirli şartları sağlayan dağıtım lisansı sahibi tüzel kişilerin teknik ve ekonomik gerekçeleri dikkate alınarak Kurul tarafından uygun bulunması hâlinde kendi faaliyet alanında faaliyet gösteren tüzel kişilerden sadece birine iştirak etmesi mümkündür. İştirake ilişkin şartlar ve uygulamaya ilişkin usul ve esaslar Kurul tarafından hazırlanan yönetmelikle düzenlenir.

[303] Interim Article 2, 5th paragraph: "*Bu Kanun hükümlerine göre, dağıtım faaliyeti hariç, BOTAŞ'ın dikey bütünleşmiş tüzel kişiliği 2009 yılına kadar devam eder. Bu tarihten sonra BOTAŞ yatay bütünleşmiş tüzel kişiliğe uygun olarak yeniden yapılandırılır. Yeniden yapılandırılma sonucu meydana gelecek yeni tüzel kişilerden, sadece gaz alım ve satım sözleşmelerine sahip olan ve ithalat faaliyeti yapacak olan şirket, BOTAŞ'ı temsil eder ve BOTAŞ adı ile anılır. Yeniden yapılandırılma sonucu ortaya çıkan bu şirketlerden iletim faaliyeti yapan şirket hariç, diğerleri iki yıl içinde özelleştirilir. BOTAŞ'ın iletim, depolama, satış, ithalat faaliyetlerine ilişkin muhasebe ayrışımı, hazırlık dönemi sonundan itibaren oniki ay içerisinde gerçekleştirilir. BOTAŞ'ın Hazine garantili yükümlülükleri saklıdır."*

[304] LNGM Art. 7 (d). "*d) Dağıtım şirketlerinin bir yıl içerisinde dağıtacakları gazın en fazla yüzde ellisini bir tüzel kişiden satın almaları esas olup, Kurul rekabet ortamı oluşmasını dikkate alarak bu miktarı artırmaya veya azaltmaya yetkilidir.*"

operators and old players will be against third party access to the current transmission since they would expect to exploit their monopoly power on the transmission network. EMRA's 2018 Annual Report emphasizes TPA as the most important tool in achieving competition in the market and the relevant EU energy directives are arranged accordingly.[305] Currently BOTAŞ is the only transmission operator owning the whole transmission network. According to LNGM, the transmission operators, namely BOTAŞ, have to connect users to the transmission network within 12 months.[306] Yet this being the rule, there is open door policy for potential rejection of connection to the system. Players can reject the connection of other players with the reasons of not having proper capacity or cannot comply with their liability if they let the other party's connection or potential of huge financial liabilities due to their current contracts.[307] In any case, EMRA will be the final decision maker on the issue.

3.3.3.6. The Liability of Strategic Storage

Turkey is very vulnerable to import of energy resources. Unlike oil, there is more dependency on the natural gas resource countries, which bears a higher supply insecurity in politically problematic times, such was the case in 2015-6 winter, when Turkey had political problems with Russia. So, a certain percentage of total consumption shall be strategically

[305] EPDK, 2018, p.13. Yet EMRA does not mention on how and when this has achieved or will be achieved in Turkish natural gas market.

[306] LNGM Art. 4. (4) (c) (1): "*c) İletim: İletim faaliyetini gerçekleştirecek olan tüzel kişiler, aşağıdaki hususlara uymakla yükümlüdür. 1)İletim şirketleri sistemin uygun olması halinde, Kurum tarafından tespit edilen kriterler çerçevesinde, sisteme bağlanmak isteyen kullanıcıları on iki ay içerisinde en uygun şebekeye bağlamakla yükümlüdür*."

[307] LNGM Art. 8 (b): "*Doğal gaz piyasa faaliyeti yapan tüzel kişiler, sisteme giriş için talepte bulunan diğer tüzel kişiler ve serbest tüketicilerin sisteme giriş taleplerini, ancak yeterli kapasiteye sahip olamama veya bu kişilerin sisteme girişleri halinde yükümlülüklerini yerine getiremeyecekleri veya mevcut sözleşmeleri nedeniyle ciddi mali ve ekonomik tazminatlara mahkûm olabilecekleri durumlarda kabul etmeyebilir.*
Kapasitesizlik veya hizmet yükümlülükleri veya mevcut sözleşmeler nedeniyle, meydana gelen ciddi ekonomik güçlükler yüzünden sisteme giriş talebinin reddedilmesi halinde, durum gerekçeleriyle birlikte derhal Kuruma bildirilir.
Kurul, kapasite veya bağlantı yokluğu veya başka bir engel olup olmadığını, bu Kanun ve çıkarılacak yönetmeliklerde belirtilen kriterlere göre araştırarak üç ay içerisinde kararını taraflara bildirir.
Sisteme giriş talep eden kullanıcının kapasite veya bağlantı yokluğu durumunu bertaraf etmek amacıyla gerekli masrafları yüklenmesi halinde sisteme giriş reddedilemez.
Piyasada faaliyet gösteren tüzel kişilerin mevcut sözleşmelerinde yer alan hükümlerden kaynaklanan ciddi ekonomik ve mali güçlükler nedeniyle sisteme girişin reddedilmesi halinde, iletim şirketi imzaladığı sözleşme nedeniyle, zor durumda kalan diğer tüzel kişinin Kuruma başvurması üzerine, Kuruldan sisteme giriş mecburiyetini geçici olarak kaldırmasını talep edebilir ve gerekli bilgilerle birlikte sorunun çözümü için planladığı önlemleri Kurula sunar. Kurul, iki ay içinde talep konusunda yapılacak işlem hakkında karar verir. Ancak, sisteme giriş mecburiyetinin geçici olarak kaldırılması talebinin Kurul tarafından reddedilmesi halinde, iletim şirketi talepte bulunan gerçek ve tüzel kişiyi sisteme bağlamaya mecburdur.

stored. The players of natural gas supply such as importers, exporters and wholesaler are expected to store a certain compulsory amount.[308]

3.3.3.7. The Liability of Protecting the Environment

Environment is an area specifically regulated and those regulations cross-cut all other regulations. It is also an area strictly regulated in international law which mostly transposed to the domestic legislation. As discussed before, Environment Law Nr 2872 dated 09/08/1983 and Protection of Seas against Oil Pollution Law Nr.5312 dated 03/03/2005 has certain provisions on establishing risk liability for damages arising environmental pollution. These are valid for natural gas market services. Furthermore, İnal provides a detailed list of international Agreements that Turkey is a party, on instituting liabilities to ensure environmental protection.[309]

On top of these, the Object Article 1 of LNGM mentions the protection of environment a goal and thus liability of state. Furthermore, the EMRA Law Nr. 4628 emphasizes the inclusion of renewable energies as well as ensuring public interest in energy production activities, which can be interpreted as in line with liability of environmental protection.[310]

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[308] Dogal Gaz kanunu ilgili madde. *Doğal gaz piyasa faaliyeti yapan tüzel kişiler, sisteme giriş için talepte bulunan diğer tüzel kişiler ve serbest tüketicilerin sisteme giriş taleplerini, ancak yeterli kapasiteye sahip olamama veya bu kişilerin sisteme girişleri halinde yükümlülüklerini yerine getiremeyecekleri veya mevcut sözleşmeleri nedeniyle ciddi mali ve ekonomik tazminatlara mahkûm olabilecekleri durumlarda kabul etmeyebilir.*
Kapasitesizlik veya hizmet yükümlülükleri veya mevcut sözleşmeler nedeniyle, meydana gelen ciddi ekonomik güçlükler yüzünden sisteme giriş talebinin reddedilmesi halinde, durum gerekçeleriyle birlikte derhal Kuruma bildirilir.
Kurul, kapasite veya bağlantı yokluğu veya başka bir engel olup olmadığını, bu Kanun ve çıkarılacak yönetmeliklerde belirtilen kriterlere göre araştırarak üç ay içerisinde kararını taraflara bildirir.
Sisteme giriş talep eden kullanıcının kapasite veya bağlantı yokluğu durumunu bertaraf etmek amacıyla gerekli masrafları yüklenmesi halinde sisteme giriş reddedilemez.
Piyasada faaliyet gösteren tüzel kişilerin mevcut sözleşmelerinde yer alan hükümlerden kaynaklanan ciddi ekonomik ve mali güçlükler nedeniyle sisteme girişin reddedilmesi halinde, iletim şirketi imzaladığı sözleşme nedeniyle, zor durumda kalan diğer tüzel kişinin Kuruma başvurması üzerine, Kuruldan sisteme giriş mecburiyetini geçici olarak kaldırmasını talep edebilir ve gerekli bilgilerle birlikte sorunun çözümü için planladığı önlemleri Kurula sunar. Kurul, iki ay içinde talep konusunda yapılacak işlem hakkında karar verir. Ancak, sisteme giriş mecburiyetinin geçici olarak kaldırılması talebinin Kurul tarafından reddedilmesi halinde, iletim şirketi talepte bulunan gerçek ve tüzel kişiyi sisteme bağlamaya mecburdur."

[309] İNAL, 2017, pp. 16-20.
[310] Art. 5 (4) (p): "*p) Elektrik enerjisi üretiminde çevresel etkiler nedeniyle yenilenebilir enerji kaynaklarının ve yerli enerji kaynaklarının kullanımını özendirmek amacıyla gerekli tedbirleri almak ve bu konuda teşvik uygulamaları için ilgili kurum ve kuruluşlar nezdinde girişimde bulunmak."* Art. 5 (5) (m): "m*) Üretim, iletim ve dağıtım tesislerinin inşası ve işletilmesi sırasında genel olarak kamu yararının, hidrolik kaynakların,*

3.3.3.8. The Liability of Constructing Reliable Public Works

As discussed in general liability in terms of risk liability at the first part of this Section, a great deal of cases are grouped under the damages due to accidents emerged from public Works networks. In this respect, EMRA aims to achieve a quality constructed public networks in natural gas market. So, it foresees a liability for relevant players to work only with certified and capable construction companies for public works investments.[311]

In this chapter, a detailed analysis of the issue of "liability" in Turkish law is investigated. Concerning public services, the liabilities are largely judicially under Administrative Law. The public services pertaining to "natural gas market" have a special place within the case law, indicating definitely "objective liability" of the state irrespective from whether the damaged party being user or third party. This consideration is based upon the dangerous-risky nature of the natural gas network. Under objective liability, whether the liabilities are to be considered part of *risk liability* (Art. 71, TLO) or the liability of owner of building (Art. 69, TLO) is unclear, since risk liability has just recently (in 2012) enters into the Law. The risk liability approach provides more protection to the damaged party and the trend is moving towards risk liability, where the service provider is liable at all terms to compensate the damage.

Risk liability approach does not need the presence a fault or absence of due care by the damaging party. It only needs the presence of a causal link between the damage and the event. The only conditions that can break this casual link is the *force majeure* and *the faulty acts of the damaged party*. Other than the break of causal link, there is not any defence that can eliminate the liability of the state. This does not necessarily mean that in case of damage, the State principally will compensate the damage. As partly seen in the discussion for the direct effect of the EU legislation, as long as the state takes effective measures that the

ekosistemin ve mülkiyet haklarının korunması için diğer kamu kuruluşları ile birlikte hareket ederek kamu yararı ve güvenliğine tehdit teşkil eden veya etme olasılığı bulunan durumları incelemek ve bu durumları ortadan kaldırmak amacıyla, daha önceden bilgi vermek şartıyla bu tesislerde 20/11/1984 tarihli ve 3082 sayılı Kanun hükümleri uyarınca gereken tedbirleri almak."

[311] LNGM Art. 5: "*Yapım ve hizmet faaliyetleri Madde 5 – Doğal gaz piyasasında faaliyet gösterecek ithalatçı şirket, ihracatçı şirket, iletim şirketi , depolama şirketi, dağıtım şirketi, toptan satış şirketi ve serbest tüketiciler, Kurumdan sertifika almış gerçek ve tüzel kişiler ile yapım ve hizmet sözleşmesi imzalayabilir. Doğal gazla ilgili herhangi bir yapım ve hizmet faaliyeti, sertifika sahibi olmayan kişiler tarafından gerçekleştirilemez."*

damage of the individuals are compensated effectively, the state is not principally liable. However, if the individual cannot receive the compensation anyhow, the State becomes liable for the damage, like being joint liable to the damage.

Under current natural gas legislation, eight important special state liabilities concerning the four public service areas are determined. If a damage occurs in these eight areas, it is most likely that state will have a risk liability to compensate. It seems difficult to limit these eight special liabilities that mainly relates with natural gas pipelines, since transmission has been an integral part of them. Yet, ensuring TPA, strategic storage, protecting the environment and Constructing Reliable Public Works seems to be most relevant state liabilities. In the next chapters, the findings for state liabilities from the domestic law will be integrated with the state responsibility coming from international law obligations.

CONCLUSION

In this study, we have tried to present a detailed discussion around the possible state responsibility concerning transit natural gas pipelines as well as their domestic and international law foundations. The conceptual work included an in depth survey on Turkish law for establishing an integrative framework of public service obligations and the state liabilities. One major significance has been the application of these two concepts to the natural gas market services. Similarly, the most relevant international law sources state responsibility of natural gas pipelines, the EU natural gas legislation, the WTO-GATT, the ECT and finally special natural gas pipeline agreements have been investigated.

It will be useful to summarize our findings. The services under natural gas market in Turkey have traditionally been accepted as Public Service by case law. This increased the use of Administrative Law and Administrative Courts as the proper venue for judicial review. The damages stemming from natural gas market have been decided according to the *objective liability* approach where it does not the state being faulty for liability; the presence of a causal link has been regarded enough to establish state liability. The objective liability has certain sub categories and traditionally, state liabilities in natural gas market were regarded mostly as *the liability of owner of building* and *liability due to equity.* With the recent addition of *risk liability* concept (another sub-category of objective liability) in the Turkish Law of Obligations (Art. 71), the Courts increasingly began to use this type of liability to base their decisions. This indicates the trend and *risk liability* approach protects the damaged party the most.

Before 1980s, the natural gas market was dominated by the public sector, so it was easier to accept all natural gas market activities as a blanket public service activity. However, in accordance with the neo-liberalism trend everywhere, Turkey has also started to liberalize its markets. The model for natural gas market has been the Regulation or Authorization model, where the state moved back only regulating and supervising the market, via Regulatory Public Authorities. Turkish Constitution does not impose the public services being carried out by private legal bodies if they are under the strict control of the state. But, now, the market activities and public services activities get mixed, thus traditional blanket policy of accepting all kinds of natural gas market activities as public service activities is no more applicable.

Our detailed analysis on the current legislation and survey on case law indicate that among eight potential areas of services in the natural gas market, only four have public service character: activities those authorized under *production, transmission, storage and distribution.* Damages of individuals under these four areas of activities shall be compensated according to risk liability approach. Risk liability approach does not need the presence a fault or absence of due care by the damaging party. It only needs the presence of a causal link between the damage and the event. The only conditions that can break this causal link is the *force majeure* and *the faulty acts of the damaged party*. There can be joint liability in these areas, the authorization holder and the state (namely EMRA). That means, the individuals try to get remedies from relevant authorization holder first, if that is not possible, the liability of state gets involved.

These constitute the general principles for state liability, but the practical examples of the activities that can lead to state liability are also analysed but together with state responsibility stemming from the international law. In international law, the relevant EU legislation for natural gas has indicated a high level of achieved harmonization of the Turkish natural gas legislation. In this respect, third party access, unbundling, consumer protection, and environment protection emerge as the significant fundamental principles that lead to state liabilities. *Third party access* liability (a state liability stemming from domestic law) seems to be complemented with the *freedom of transit* responsibility (a state responsibility from international law) which is powered by both WTO and ECT. Turkey has just started to increase its transit natural gas pipeline projects network, but in the future, this seems the main area for state responsibility since it has both internal and external dynamics to get involve.

Secondly, unbundling liability (domestic law) seems to comply with the state responsibility of the liabilities of state-owned transmission operators (under ECT and special bilateral Agreements). Until a full unbundling s achieved, Turkish state will bear the liabilities stemming from the activities of BOTAŞ.

Thirdly, protection of environment state responsibility has also both domestic and international sources. Actually, protection of environment, like consumer protection, is not a sector specific area but rather horizontal topic biding all kinds of sectors. Thus, since

natural gas pipelines are prone to environmental hazard, this is also among major state responsibility and there is a bunch of international practice on this matter.

Fourthly, tax exemption, investment incentives and land privileges for the natural gas pipeline projects constitute another major state responsibility area. Normally, the sources for the responsibility mentioned above is IGA-HGA bilateral agreements but since they are adopted in a way to cut the provisions of any domestic Act, they can be claimed to have domestic sources as well. The only claimant in this type of liability could be the project company of the pipeline, yet the liability itself could be enormous. The dispute settlement mechanism of ECT and the commitment to international arbitration rules are complementary to this state responsibility.

Other than these areas, consumer protection, ensuring competition in the market, the responsibility of supervision and regulating the market can also be some other specific liabilities of state, but they have little relevance to the natural gas pipelines.

A thorough analysis for the comparison between the EU and Turkish legislation concerning natural gas markets will indicate the high level of achieved harmonization on fundamental principles. Furthermore, Turkish domestic legislation is more detailed in terms of specifying measures of strategic storage, market share, construction requirements, tariff, distribution system and dispute settlements. This is due to the fact that most of those issues are left to national member state regulations in TGD, an area well beyond the scope of this Thesis.

So, a major claim is that state liabilities concerning natural gas market under domestic legislation is compatible with the EU level legislation. EU level legislation confirms and strengthens the current market design shaped by the domestic legislation. Since an important area, the jurisdiction on cross-border pipelines are not answered on the EU-level legislation, Turkey does not seem to have any other extra state liability-responsibility urged by the EU level legislation which is already not foreseen within the domestic legislation. So, in that regard, potential state responsibility for cross-border pipelines stemming from international law seems to provide the missing link for presenting the full picture of state responsibility.

Overall, as seen in this study, state responsibility of transit natural gas pipeline projects is a large area to research. The future researchers can focus on special liability areas described within the thesis such as third party access and freedom of transit.

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English-Turkish Glossary of Legal Terms

administrative contracts (*idari sözleşmeler*)

administrative police (*idari kolluk*)

agency (*vekalet)*

authorization-licensing (*ruhsat*)

Build Operate Transfer-BOT (*Yapi-İşlet- Devret*)

civil courts (*hukuk mahkemeleri*)

civil servant (*memur*)

concession (*imtiyaz*)

concession contract (*imtiyaz sözleşmesi*)

de facto damage vs. being deprived of profit (*yoksun kalınan kar*)

decentralized public institution by service (*Hizmet Bakımından Yerinden Yönetim Kuruluşu*)

defect good (*ayıplı mal*)

eligible customer (*serbest/elverişli tüketici*)

gratuitousness (*bedavalılık/meccanilik*)

integrative nature of the administration (*idarenin bütünlüğü ilkesi*)

joint governance (*müşterek emanet*)

police *(kolluk*)

liability in accordance with equity (*hakkaniyet sorumluluğu*)

liability of due care (*özen sorumluluğu*)

liability of equality before public charges (*fedakarlıkların denkleştirilmesi sorumluluğu*)

liability of owner of building (*yapı malikinin sorumluluğu*)

negative damage (*menfi zarar*)

non-contractual liability (*sözleşme dışı sorumluluk*)

non-eligible customer (*serbet olmayan/elverişsiz tüketici*)

non-pecuniary loss (*manevi zarar*)

objective liability or causality liability (*kusursuz sorumluluk -sebep sorumluluğu*)

physical damage (*maddi zarar*)

positive damage (*müspet zarar*)

primary responsibility of public service (*hizmetin asli sorumlusu*).

Public Economic Enterprises (*Kamu İktisadi Teşebbüsleri)*

public interest *(kamu yararı*)

public works (*bayındırlık eserleri*)

regulation (*regülasyon*)

regulation and supervision (*düzenleme ve denetleme*)

risk liability (*tehlike sorumluluğu*)

service fault (*hizmet kusuru*)

state liability (*idari sorumluluk*)

supervision (*denetim*)

surveillance (*gözetim*)

tax farming/tenancy (*iltizam*)

the "Appropriate Causality Link" theory (*uygun nedensellik bağı*)

the Court of Jurisdictional Conflict (*Uyuşmazlık Mahkemesi*)

the equity and justice (*hakkaniyet-nesafet*)

the law of liability (*sorumluluk hukuku*)

the unexpected situation (*beklenmeyen hal)*

tort (*haksız fiil)*

tort liability or subjective liability (*kusur sorumluluğu*)

Turkish Law of Obligations (*Türk Borçlar Kanunu*)

unjust enrichment (*sebebsiz zenginleşme*)