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Power, Authority and Security: The EU's Russian Gas Dilemma

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Abstract

This paper investigates contestation of authority in EU energy policy, with a focus on natural gas. It argues that the main challenge centers on the EU's goals and means of energy security policy, not the location and scope of authority. The contested choice is between an across-the-board approach to regulation (Regulatory Power)- and a strategy that opens for the use of regulatory tools for geo-political purposes (Market Power). Competing claims of authority and competing views on how the European Commission should wield its regulatory power reflect both geography (North-Western versus (South-)Eastern Europe) and the policy paradigm (market versus geo-politics). The Commission's traditional strategy in energy policy – power-sharing and compromise – only works if there exists consensus on the ultimate purpose of regulation. However, when the contested issue is whether the Commission should use its regulatory power to pursue market integration or geo-political goals, this presents a genuine policy dilemma.

Key words: market power, regulatory power, geo-economy, external energy policy

“In this world, with great power there must also come - - great responsibility”

Spiderman, 1962, Marvel Comics

Introduction

The European Union has considerable power and authority in energy policy. Although the sector features shared competences between the EU and the member states, the EU has limited financial resources, and no control over how member states choose to exploit natural resources, the EU is a prime regulatory force – wielded in no small part by the European Commission. In the 1990s and early 2000s, the Commission directed its regulatory power mainly at building energy markets and improving their workings. The most important policy debates here were about public service provisions and the management of natural resources. However, in the decade following the Russian-Ukrainian gas disputes of 2006 and 2009, security of supply rose to the top of the policy agenda. The central question was not so much *whether* Vladimir Putin’s Russia represented a potential enemy armed with an ‘energy weapon’, as *how* the EU could and should use its regulatory power in pursuit of the goal of ensuring affordable and reliable external gas supplies. Consequently, the core issue is not so much whether the EU *has* the power and authority to use regulatory policy tools, as the *purpose* for which the EU should wield its power.

The central theme that unites the articles in this special issue is how authority is contested in EU energy policy. As the introductory article (PAPER 1) makes clear, authority is a somewhat broader concept than either power or competence. The global governance literature has demonstrated that authority – the ability to make decisions that others accept as legitimate and comply with – is in

constant flux. It is open to contestation; there can be overlaps between competing claims to authority; and authority can be claimed by a variety of actors. In the EU context, this means that even when legal competences are established, authority can be contested. Nevertheless, because the EU political system is ultimately dependent on the member states for enforcement and policy implementation, the three concepts of *power*, *authority* and *competence* are closely linked. If the European Commission's authority is contested, this raises questions about its competence, which in turn are likely to affect its power. Conversely, in the effort to build a single energy market over the last three decades, the Commission increased its competence and authority in parallel. On several occasions, it explicitly refrained from threatening to use its legal power (under competition law) to go beyond what it saw as limits to member state consensus (which conferred authority on the Commission).

Since the Commission embarked on its quest to build a single European energy market in the early 1990s, three main issues have caused debates about the appropriate limits of EU competence, and have been the source of overlapping claims of authority in the energy field. The first is the appropriate balance between member state and European Union competences. The second is the balance between the priorities of competition policy, environmental policy, and security of supply. Both are addressed in other articles in this volume. The focus here is on the third source of contested authority: the strategic dimension of energy policy. Energy is not simply a good like any other. It is a mixed good in that it has some of the characteristics of a private good (it is rival and excludable in consumption) and some of a public good. The stable supply of energy at socially acceptable prices is one aspect of the public goods dimension, and it has strategic implications.

Although the security of supply question is pertinent to all sources of energy, it is most salient with respect to natural gas. Whereas oil markets are global, a substantial part of the natural gas trade in Europe is still conducted in terms of bilateral contracts. Russia is the dominant supplier for many states, and the appropriate role of ‘red gas’ (Högselius 2012) is very much contested. With the Russian annexation of the Crimea in 2014, the external dimension of EU energy policy became even more salient, and security of gas supply emerged as a core issue in the strategy for a Energy Union adopted by the Commission in February 2015. It has been argued that the step towards the Energy Union signaled a shift from a priority of market liberalization in the three regulatory ‘energy packages’ of 1998, 2003 and 2009, to security of supply (Andersen, Goldthau, and Sitter 2017b), in addition to tying EU energy policy more firmly back to climate goals. When the Commission proposed a revision of the Gas Directive in November 2017, to ‘clarify’ that the core principles of EU energy legislation apply to gas pipelines to and from third countries up to the EU border (European Commission 2017a), this was in a context where some member states were at odds over whether the planned Nord Stream 2 pipeline from Russia to Germany constituted an energy security risk (Loskot-Strachota 2016), and whether it could or should be blocked. This debate goes to the heart of the problem of EU authority with respect to external gas trade. It is not so much about where power or competence should be located, as much as the goals for which power should be exercised. In its simplest form, the question is whether the EU ought to use its regulatory power to address a threat that arises from geopolitics.

The present article explores how the EU Commission has dealt with this question. To this end, we juxtapose the concepts of Regulatory and Market Power in order to delineate a market-liberal from a geo-political approach to regulation. This allows tracing the Commission’s deliberate move from focusing on advancing gas market integration to becoming an actor in the realm of EU external

security policy by at the same time unveiling the underlying contestations. With this, the present article zooms in on what (Surrallés, Solorino and Fairbass 2020) call conflicts of authority on the horizontal dimension, which arise from a recalibration in the principal paradigm underpinning EU policy making in natural gas. At its core, the EU's regulatory power rests on the market-liberal model. Using regulation to address issues other than those concerned with the design and functioning of commodity or other markets – such as geopolitics – not only crosses the line to market power. It also inevitably creates tensions. As the present article argues, the Commission as the contending actor adopted a legal strategy to sanction its advance into new policy territory. On one hand, this strategy addresses sovereignty-based contestation, as it amends the Commission's authority. On the other, it also addresses substance-based contestation, as it positively sanctions a geopolitical interpretation of the EU regulatory toolbox.

This article is divided into four parts. The first assesses the Commission's competences and authority with respect to the EU's external gas trade. It shows that the gas market liberalization which got underway in the late 1990s has resulted in a policy regime with some overlapping competences, which the Commission to a large extent managed through power-sharing. The second section turns to how authority has been contested in the gas sector, using the Nord Stream 2 debate as a case. Here, the Commission has considerable power, but its authority is dependent on its legitimate – or responsible (in the eyes of the beholders) – exercise of this power. The third part turns to the Commission's options in the face of open contestation between liberally and geopolitically oriented member states. It shows that when it comes to dealing with security of external gas supply, the choice between market-oriented and strategic use of regulation is a genuine policy dilemma. The fourth section turns to analyzing how the Commission has used regulation to try to avoid or circumvent this dilemma, and tried to strike a balance between a regulatory power

strategy and a market power strategy. Finally, the conclusion reflects on the theoretical implications of the findings. It also puts forward the more normative argument that in the choice between regulatory power and market power, only the former is compatible with the EU's long-standing grand strategy.

Power, authority and consensual decision making in EU gas market policy

Like many other EU policy sectors, the allocation of power, authority, and policy making in the energy sector is the outcome of a gradual process that has involved both hard bargains between the member states and a gradual extension of the Commission's formal competence. What makes energy policy – and natural gas policy in particular – somewhat exceptional is that it also involves compromises between three very different policy goals: free trade, sustainability, and security of supply. The EU member states have long been divided as to the nature and importance of the three issues, and these divisions sometimes cut across each other. For example, both the UK and the Nordic states have been more market-oriented since the early 1990s, but with the latter also taking a more assertive stance on the environment dimensions of energy policy (Lieverink and Andersen 1998). Likewise, both Poland and Hungary are somewhat skeptical toward the free-market dimension of EU energy policy, but they take radically opposite views on whether reliance on Russian gas constitutes a security problem or not (Nosko and Mišík 2017).

When it came to market liberalization, the Commission's strategy in the 1990s and 2000s was shaped by its reluctance to use its formal powers in the face of member state opposition. The Commission had considerable formal powers i) in Robert Dahl's sense of compelling other actors to do something (Dahl 1957); ii) in E. E. Schattschneider (1960) and Peter Bachrach and Morton

Baratz's (1962) sense of setting agendas and establishing what the alternatives are; and even iii) in Steven Lukes' (1974) sense of influencing what other actors want. But the Commission's authority – in the Weberian sense of the commands of one actor being accepted as binding by the recipient (Spencer 1970) – depended very much on its actions being seen as legitimate in what Weber (1922) called a legal-rational sense (1922). Indeed, the Commission's quest to maintain and enhance its long-term authority in the energy sector caused it to promote compromise arrangements for the first energy packages that were the subject of open debate between the energy and competition Commissioners (Andersen and Sitter 2006). Consequently, the Commission won acceptance for the principle of market liberalization at the cost of exemptions and derogations that allowed the more skeptical member states to claim that they kept liberalization at bay in practice. Over the next decade the Commission persuaded the member states to adopt follow-up legislative packages that pushed market liberalization in the gas sector forward, at the same time as the boundary between national and EU competence was elaborated more clearly in the 2007 Lisbon Treaty.

The Lisbon Treaty reflects the fact that national governments have traditionally regarded the management of natural resources and policy decisions about the use of energy resources as strategic for national welfare and/or economic development. These preferences were hardwired into the Treaty by way of Art. 194 (2), which states that: “[EU level energy] 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)” (European Communities 2007). Indeed, Art. 192(2) states that environment policy decisions shall be subject to unanimity requirements in the Council of Ministers in the case of “measures significantly affecting a Member State's choice between

different energy sources and the general structure of its energy supply.” Even though directives on renewable energy have been adopted under majority voting procedures, article 192 and 194 thus explicitly protect the member states’ rights to choose their own energy mix.¹

On the other hand, as gas markets were liberalized after 1998, energy firms and utilities were subject to ordinary EU competition law as well as the specific rules laid down in the three energy packages of 1998, 2003 and 2009 (European Parliament and the Council 1998; European Parliament and the Council 2003; European Parliament and the Council 2009). Combined, these directives established third party access (TPA) to pipelines, legal and ownership unbundling of distributing and transmissions activities, and set up the independent Agency for the Cooperation of Energy Regulators (ACER). From the Commission’s perspective, this was a triumph of the idea of a liberal internal market, even if the road there was not completely smooth. Conceptually, internal EU energy policy therefore mirrors, above all, the regulatory state model for governance (Lodge 2008; Majone 1994). It is concerned primarily with ‘creating markets and making them work’ (Goldthau and Sitter 2014; Goldthau and Sitter 2015a). Even though environmental policy emerged as a very important policy area and directly affects energy markets, the main principle remains liberal. Likewise, the Security of Supply Regulation (European Parliament and the Council 2010) was primarily a directive that supplemented the market-based approach, and hardly signaled a change of policy or direction. The 2015 Energy Union strengthened the focus on sustainable development and security of supply (as well as research, innovation and competitiveness), but it does not change either the formal competences of the EU and its member states or the practice (Andersen, Goldthau, and Sitter 2017a; Szulecki et al. 2016).

¹ For the potential of shale gas as a domestically available energy resource particularly in Eastern Europe see Goldthau 2018.

The empirical question is whether these patterns of mixed authority caused serious problems in terms of contested authority, sovereignty or efficient policy-making. Until recently, the overall answer was negative. From the early years of the European Economic Community until the mid-1990s, the member states effectively kept control of their energy sectors largely by keeping areas such as gas and electricity outside the scope of EU competences, and resisted efforts by the European Commission to change this. Since 1998, the member states have maintained considerable influence of their gas sector through national regulation and ownership, and by ensuring that EU-level decision-making is consensual. As gas market liberalization proceeded, the European Commission and the member states elaborated new mechanisms for maintaining consensus and sharing power. Key mechanisms for managing member state heterogeneity in the gas sector include temporary derogations, delegation of power to independent agencies (which operate consensually), a degree of national control over implementation (including state ownership of energy companies), and even the Commission adopting a pragmatic stance towards accommodating member state preferences (Andersen and Sitter 2014).

This kind of power-sharing is sometimes discussed as a consequence of or feature of liberal intergovernmentalism (Moravcsik 1993) or new intergovernmentalism (Puetter 2014), but conceptually it owes more to the debates about power-sharing in plural democracies (Lijphart 1977). Consensual decision-making was essential to produce outcomes that the states could accept as legitimate, and were thus needed to establish the Commission's *authority* in the sector. Two decades later this logic still held: the delegation of power to ACER involved a Board of Regulators consisting of senior representatives of the member states' National Regulatory Authorities. As consequence, and although both new legislative proposals and individual regulatory decisions keep

on being contested in terms of content, there has been little contestation in terms of rival claims to sovereignty or authority.

Contesting EU authority in the gas sector

To be sure, EU gas market integration was not a linear process. For a variety of reasons, many member states failed to fully implement the various energy packages. But as the Commission's 2014 review of the EU's 'Progress towards completing the Internal Energy Market' (European Commission 2014) showed, most of these problems owed to difficulties with coordination and the need to elaborate new technical standards. As in any other EU sector there is a regular supply of infringement cases, but few involve any kind of dispute about the scope of the Commission's authority. Similarly, the Commission's 2016 report on the compliance of bilateral Intergovernmental Agreements (IGAs) between EU member states and non-EU energy suppliers (European Commission 2016) demonstrated a clear lack of member state action. However, the problem was not related to the legitimacy of the Commission evaluating IGAs (which is what the Commission had been asked to do as per a 2012 Decision in order to inject more transparency into the market (European Parliament and Council of the European Union 2012)); but rather to legal difficulties arising from the ex-post nature of the compliance check.

The main challenge to power-sharing as a mechanism for securing legitimacy and enhancing authority has come with the increased salience of *energy security*. This is not so much a question of where formal and informal power lies, as of the goal for which power is exercised in the first place. This issue is rooted in a deeper division between states that take a liberal approach to gas markets and those that see gas primarily through a geopolitics lens. Since the turn of the

millennium, a political cleavage has developed between the liberal EU and European Economic Area states that view gas mainly as a private good with some of the ordinary public goods characteristics of a network industry, and those that see gas as an important strategic good and fear that Russia might deploy the ‘energy weapon’. For the former, energy remains a matter of low politics (though the security argument may occasionally help pushing the cause of market integration (Herranz-Surrallés 2015)). The latter view it as a question related to high politics (Andersen, Goldthau, and Sitter 2017b) and securitization (Boersma and Goldthau 2017; Judge and Maltby 2017; Natorski and Herranz-Surrallés 2008). Judging by their official public position on core energy policy priorities, the most prominent and vocal members of the first group include Germany, the Netherlands, the UK, the Czech Republic and Norway; the second is led by Poland and the three Baltic states. The disputes over the desirability of the North Stream 2 gas pipeline from Russia to Germany through the Baltic Sea and how best to deal with this issue by and large reflected this cleavage (see Table 1).

[Table 1 about here]

The issue at hand has three dimensions, which add up to a cleavage between liberal and geopolitically oriented states. The first dimension concerns the nature of the Russian threat to the EU (and EEA), and the role energy plays in this. The main difference between the two groups of states is that the more liberally oriented acknowledge the Russian threat, but do not see this as necessarily having a major gas dimension. The second dimension concerns what should be the main concern for EU energy policy: security or growth. Here the liberal states separate energy from security policy, while the more geopolitically oriented ones see these two issues as inseparable. Consequently, the third dimension of the energy security issue becomes contestation

over how the EU (and its member states) should use the regulatory tools at their disposal. The next section turns to the strategies available to the EU for dealing with this question of how and for what purpose its regulatory authority should be used in the gas sector.

Managing contested authority in the gas sector: the European Commission's policy options

In the gas sector, the EU has the tools to manage diffuse authority as far as the internal dimension of energy policy is concerned. It does so by power-sharing between the member states and the EU level, using various ways of delegating power to specialized agencies, embracing modes of private regulation (see PAPER 4), or even experimentalist governance (Eberlein 2010). During the 1990s and early 2000s, in the processes leading up to the first and second energy packages, a certain degree of 'fuzziness' (Andersen and Sitter 2009) about the goals was both possible and desirable. Both the enthusiastic liberalizers (e.g. the UK and the Netherlands) and the more skeptical ones (e.g. France and Belgium) could present the compromise solutions and gradualist approach to liberalization as a political victory. Compromise might limit the extent of reform at any given date, but left the road open for more reform later. In the 1990s the Commission's principled push for energy liberalization (driven by a series of its Competition Commissioners) was tempered by a pragmatic approach to gas markets (advocated by Energy Commissioners) designed to avoid abrupt change. In the 2000s, this pragmatic liberalization continued. Power-sharing is not much good until everyone agrees what this power is used for, but in the case of the extension the Single European Market to the gas sector the Commission managed to secure agreement on the overall goals in return for compromise on the practicalities of liberalization. But when it comes to the external dimension of energy policy, there is no such consensus.

The starting point for a discussion of the Commission's options for dealing with contestation over the security dimension of its gas policy is that (unlike gas liberalization) this is no longer the kind of problem related to competing sovereignty claims or diffuse authority that can be prevented by managing the transition from less to more EU authority. As long as Russia was seen as a reliable energy supplier, the security dimension of the EU's gas trade with its big neighbour had low salience. However, this began to change with the Russian-Ukrainian gas disputes of 2006 and 2009, both of which affected gas supply in south-eastern EU member states. In 2014 the Crimea crisis increased the salience of this issue dramatically, and the downing of Flight MH17 over Ukraine on 17 July 2014, made the question of how the EU should react acute (193 of the 298 casualties were Dutch nationals). Reports of Russian interference in the US elections and the Brexit referendum of 2016 hardly reduced concerns about a resurgent Russian imperialism. In addition, both the EU and NATO suffered internal stress, the former linked to the populist challenges to the rule of law in countries like Hungary and Poland, and the latter when the new US president questioned his commitment to collective defense. In this deteriorating geopolitical context, gas trade was just one of many dimensions of EU security that rose to the top of the political agenda. It could no longer be managed by downplaying or fudging the issue.

If the EU's problems related to competing claims about how authority ought to be used in the gas sector cannot be prevented, can they be managed? Conceptually, there is a fundamental difference between management by compromise and power-sharing on one hand, and management by way of stark choices on the other. In the gas market liberalization process, power-sharing went hand in hand with delays, compromise and de-politicization. But when it comes to the security dimension of gas, power-sharing and de-politicization does not offer viable routes out because it is the politicization of gas trade that is the root of the problem. The challenge for the Commission lies in

how to *wield* power. This gets us to an important conceptual aspect of the EU energy security conundrum: how the different claims of authority loop back to the way EU authorities use the power at their disposal, the purpose of wielding this power, and the paradigm underpinning it. In policy terms, this is a straightforward dilemma: the Commission can either use its regulatory authority for a wider set of political ends, or it can limit it rather narrowly to making the EU gas market work better. As far as the external dimension of gas regulation is concerned, managing problems of authority means choosing one strategy or another.

[Figure 1 about here]

As discussed in more detail elsewhere (Goldthau and Sitter 2018), there are four ways the EU can wield external power in energy affairs: 1) classic *neutral power of regulation* (to build markets and manage them), 2) *regulatory power* entailing a bias toward consumer (shifting the balance between exporters and importers, for EU consumer benefit), 3) *market power* (featuring a selective use of regulation, notably for political purposes), and 4) hard *economic power* (making energy – which in many ways can be conceptualized as low politics – subject to high politics rationales). All four types of wielding power lie on a continuum from a liberal approach to a geopolitical approach. (see Figure 1).

At the EU-level, strategies based on the models on both ends of the spectrum have proven difficult. The fully liberal approach relies on a broad agreement on the desirability of international rules-based governance, which is in short supply beyond the EU's borders. The hard economic power model, on the other hand, is applicable in very limited circumstances only (such as the Iran sanctions), as it rests on a common foreign and security policy and the collective action of EU

member states. By contrast, the EU has proven very successful when it comes to building an internal energy market and regulating its functioning. Given its size, it has also become evident that there exists a strategic and indeed external dimension of EU gas market regulation. Unsurprisingly, therefore, it is around the deep contestations about the nature of the Russian threat, what the EU is ultimately for (security or growth), and how the Commission should use its (limited but elaborate) regulatory state toolbox, that the two models of regulatory versus market power have clashed. This is what we turn to next.

Confronting the security of supply policy dilemma: Regulatory Power or Market Power?

EU member states that subscribe to a liberal model and a pro-growth agenda tend to advocate the *regulatory power* approach when it comes to addressing security of supply concerns. This is notwithstanding their stance toward Russia. As Table 1 suggests, member states that fall into the ‘liberal’ camp tend to have a strong view on the Kremlin’s geopolitics, including the Netherlands or Sweden. Still, their preferred approach to dealing with Gazprom, the state-owned gas monopolist, and Russian gas more generally, is one based on Single Market rules. From a regulatory power perspective, Gazprom becomes subject to the entire body of EU energy regulation the moment the company’s energy services enter the SEM: Gazprom will be forced to comply with the EU’s (unilaterally set) rules, as any other company serving EU customers. In other words, the way the Russian gas exporter would be treated is as a dominant market player – not as Moscow’s foreign policy arm.

In line with the regulatory power model, the Commission – the EU’s chief market authority – enforced the end of destination clauses in gas contracts, battled against long-term take-or-pay

agreements and launched a competition policy case against Gazprom for abuse of its dominant position in gas pricing (Goldthau and Sitter 2015a). Arguably, the Commission acted in an increasingly assertive manner, determined to use its powers to the fullest. The decisive element here, however, lay in the fact that the Commission would target *any* company that sold gas to the EU, whether from the EEA or Russia, and in the case of long-term contract LNG even from Nigeria (Talus 2011). Put differently, when exercising regulatory power, even when ‘playing tough’, the EU still by and large applied energy regulation in a neutral way, across the board toward all (external) actors it deemed to be possibly violating EU rules. The sole regulatory bias consisted in favoring (domestic) consumer interests over (foreign) producer interests. It was not so much the ‘nationality’ of each foreign suppliers that made the difference, as their character and behavior.

Arguably, the Commission acted in line with the regulatory power model because it is a ‘liberal animal’ by design (Goldthau and Sitter 2015a). But it also did so because some other, arguably more strategic, elements that had found their way into EU regulation ensured the continued support of more geopolitically-minded member states. For instance, the 2009 Third Energy Package introduced the much-debated ‘Gazprom clause’ (Cottier, Matteotti-Berkutova, and Nartova 2010) – a thinly veiled attempt to prevent specifically Russia’s state company from acquiring EU gas transmission systems. What had been the result of a consensual ‘fudge’ to install the Third Energy Package effectively opened the door for adding a second bias to EU regulation: a deliberately targeted or selective use thereof, crossing the line to a market power approach.

The most prominent case in this regard is the Nord Stream 2 pipeline, the 55 bcm offshore link between Russia and Germany across the Baltic Sea. Nord Stream 2, owned and built by Gazprom, will double the capacity of the existing Nord Stream link, thus possibly cementing Russia’s

dominant position in the European gas market, and put in question future transit of Russian gas through Ukraine. The project is politically contested, not the least against the backdrop of Russian gas supplies being subject of long-standing East European fears of import dependency, but it also owes much to Russia's annexation of Crimea in 2014 (for a detailed discussion see PAPER 8). The strategy of the Commission, an early critic of additional pipelines bringing Russian gas into the EU, has been to make Nord Stream 2 subject to the Third Energy Package and therefore to TPA provisions, which the Gazprom-led infrastructure project would find hard to comply with.

This process saw several twists and turns. As applying existing TEP regulations to offshore pipelines proved legally not waterproof, the Commission in late 2017 suggested amending the 2009 Gas Directive and extending it to gas pipelines to and from third countries (European Commission 2017b). The proposed revision envisaged derogations for existing pipelines and exemptions for planned projects. A flanking Memo issued by the Commission, however, detailed that among the two planned upstream pipelines affected by the proposed revision, only Nord Stream 2 would need to fully comply, as the Trans-Adriatic Pipeline (TAP) connecting Greece's Turkish border with Italy was granted an exemption (European Commission 2017c). After a year-long tug-of-war between proponents and opponents of the Commission proposal, the Council and the European Parliament in February 2019 agreed on a compromise de facto extending EU TEP provisions to offshore pipelines, but ensuring legal oversight remained with the Member State in whose territorial sea "the first interconnection point with the Member States' network is located" (Council 2019). The Commission will retain the role of vetting the legal decisions of that very member state, including ruling on exemptions from TEP rules that said member state (Germany in the case of Nord Stream 2) might ask for. The Gazprom-owned Nord Stream 2 company responded by exploring options for corporate restructuring to circumvent or limit Commission oversight,

including establishing a separate company to manage the part of the pipeline that would run through German territorial waters (FT 2019). The Gas Directive Amendment was adopted on 15 April 2019.

It is fair to argue that the rationale underpinning the legal debate in the EU was to stop the project on grounds of not being compatible with EU energy laws, rather than to ensure its lawful operation. This entails a distinct element of selective, rather than equal, treatment, in which regulation as applied singles out individual targets rather than applying across the board. The stated objective of such a market power approach is to prevent the project in favor of a politically preferred supply route – across Ukraine – and to strengthen the Strategic Partnership on energy with Kyiv (European Commission 2015). More generally, it reflects a broader, geopolitical motivation, in which Russian-sponsored pipeline infrastructure becomes a mere proxy for reacting to Moscow's assertive foreign policy. With this, EU energy regulation is meant to serve national security goals, not necessarily market-related ones. This contrasts with a liberal, regulatory power approach that would seek to maintain competition in the EU downstream gas sector and strengthen market oversight in light of the pipeline's potential impact on market liquidity levels or price structures (for a critical discussion of this aspect see (Kotek, Selei, and Tóth 2017).

The proponents of a market power approach toward European pipeline politics, and particularly to Nord Stream 2, are indeed primarily found in Eastern Europe, thus confirming the split between more market-oriented, liberal EU member states, and the ones concerned primarily with national security as regards their external gas supplies (Lang and Westphal 2017). But it is important to note that the rift runs all the way through Europe. A case in point is German politicians arguing in favor and against Nord Stream 2 across the political spectrum, and resting on opposite views of

Nord Stream 2 being an economic or a political project (Caspary et al. 2018; Weber et al. 2018). In other words, competing claims of authority, and competing views on how EU authorities should wield their power, may to a certain degree reflect both geography and the paradigm typically represented by it (North-Western Europe representing a more market-focused, liberal outlook, Eastern and South-Eastern Europe a more security-focused one). At the same time, the divisive nature of Russia's foreign policy action, particularly in Ukraine, gives rise to deep contestations over the appropriateness of sticking to a regulatory power model, in the face of mounting geopolitical pressure on Europe – contestations which do not necessarily follow geography.

An interesting case in this regard is Denmark. The Danish parliamentary debates about how to deal with Nord Stream 2 resulted in a new law that obliged the foreign minister to consider the security implication of the pipeline project (if it ran through the country's territorial waters), while the environment impact assessment was left to the Danish Energy Agency (Folketingstidende A. 2017). The Nord Stream 2 company responded by exploring alternative routes that ran through the Danish Exclusive Economic Zone but avoided its territorial waters. It submitted a proposal for this in August 2018, over which the Danes procrastinated in the hope that a decision might be taken at the EU-level. With the February 2019 EU compromise and in the light of the new EEZ-only route, the Danish territorial sea issue became less important. On 30 October 2019, the Danish Energy ministry approved the new route as an 'administrative decision' – at considerable costs to the project in terms of both time and money. The delay also meant that the pipeline would be covered by the new above-mentioned EU Gas Directive. The important point here is that Denmark separated security from regulatory aspects, thus eschewing the Market versus Regulatory Power debate.

Conclusion

Great power brings great responsibility. In energy security, the main challenge for the EU in terms of competing claims to sovereignty and authority is about the goals and means of energy policy. For the Commission, authority means legitimacy, and this depends on responsible use of power. As the discussion above suggests, the contestations surrounding external gas policy do not so much center on the Commission's legal competence, as on what 'appropriate use of power' means, i.e. what ends regulation should be used for. This contestation culminated in the debate around Nord Stream 2.

The Nord Stream case 2 speaks to two central elements of the horizontal contestation outlined by Surrallés, Solorino and Fairbass (2020): the sovereignty element, i.e. the formal authority of the Commission to act in the case of an offshore pipeline; and the substance-related element, which essentially is about redefining the purpose of EU regulation inspired by geoeconomics rather than being an exercise of market-liberalism. The interesting finding here is that the Commission obviously used a legal sanctioning strategy for both, to do away with ambiguity in authority and to sanction its foray into external security affairs. This warrants further empirical investigation into the way the legal strategy may be used for substance-related contestations of authority in the European Union, using cases from policy fields other than energy. Moreover, the findings call for further inquiry into the degree to which legal sanctioning fosters (or not) the de-politicization of contested issue areas. The Commission's strategy to have EU member states formally vet its (new) powers in external energy infrastructure regulation arguably represented a deliberate step to further politicize Brussel's prime toolbox, not the opposite. Additional research is therefore needed to

explore whether the de-politicization argument holds only in certain contexts, notably under the conditions of the liberal paradigm.

In addition to the theoretical implications, the discussion in this article raises normative questions and highlights trade-offs entailed in the EU's current trajectory. Overall, three conclusions can be drawn. First, as gas trade is becoming highly (geo-)politicized, this puts an end to fuzziness as the workhorse of EU gas politics. The deep division over how to cope with Russian gas cannot be managed by power-sharing and a measured accommodating of member state preferences. The Commission faces a real policy dilemma: it will be called upon again and again to use regulation to keep in check projects that some governments see as a geopolitical problem. Accommodating these calls would change the nature of the EU's regulatory regime – at least in terms of how regulation is used in practice. In the context of Nord Stream 2, the Commission faces the choice between a regulatory power or a market power strategy. The 2019 amendment opens the door to the Commission openly using regulation in an attempt to halt the pipeline, or linking (the threat of) regulatory action to its effort to broker a Russia-Ukraine gas deal. Such an exercise of market power would politicize regulation, and test the limits of the EU's 'soft power with a hard edge' (Goldthau and Sitter 2015b).

Second, there is a risk that a market power approach to gas regulation undermines the central purpose of regulation – to build and manage a single market for energy and a level playing field, broadly acceptable to all member states. The contestation around the main purpose of EU energy regulation – market creation or geo-economics – goes straight to the heart of a very normative question: the nature of EU as a polity. The EU, like all states, has a grand strategy: it is a liberal actor. Regulatory power, both as a normative concept and as it is practiced, is compatible with this

grand strategy; market power, not so much. Moving toward a market power approach might therefore challenge the EU's grand strategy – which is an important source of its legitimate authority. Ultimately, this involves questions of legitimacy. Member states that favor contested Russian pipeline projects view the role of the EU as limited to ensuring market functioning, and tend to question the legitimacy of EU authorities' interfering in these projects for security reasons. States that oppose these pipelines view the role of EU authorities as going beyond market aspects, and EU energy regulation as a perfectly legitimate means to address geopolitical challenges. Leaving the regulatory power/market power dilemma unresolved might decrease the EU's authority in the eyes of both types of states.

Third, and as a consequence, the EU might be well-advised to address security problems by means of security policy tools, rather than dealing with such challenges through regulation. This means 'properly' securitizing such issues, with the consequence of them becoming subject to the hard security toolbox.² As discussed above, In fact, the Danish government showed a possible way out of the gas security/trade conundrum: instead of using environment rules for preventing the project, they passed a new law allowing for assessment of pipeline projects that cross their national waters on national security grounds. If a similar approach were taken at the EU level, this might come at the cost of the EU not always being able to act. But it would solve a problematic policy dilemma by clearly delineating what currently gets muddled: regulatory power for regulatory purposes; and hard economic power for security purposes. The danger of crossing the regulatory power/market power is that 'irresponsible' use of power might undermine the EU's authority in the long term.

² For a securitization lens on EU energy policy see Szulecki 2017).

References

- Andersen, Svein, Andreas Goldthau, and Nick Sitter, eds. 2017a. *Energy Union: Europe's New Liberal Mercantilism?* Basingstoke: Palgrave Macmillan.
- Andersen, Svein, Andreas Goldthau, and Nick Sitter. 2017b. From Low to High politics? The EU's Regulatory and Economic Power. In *Energy Union. Europe's new Liberal Mercantilism?*, edited by S. Andersen, A. Goldthau and N. Sitter. Basingstoke: Palgrave Macmillan, 13-26.
- Andersen, Svein S., and Nick Sitter. 2006. Differentiated Integration: What Is It and How Much Can the EU Accommodate? *Journal of European Integration* 28 (4):313-330.
- Andersen, Svein S., and Nick Sitter. 2009. The European Union Gas Market: Differentiated Integration and Fuzzy Liberalization. In *Political Economy of Energy in Europe*, edited by G. Fermann. Berlin: BWW.
- Andersen, Svein S., and Nick Sitter. 2014. Managing Heterogeneity in the EU: Using Gas Market Liberalisation to Explore the Changing Mechanisms of Intergovernmental Governance. *Journal of European Integration* DOI: 10.1080/07036337.2014.953947.
- Bachrach, Peter, and Morton S. Baratz. 1962. Two Faces of Power. *American Political Science Review* 56 (4):947-952.
- Boersma, Tim, and Andreas Goldthau. 2017. Wither the EU's market making project in energy: from liberalization to securitization? In *Energy Union. Europe's new Liberal Mercantilism?*, edited by S. Andersen, A. Goldthau and N. Sitter. Basingstoke: Palgrave Macmillan, 99-114.
- Caspary, Daniel, Werner Langen, Joachim Pfeiffer, Georg Nüßlein, Hubertus Heil, Bernd Westphal, Achim Post, and Timon Gremmels. 2018. Nord Stream 2 stärkt Europa. *Frankfurter Allgemeine Zeitung*, 07 March.
- Cottier, Thomas, Sofya Matteotti-Berkutova, and Olga Nartova. 2010. Third Country Relations in EU Unbundling of Natural Gas Markets: The "Gazprom Clause" of Directive 2009/73 EC and WTO Law. *Working Paper* 2010 (06).
- Dahl, Robert A. 1957. The Concept of Power. *Behavioral Science* 2 (3):201-215.
- Eberlein, Burkard. 2010. Experimentalist Governance in the European Energy Sector. In *Experimentalist Governance in the European. Towards a New Architecture*, edited by C. F. Sabel and J. Zeitlin. Oxford: Oxford University Press, 61-79.
- European Commission. 2014. Progress towards completing the Internal Energy Market.COM(2014) 634 final.
- European Commission. 2015. Energy Union Package. A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank. COM(2015) 80 final. Brussels.
- European Commission. 2016. Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of the Decision 994/2012/EU establishing an information exchange mechanism on intergovernmental agreements between Member States and third countries in the field of energy.COM(2016) 54 final.
- European Commission. 2017a. Energy Union: Commission takes steps to extend common EU gas rules to import pipelines. *IP/17/4401*, 08.11.
- European Commission. 2017b. Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/73/EC concerning common rules for the internal market in natural gas (Text with EEA relevance). COM(2017) 660 final.
- European Commission. 2017c. Questions and Answers on the Commission proposal to amend the Gas Directive (2009/73/EC). *MEMO 17/4422*.

- European Communities. 2007. The Treaty of Lisbon amending the Treaty Establishing the European Union and the Treaty Establishing the European Community including the Protocols and Annexes, and Final Act with Declarations. C 306 (01).
- European Parliament and Council of the European Union. 2012. Decision No 994/2012/EU of the European Parliament and of the Council of 25 October 2012 establishing an information exchange mechanism with regard to intergovernmental agreements between Member States and third countries in the field of energy Text with EEA relevance *Official Journal of the European Union* L 299 (27/10/2012):13-17.
- European Parliament and the Council. 1998. *Directive 98/30/EC concerning common rules for the internal market in natural gas, 22 June*. Brussels: European Parliament and Council of the European Union.
- European Parliament and the Council. 2003. *Directive 2003/55/EC concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC, 26 June*. Brussels: European Parliament and Council of the European Union.
- European Parliament and the Council. 2009. *Directive 2009/72/EC concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (Text with EEA relevance), 13 July*. Brussels: European Parliament and Council of the European Union.
- European Parliament and the Council. 2010. Regulation (EU) No 994/2010 of the European Parliament and of the Council of 20 October 2010 concerning measures to safeguard security of gas supply and repealing Council Directive 2004/67/EC (Text with EEA relevance). *Official Journal of the European Union* L 295 (12.11.2010):1–22.
- Folketingstidende A. 2017. *Lovforslag nr. L 43: Lov om ændring af lov om kontinentalsoklen*. Copenhagen: Folketinget.
- FT. 2019. Nord Stream 2 eyes way to curb EU oversight of \$9.5bn pipeline. March 14.
- Goldthau, Andreas. 2018. *The Politics of Shale Gas in Eastern Europe. Energy Security, Contested Technologies and the Social Licence to Frack*. Cambridge: Cambridge University Press.
- Goldthau, Andreas, and Nick Sitter. 2014. A liberal actor in a realist world? The Commission and the external dimension of the single market for energy. *Journal of European Public Policy* 21 (10):1452-1472
- Goldthau, Andreas, and Nick Sitter. 2015a. *A Liberal Actor in a Realist World. The European Union Regulatory State and the Global Political Economy of Energy*. Oxford: Oxford University Press.
- Goldthau, Andreas, and Nick Sitter. 2015b. Soft power with a hard edge: EU policy tools and energy security. *Review of International Political Economy* 22 (5):941-965.
- Goldthau, Andreas, and Nick Sitter. 2018. Regulatory Power or Market Power Europe? Leadership and Models for External EU Energy Governance. In *New Political Economy of Energy in Europe: Power to Project, Power to Adapt*, edited by J. M. Godzimirski. Basingstoke: Palgrave.
- Herranz-Surrallés, Anna. 2015. An emerging EU energy diplomacy? Discursive shifts, enduring practices. *Journal of European Public Policy* 23 (9):1386-1405.
- Högselius, Per. 2012. *Red Gas. Russia and the Origins of European Energy Dependence*. Basingstoke: Palgrave Macmillan.
- Judge, Andrew, and Tomas Maltby. 2017. European Energy Union? Caught between securitisation and "riskification". *European Journal of International Security* 2 (2):179-202.
- Kotek, Péter, Adrienn Selei, and Borbála Takácsné Tóth. 2017. *The Impact Of The Construction Of The Nord Stream 2 Gas Pipeline On Gas Prices And Competition*. Budapest: REKK Foundation.
- Lang, Kai-Olaf, and Kirsten Westphal. 2017. *Nord Stream 2 – A Political and Economic Contextualisation*. Berlin: Stiftung Wissenschaft und Politik.SWP Research Paper 2017/RP 03.
- Liefferink, Duncan, and Mikael Skou Andersen. 1998. Strategies of the 'green' member states in EU environmental policy-making. *Journal of European Public Policy* 5 (2):254-270.

- Lijphart, Arend. 1977. *Democracy in Plural Societies: A Comparative Exploration*. New Haven: Yale University Press.
- Lodge, Martin. 2008. Regulation, the Regulatory State and European Politics. *West European Politics* 31 (1/2):280-301.
- Loskot-Strachota, Agata. 2016. Nord Stream 2: policy dilemmas and the future of EU gas market. Oslo: NUPI.
- Lukes, Steven. 1974. *Power: a Radical View*. London: MacMillan Press.
- Majone, Giandomenico. 1994. The rise of the regulatory state in Europe *West European Politics* 17 (3):77 - 101
- Moravcsik, Andrew. 1993. Preferences and power in the European Community: a liberal intergovernmentalist approach. *Journal of Common Market Studies* 31 (4):473–524.
- Natorski, Michal, and Anna Herranz-Surrallés. 2008. Securitizing Moves To Nowhere? The Framing of the European Union's Energy Policy *Journal of Contemporary European Research* 4 (2):70-89.
- Nosko, Andrej, and Matúš Mišík. 2017. No United Front: The Political Economy of Energy in Central and Eastern Europe. In *Energy Union. Europe's New Liberal Mercantilism?*, edited by S. Andersen, A. Goldthau and N. Sitter. Basingstoke: Palgrave Macmillan, 201-222.
- Puetter, Uwe. 2014. *The European Council and the Council: New intergovernmentalism and institutional change*. Oxford: Oxford University Press
- Schattschneider, Elmer Eric. 1960. *The Semisovereign People: A Realist's View of Democracy in America*. New York: Holt, Rinehart and Winston.
- Spencer, Martin E. 1970. Weber on Legitimate Norms and Authority. *The British Journal of Sociology* 21 (2):123-134.
- Surrallés, A. H., I. Solorino and J. Fairbass. 2020. "Renegotiating Authority in the Energy Union: A Framework for Analysis." *Journal of European Integration*, 42 (01)
- Szulecki, Kacper, ed. 2017. *Energy Security in Europe. Divergent Perceptions and Policy Challenges* London: Palgrave.
- Szulecki, Kacper, Severin Fischer, Anne Therese Gullberg, and Oliver Sartor. 2016. Shaping the 'Energy Union': between national positions and governance innovation in EU energy and climate policy. *Climate Policy* 16 (5):548-567.
- Talus, Kim. 2011. Long-term natural gas contracts and antitrust law in the European Union and the United States. *Journal of World Energy Law & Business* 4 (3):260-315i.
- Weber, Manfred, Reinhard Bütikofer, Nadja Hirsch, Elmar Brok, Norbert Röttgen, Oliver Krischer, and Michael Link. 2018. Nord Stream 2 schadet Europa. *Frankfurter Allgemeine Zeitung*, 20 February.
- Weber, Max. 1922. *Wirtschaft und Gesellschaft*. Tübingen: Mohr.

Table 1: Official public stakeholder positions on the contested Nord Stream 2 gas pipeline, 2017/18

Country/Actor	Role (or presence of firm)	Position in 2017/2018	Use EU regulation to prevent NS2?
Russia	Terminal	Strongly favoured NS2	No
Germany	Terminal	Favoured NS2, but increasingly concerned about geopolitical impact; governing parties internally divided	No
Finland	Transit EEZ	Against NS2 for geopolitical reasons, but resultantly approved transit	No
Sweden	Transit EEZ	Against NS2 for geopolitical reasons, but resultantly approved transit	No
Denmark	Transit EEZ and territorial waters	Against NS2 for geopolitical reasons, but resultantly approved transit, passed new law to permit blocking NS2 on security grounds	No
Poland	Espoo consultation	Strongly opposed to NS2 for geopolitical reasons, blocked consortium in 2016	Yes
Latvia	Espoo consultation	Opposed to NS2 for geopolitical reasons	Yes
Lithuania	Espoo consultation	Opposed to NS2 for geopolitical reasons	Yes
Estonia	Espoo consultation	Opposed to NS2 for geopolitical reasons	Yes
Norway	Kværner (subcontractor)	Took no position, because the country is Russian main competitor in EU gas supply	No
France	Engie	Moderately favourable, focus on trade	No
Netherlands	Shell	Moderately favourable, focus on trade, but highly critical of Russian Ukraine policy	No
UK	Shell	Against NS2 for geopolitical reasons	Yes
Austria	OMV	Moderately favourable, focus on trade	No
Hungary	Energy deals with Russia	Pro-Russian, but solidarity with Poland, ambivalent and low-profile on NS2	No
Czech Rep		Somewhat pro-Russian, ambivalent and low-profile on NS2	No
Slovakia		Against NS2 for geopolitical reasons	Yes
Bulgaria		Somewhat pro-Russian	No
Italy	TAP terminal	New government opposed to TAP, and friendly to Russia	No
EU Energy Commissioner		Against NS2 for geopolitical reasons and security of supply reasons	Yes
EU Council President		Against NS2 for geopolitical reasons and security of supply reasons	Yes
Other EU states		More or less neutral, East Central European states more sympathetic with Poland	Divided
USA Congress		Strongly opposed to NS2 for geopolitical reasons	N/A
USA President		Strongly opposed to NS2 as potential competitor in gas supply (LNG)	N/A
NATO General Secretary		No position, NS2 is not a NATO issue	N/A

Source: Comprehensive survey of DW, EUobserver, Euractiv, Financial Times, Norwegian Telegram Bureau, Oil & Gas Journal, Politico, Politiken, TASS, for 2017-2018 (August); compilation authors' own.

Figure 1: EU types of external power in energy

Neutral Power of Regulation	Regulatory Power	Market Power	Hard Economic Power
<ul style="list-style-type: none"> • Regulation for the sake of creating markets & making them work • Strong normative motivation (liberal model) • External effects through spillover 	<ul style="list-style-type: none"> • External effects b/o attractiveness of market size • Regulatory bias toward consumer benefit • Producer companies / exporters to “come & play” on SEM 	<ul style="list-style-type: none"> • External effects b/o (attractiveness of) market size • Double bias: includes selective use of regulation • Market regulation function of non-market goals 	<ul style="list-style-type: none"> • Energy sanctions • Demand collusion (monopsony) • Low politics function of high politics

