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Dr Francesca Batzella

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# Engaged but constrained. Assessing EU actorness in the case of Nord Stream 2

Dr Francesca Batzella 

School of Humanities, Politics and International Relations, de Havilland Campus, University of Hertfordshire, Hatfield

## ABSTRACT

Despite helpful categorizations about the EU's role in external energy governance, more analysis is needed on the factors likely to enable or constrain the EU's actorness. This article builds on the theoretical framework of actorness as a heuristic device to assess the extent to which its different components of opportunity, capability, and presence impact on the EU's ability to be an actor in external energy governance. Looking at the case study of Nord Stream 2, the pipeline aiming to double the amount of energy transiting from Russia to Germany, the article argues that EU actorness depends on several constraining factors, such as the distribution of competence between the EU and its member states, the unwillingness of the latter to delegate competence to the former, and the existence of conflicting preferences across member states. The article applies a process-tracing method and builds on EU official documents, grey literature, and interview data.

## KEYWORDS

European Union; actorness; energy governance; capability

## Introduction

Since at least the 2004 enlargement, the European Union (EU) has been playing an increasingly active role in the external dimension of its energy policy. The third energy package, the round of EU energy market legislation, which entered into force in 2009, for instance, was clearly drafted keeping in mind relations with third countries energy suppliers in the so-called Gazprom clause (Batzella 2018a; Cottier, Matteotti-Berkutova, and Nartova 2010). The EU has also been launching a wide range of frameworks aimed to export its energy acquis to neighbouring countries, such as the Energy Community in 2005, and has integrated energy policy into other external policies such as the Eastern Partnership in 2009 (Prange-Gstühl 2009). In addition, the EU has also been more involved in energy diplomacy by building dialogues with key transit and supplier countries, such as Ukraine and Russia, respectively, in order to secure energy supplies (Herranz-Surrallés 2016).

A growing body of literature has been trying to conceptualize the EU in external energy governance. These conceptualizations tend to swing between two extremes: a liberal approach focussed on market liberalization, competition, and climate targets and

**CONTACT** Francesca Batzella  [f.batzella@herts.ac.uk](mailto:f.batzella@herts.ac.uk)  R325, School of Humanities, De Havilland Campus, University of Hertfordshire, AL10 9EU Hatfield

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a geopolitical approach conceiving of energy as a strategic good needing to be secured (Siddi 2017; Prontera 2017; Goldthau and Sitter 2020). While helpful, these conceptualizations risk polarising the debate and missing out the conditions that make one approach more likely than the other. Whether the EU acts as a liberal or a geopolitical actor – or something in between – is often the result of several factors enabling and constraining its actorness. For this reason, the article proposes an innovative approach to external energy governance looking at the different dimensions of actorness. The theoretical framework of EU actorness developed by Bretherton and Vogler (2006), – and recently revitalized by Damro, Gstöhl, and Schunz (2018) – is proposed as the main framework for analysis. This framework provides a conceptualization of actorness as ‘the extent to which the Union has become an actor in global politics’ (Bretherton and Vogler 2006, 13) and identifies three helpful components of the concept: opportunity, presence, and capability. These components can be used to offer a comprehensive assessment of the engagement of the EU in external energy governance. This article does so by looking at the Nord Stream 2 (NS2), the pipeline meant to double the amount of gas transiting from Russia to Germany, as a case study.

Since the first feasibility studies emerged in 2015, the pipeline has been heavily criticized inside as well as outside the EU. Global actors such as Russia and the United States (US) have been vocal in the debate, voicing their respective support and opposition to the project. EU official statements have made clear that the pipeline is not in line with the Union’s aims of diversification of sources, routes and suppliers, and that, by bypassing Ukraine, this transport route could have been endangered (European Commission 2017a). In an attempt to bring NS2 operation in line with its energy regulation, the EU has tried to negotiate a regulatory framework with Russia. While a mandate to do so was not authorised by the Council, the Commission issued a proposal to make existing legislation applicable to pipelines coming from third countries. After a very divisive legislative process, a revision was finally achieved in April 2019, although the extent to which this will create a clear regulatory framework for NS2 is yet to be seen. Although the distinction between the liberal and geopolitical approaches – with all the nuances in between – is helpful, this article proposes a deeper exploration of the factors constraining EU actorness, namely the distribution of competence between the EU and its member states, the divergence of preferences across the latter and their unwillingness to concede further competence to the EU in this policy area.

The article starts with a review of existing literature on the conceptualization of the EU in external energy governance. It highlights how existing conceptualizations swing between the two aforementioned extremes of a liberal model, on the one hand, and a geopolitical one on the other. The article then moves to illustrate the theoretical framework of actorness focusing on the three components of opportunity, presence, and capability and their individual as well as cumulative effect on actorness. This section develops three hypotheses, one for each component of actorness, to explore the extent to which the EU can be considered an actor in external energy governance. Following this discussion, the article moves to analyse how these three different components have affected EU actorness in the case of NS2. It does so by looking at the development of the project from its inception to the adoption of the revised gas directive.<sup>1</sup> A final section summarizes the main findings, while the conclusion highlights their implications.

## Between liberal and geopolitical approaches: conceptualizations of EU external energy governance

The existing literature offers many conceptualizations of the European Union (EU) as a global power. Two of the most well-known being Normative Power Europe (Manners 2002, 2006) and Market Power Europe (Damro 2012, 2015). In external energy governance, however, the EU is often conceptualized as a liberal or regulatory actor governing via regulation rather than direct intervention or other means of policy-making (Goldthau and Sitter 2014, 2015). Recently, the term 'liberal mercantilism' has also been used to define the behaviour of the Commission when it uses its regulatory power for issues beyond correcting market failures by selectively applying EU regulation to specific actors (De Jong and Van de Graaf 2020; Andersen, Goldthau, and Sitter 2017). The EU has also been defined as a catalytic state where market-based incentives are combined with more direct forms of intervention such as facilitating strategic infrastructure projects (Prontera 2017, 2019). Recently, the EU has been defined as a 'strategic actor [...] using various forms of power that are available in its toolkit for the pursuit of (geo)political goals' (Siddi and Kustova 2021, 3). Goldthau and Sitter (2020, 119) have proposed a categorization of four types of external power in energy. Lying on a continuum from a liberal approach to a geopolitical one, these are a) neutral power of regulation, b) regulatory power, c) market power, and d) economic power. What combines these approaches is that rather than 'settled realit[ies]' (Prontera 2019, 3), these are instead considered as 'ideal type categorisations' (Ibid.) because features of the different categorizations seem to co-exist. There have been, for instance, different cases in which the EU has moved away from the 'liberal paradigm' by supporting specific pipelines such as Nord Stream [1] and Nabucco (Goldthau and Sitter 2014, 1454) (Goldthau and Sitter 2014, 1454). Similarly, the catalytic state seems to combine regulatory tools with 'initiatives intended to facilitate market actors' and the 'implementation of specific investment projects' (Prontera 2019, 28).

Some of these contributions have also made claims about the effectiveness or success of one approach over the other. It has been argued, for instance, that the EU is generally more successful when using a liberal approach than it is when using geo-political ones (Siddi 2017, 124). Along these lines, it has been argued that the hard economic power model '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' while 'the EU has proven very successful when it comes to building an internal energy market and regulating its functioning' (Goldthau and Sitter 2020, 120–21). This literature links the success (or lack thereof) of the different approaches to many factors such as the fact that competence over energy is shared between the EU and the member states. While the EU has been able, internally, to build some consensus and power-sharing over the liberalization of energy markets, the same cannot be said of its external dimension. In the case of NS2, for instance, it has been argued that by selectively using its regulatory framework to reach geopolitical goals, the Commission was unsuccessful because it lacked the necessary regulatory tools (De Jong and Van de Graaf 2020, 505). Other authors instead have used the concept of 'parallel authority' indicating that 'the strengthening of the EU influence has not been matched by an equal restraint of national governments' competences' (Prontera 2019, 134; Andersen and Sitter 2015). Indeed, member states and their national companies can develop energy projects 'outside the

EU framework for infrastructure policy and without any EU diplomatic and financial support, or even in overt opposition to the European Commission' (Ibid.). This means that 'member states can still develop their own energy security agendas, which are not necessarily aligned with the one pursued by the European Commission. Nord Stream 2 is an example of this where the Commission opposes these projects but cannot block them if they comply with the rules of the Internal Energy Market (IEM)' (Ibid., 134). It has also been argued that the controversy surrounding the amendments to the gas directive demonstrate both the substantial national support for an empowerment of the EU, and the persistent unwillingness to delegate authority. In this regard, the study into NS2 underlines the constraints under which the EU operates as a global actor more generally speaking, and especially when dealing with Russia (Schmidt-Felzmann 2020, 140). Indeed, conflicting interests within the EU have been deemed able to reduce its ability to manage conflicts arising from external challenges. In the case of NS2, this is illustrated by the US–German dispute on the pipeline and its impact on the EU (Ibid.).

To sum up, the literature reviewed so far on external energy governance, some of which has started to look at NS2 as a case study, highlights several factors able to impact on the EU ability to act as a liberal or a geopolitical actor – or anything in between: a) the geopolitical approach being deemed less successful than the liberal approach, b) the problem of parallel authority (the mismatch between EU influence and member states' competence), c) the persistent unwillingness of member states to delegate authority to the Commission, and d) conflicting interests within the EU reducing its ability to manage conflicts arising from external challenge(r)s. These insights open the way for a more systematic analysis of the factors affecting the actorness of the EU in the external energy governance. In pursuing this endeavour, this article builds on the literature on EU actorness as developed by Bretherton and Vogler (2006), which has been recently revitalized to make sense of EU external engagement in a wide range of policy areas (Bretherton and Vogler 2006; Damro, Gstöhl, and Schunz 2018; Schunz and Damro 2020; Gerards, Schunz, and Damro 2021; Batzella 2018b).

### **Exploring opportunity, presence, and capability: a theoretical and methodological framework for actorness**

Bretherton and Vogler (2006, 13) define actorness as 'the extent to which the Union has become an actor in global politics.' They identify three constitutive features of actorness: opportunity, presence, and capability (Ibid.). 'Opportunity denotes factors in the external environment of ideas and events' and 'signifies the structural context of action' (Bretherton and Vogler 2006, 24). 'Presence' is about the 'influence beyond its borders' that the EU exerts 'by virtue of its existence' (Ibid.). Finally, 'capability' refers to 'the internal context of EU external action' (Ibid., 29) and points toward 'those aspects of the EU policy processes that, by constraining or enabling action, govern the Union's ability to capitalise on presence or respond to opportunity' (Bretherton and Vogler 2013, 381). This theoretical framework has been applied systematically to understand and explain EU actorness in a wide range of external policies from well-established and fully fledged ones, such as trade, to recently emerging external policies like science and research (Damro, Gstöhl, and Schunz 2018) as well as energy (Batzella 2018b). In this context, opportunity, presence and capability are defined – heuristically – as 'strong', 'moderate', or 'weak'. In

virtue of their cumulative effect, the three components can lead to three degrees of actorness: 'high', 'medium', and 'low' (Damro, Gstöhl, and Schunz 2018, 17). A high degree of actorness requires at least two of its components to be strong, while a medium degree of EU actorness would need at least two moderate components. If two or more components are weak, actorness is considered to be low (*ibid.*).

As far as energy is concerned, the degree of actorness has been defined as medium as a result of moderate opportunity, presence, and capability (Batzella 2018b). Moderate opportunity means that the external energy policy context is characterized by global competition for energy resources. Presence is operationalized as the EU's ability to exert influence beyond its borders that is mainly related to the effects produced by the internal energy market. Finally, moderate capability consists of a combination of constraining and enabling factors due to both the historical development of this policy area as well as the legal basis for EU action (Batzella 2018b). This theoretical framework is applied to assess EU actorness in the case study of NS2 building on three hypotheses exploring the extent to which each of the three components impacts on the overall actorness. As far as the cumulative effect is concerned, the overall degree of EU actorness is expected to be 'medium'. The three hypotheses are formulated as follows:

H1 [opportunity]: the structural context of action, characterized by divergent pressure from different global actors (Russia supporting and the USA opposing the pipeline) together with EU dependency on energy coming from abroad, limits the scope for EU action;

H2 [presence]: although its internal energy market is appealing to external actors such as Russia, the EU has limited tools to enforce its energy legislation beyond its borders;

H3 [capability]: the distribution of competence between the EU and its member states, the unwillingness of the member states to delegate competence to the EU and the existence of conflicting interests across member states limit the ability of the EU to act promptly and coherently.

Table 1 below summarizes the definition of the three components of actorness, their operationalization as well as their expected outcome in terms of actorness.

The article applies a process tracing method to analyse the EU's actorness in the case of NS2. This method has been already used in the study of EU actorness (Gerards, Schunz, and Damro 2021) and is here applied to identify the main causal mechanisms linking the three components of opportunity, presence, and capability ('causes' or 'set of causes') with an 'outcome', that is, EU actorness (George and Bennett 2005; Beach and Pedersen 2019). This is done by 'observing the empirical fingerprints, or traces, left by the operation of a causal mechanism' (Beach and Pedersen 2019, 2) in this case. The method allows tracing the 'unfolding of events or situation over time' but also to focus on 'good snapshots at a series of specific moments', that is, 'key steps in the process' through which we can then analyse change and sequence (Collier 2011, 824). While process tracing has already been applied on NS2, de Jong and Van de Graaf 2020 for instance, have applied it to analyse 'Commission's effort to stymie the Nord Stream 2 project', this article deeply explores the factors enabling or constraining EU actorness tracing key steps in the Commission behaviour.

**Table 1.** Definition, operationalization, and expected effect on actorness of opportunity, presence, and capability.

|                    | Definition                                                                                                                                                                                                                                                | Operationalization                                                                                                                                                                                                                    | Expected effect on actorness                                                      |
|--------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------|
| <b>Opportunity</b> | 'Factors in the external environment of ideas and events', 'the structural context of action' (Bretherton and Vogler 2006, 24).                                                                                                                           | Moderate:<br>USA and Russia exercise opposing pressures on the EU (the former against the pipeline, the latter in favour)                                                                                                             | The EU's scope for action is constrained by the pressure of the US and Russia.    |
| <b>Presence</b>    | 'Influence beyond its borders' that the EU exert 'by virtue of its existence' ((Bretherton and Vogler 2006, 24)                                                                                                                                           | Moderate:<br>the EU internal energy market is appealing to external actors such as Russia and the USA, but the EU has limited regulatory tools beyond its borders.                                                                    | The EU is limited in its ability to enforce its energy acquis beyond its borders. |
| <b>Capability</b>  | 'The internal context of EU external action' (Ibid., 29), 'aspects of the EU policy processes that, by constraining or enabling action, govern the Union's ability to capitalise on presence or respond to opportunity' (Bretherton and Vogler 2013, 381) | Moderate:<br>Competence on energy policy is shared between the EU and its member states,<br>Some member states are unwilling to delegate further competence to the EU.<br>Member states have conflicting interests over the pipeline. | The EU is limited in its ability to act promptly and coherently.                  |

To conduct a thorough process tracing, the analysis builds on a wide range of sources that are used critically and complementarily. First, EU official documents and statements are used to identify the position and strategies of the Commission as well as of the member states over NS2. Second, academic literature, analysis from reputable sources, and news websites specialised on the EU and/or energy policy are used to better explore the positions of the different actors involved in the project that might go unrecorded in official statements. Finally, the analysis is also complemented with four semi-structured interviews conducted in May 2018 with EU officials working in the following settings: DG Energy, Council Secretariat and two Permanent Representations of Member States to the European Union.

## Assessing EU actorness on Nord Stream 2 (NS2)

NS2 is an international infrastructure project intended to bring natural gas from Russia to Germany. The project is owned by Gazprom and involves the following European financial investors: Uniper and Wintershall (Germany), Royal Dutch Shell (UK – Netherlands), Engie (France), and OMV (Austria) (Nord Stream 2, 2021). As soon as a feasibility study for this project started in 2011, an animated debate around the pipeline developed not only within the EU but also outside its borders. In this section, the article maps the international context (a) as well as the internal context (b) in which the project has developed. In doing so, it applies the concepts of opportunity, presence, and capability as conceptualized by the literature on EU actorness (Bretherton and Vogler 2006; Damro, Gstöhl, and Schunz 2018). It then turns to analyse the steps taken by the EU in dealing with this controversial pipeline. In doing so, it shows how at first the EU tried to use energy diplomacy tools to negotiate a regulatory framework for the pipeline with Russia (c) but was constrained to the field of regulatory tools, which eventually boiled down to the revision of existing legislation (d).



### ***The international context: opportunity***

NS2, like its predecessor Nord Stream, has triggered strong reactions outside the EU, especially from two other global actors: the US and Russia. President Trump described the project as 'inappropriate' and accused Germany of being 'totally controlled by Russia' (Euractiv 2018). In addition, in 2019 the US Congress passed sanctions legislation against the companies involved in the pipeline which were then expanded in 2020 (U.S. Department of State 2021). Further threats of sanctions were announced in January 2021 (Euractiv 2021). Under President Biden, however, an agreement has been reached between the US and Germany where the latter promised 'to impose sanctions on Russia if Moscow threatens its neighbours' [i.e. Ukraine] energy security' (Financial Times 2021). This scenario might well constitute a favourable 'opportunity' for the EU that is probably not likely to completely stop NS2 but has proved resolute in upholding EU energy acquis. It has to be kept in mind that, in 2019, 36% of US LNG exports went to the EU (European Commission 2020). On the other hand, in a meeting between Chancellor Merkel and Russian President Putin, the latter defined NS2 as a 'purely economic project' while the former, although she had used the same expression in the past, pointed out that 'Ukraine has to play a role also with Nord Stream 2 in place' (Euractiv 2018). Indeed, if NS2 becomes operational, the role of Ukraine as a transit country might be endangered. The 'external policy context' or 'opportunity' (Bretherton and Vogler 2006, 24) of the EU in the case of NS2 is therefore characterized by divergent interests of two major international actors: Russia as the main source of natural gas for the EU, and the US with an interest in exporting LNG to Europe, which has framed the debate around NS2 in terms of security bringing the project to the centre of NATO discussions, and has threatened sanctions against the companies involved in the project. Considering its energy dependence, the EU needs affordable natural gas from Russia but is also very well aware of the risks of bypassing Ukraine and antagonising the US. This suggests that opportunity for the EU is rather moderate and constrains its actorness as the external environment limits the scope for its action.

### ***The internal context between presence and capability***

Inside the EU, tensions have also been dominating the debate on NS2. While countries such as Germany and Austria strongly support the project, others such as Poland and other Eastern European countries have been vocal about their opposition to the pipeline (Euractiv 2018). The former see NS2 as solely an economic project which will increase the supply of gas in the EU, whereas the latter see NS2 as further extending the EU's reliance on Russian gas. In an official visit to Germany, the Polish President Andrzej Duda restated his opposition to the pipeline, arguing that Germany should not be involved in NS2 and that the project should be stopped by the Commission (Deutsche Welle 2018). At EU level, the European Commission has made no secret of its opposition to the pipeline, with the argument that:

'the Nord Stream 2 project does not contribute to the Energy Union objectives of giving access to new supply sources, routes or suppliers [...] it could allow a single supplier to further strengthen its position in the European Union gas market and lead to a further concentration of supply routes' (European Commission 2017a).



In addition, the project would endanger existing transport routes via Ukraine (Ibid.). While the implications of this divergence will be clarified later in this article, it can already be stated that this is a problem in terms of ‘capability’ of the EU because different preferences across the member states and the Commission might hinder the coherence of the policies of the individual member states and the EU energy policy and, in turn, the EU’s actorness (Batzella 2018b).

Furthermore, it must be observed that the very fact that it exists, makes the EU internal energy market particularly attractive to Russia but also, as we have seen, to the US, hoping to export their LNG to Europe. The EU therefore exerts an ‘influence’ (Bretherton and Vogler 2006, 24) on these two countries but also on Ukraine as a transit country. Ukraine is a key partner of the EU under the framework of the European Neighbourhood Policy (ENP) and the Eastern Partnership. The Russia–Ukraine gas disputes of 2006, 2009, and 2014 confirmed the importance of Ukraine as a transit country and have pushed the EU to strengthen the partnership with it. There have been several signs of this engagement. First, the mediating role of the EU during the gas disputes and, more recently, in the Russia–Ukraine gas transit agreement signed in December 2019 after months of difficult talks (Euractiv 2019). On the other hand, the EU has had a hard time in persuading non-EU countries to comply with EU energy law. While Ukraine has shown some willingness to comply with the EU *acquis* in energy, the same cannot be said for Russia, whose giant Gazprom has shown reluctance to abide by EU norms when it comes to energy trade. As far as ‘presence’ is concerned, therefore, we can define this as moderate. While the EU internal energy market is attractive to supplier as well as transit countries, the fact that the major energy supplier of the NS2 pipeline is unwilling to comply with EU energy regulations strongly constrains EU actorness. While the EU can enforce legislation within its borders, this does not apply externally.

### *Attempting energy diplomacy (June 2017)*

In an attempt to make sure that the pipeline would comply with EU energy market rules, in June 2017, the Commission asked the Council for a mandate to negotiate a specific regime with Russia (European Commission 2017a). The rationale of the Commission was that under the Third Energy Package, the offshore section of the pipeline is in a specific situation because part of it, including its only entry point, lies outside EU jurisdiction. The aim of the mandate was therefore to negotiate with Russia a special legal framework, which would consider fundamental principles stemming from international and EU energy law, that is, transparency in pipeline operation, non-discriminatory tariff-setting, an appropriate level of non-discriminatory third-party access, and a degree of separation between activities of supply and transmission (Ibid.). This attempt, however, did not receive a positive response from the Council which did not consider the request for some time (Interview No 1) until eventually in September 2017, its legal service rejected the proposal, stating that there was no legal rationale for such a mandate (Prontera 2019, 134). This seems to highlight the importance of the feature of ‘capability’ as intended by the actorness literature. Indeed, EU competence on energy is shared with the member states and when it comes to negotiations with third parties, a mandate needs to be agreed between the Council and the member states. In this case, the member states strongly opposed the Commission’s attempt to use energy diplomacy, and this pushed the institution back to the realms of regulatory tools.

### ***Back to regulatory tools: the turbulent process of revision of the gas directive (November 2017 – May 2019)***

Having failed to obtain a mandate to negotiate a regulatory framework with Russia, the Commission issued a proposal aimed to revise existing EU energy rules – namely Directive 2009/73/EC concerning common rules for the internal market in natural gas – by making them applicable to all existing and future gas pipelines between the EU and third countries (European Commission 2017b). In the proposal, the Commission stressed how gas is transported mainly through pipelines as well as how the rules applicable to gas transmission pipelines connecting two or more Member States ('interconnectors') are not applicable to such pipelines entering the EU. With the proposal, therefore, the Commission aimed to fill this legislative gap and 'make the Gas Directive applicable to pipelines to and from third countries, including existing and future pipelines, up to the border of EU jurisdiction' (Ibid., 2). This includes the provisions on third-party access, tariff regulation, ownership unbundling, and transparency. The proposal also foresees exemptions for new pipelines and derogations for existing ones already in operation. The proposal also specifies that, to ensure a coherent regulatory framework for the entire pipeline, intergovernmental agreements might be signed with the third country or countries concerned (Ibid.). The Commission also stressed that 'the proposal concerns all gas pipelines to and from third countries and is not aimed at preventing the construction of any new gas pipelines' and that 'these rules will apply to Nord Stream 2 the same way as to all other projects' (European Commission 2017c). In addition, the Commission emphasised its availability to 'engage in negotiations on the operating conditions of Nord Stream 2', reasons for which it decided to not withdraw its proposal for a negotiation mandate with Russia and to await 'the Council decision on its earlier recommendation to authorise negotiations with Russia' (Euractiv 2017c).

According to some EU officials, in proposing a clear regulatory framework that would have applied not only to NS2 but also to any other pipeline, the Commission was trying to present itself as an 'honest broker' looking for a 'workable solution' for everyone (Interview No 1, Brussels, 2018). The Commission was able to put forward the proposal due to the legal basis in Article 194 of the Treaty on the Functioning of the European Union (TFEU). In analytical terms, this fits nicely with the concept of 'capability' as conceptualized by Bretherton and Vogler (2006, 24), that is, which factors enable or constrain the EU's external action. The article clearly establishes an explicit legal basis for the Union to act but it also emphasizes the member states' 'right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply' (Batzella 2018b). Hence, this Article is clearly an enabling factor but, at the same time, is also a constraining one because the Commission needs a mandate from the Council to negotiate with third countries. In addition, the Commission can issue legislative proposals but will need the European Parliament and the Council to agree for any proposal to become legislation.

According to the Commission, the revised directive would have established common rules at EU level and, therefore, an exclusive external competence for the European Union in the matter of the operation (and not construction) of pipelines (Interview No 2, 2018). The proposal triggered an animated debate within the Council where member states such as Germany, Austria, Belgium, and the Netherlands argued that such a revision was not

needed. France was also part of this group, but its opposition was not as much towards NS2 itself as on the unwillingness to give the EU more competence in this policy area (Interview No 3, 2018). On the other hand, states such as Eastern European countries together with Sweden, Denmark, and the UK have been rather supportive of the Commission proposal arguing that it would bring more clarity and would extend EU law (Interview No 1, 2018; Interview No 3, 2018).

The main points of divisions across the member states were the following. First, some feared that by conferring the Commission competences over intergovernmental agreements in the field of energy, this would have endangered national competences on the matter. Second, member states needed more clarity about the application of the revised directive. Some, such as Greece and Cyprus, for instance, wondered whether it would have applied to all the upstream pipelines or only to those with a European dimension (Interview No 1 2018). Third, a very divisive issue was whether the third energy package was applicable to the Exclusive Economic Zone (EEZ) of the countries involved in the project. While the Commission – together with Eastern European countries – would argue that this was the case, countries such as Denmark, Finland and Sweden would be uncomfortable in asking Gazprom to apply EU rules (Interview No 4, 2018).

These divisions *de facto* gridlocked the legislative process of the revision of the gas directive for several months. The process was described by an interviewee as ‘ridiculously slow’ considering that the amendments were limited to few articles of the directive (Interview No 3 2018). The legislative process of the revision spanned across four presidencies of the Council: Estonia (July–December 2017), Bulgaria (January–June 2018), Austria (July–December 2018) and Romania (January–June 2019), which drove the process in different directions. The debate became particularly intense during the Bulgarian presidency (January–July 2018) when several ‘pending issues’ meant that the proposal went back and forth between the Energy Working Group and COREPER without achieving any significant progress. According to some EU officials, Bulgaria was pressurised by some member states not to progress with the legislative process (Interview No 1, 2018; Interview No 3 2018). Progress was also slow under the Austrian Presidency (July – December 2018) on which members of the Energy Working Group had ‘zero expectations’ and described the presidency as ‘not showing any interest’ (Interview No 3 2018). Austria was indeed in the coalition together with Germany, Belgium, and the Netherlands opposing the proposal (Interview No 3 2018). Eventually, a revised draft of the directive was only achieved during the Romanian Presidency (January – July 2019) and this was by virtue of an agreement between France and Germany over the application of the directive (Talus 2019). The two countries suggested to restrict such application to the ‘territory and territorial sea of the Member State where the first interconnection point is located’ (Talus 2019, 4). The legislative process therefore confirmed that no matter what the extent to which the Commission aims to impact on energy governance, this still has to be done using the available means which, in this case, entail backing from the member states. In this case, the constraints related to ‘capability’ were more than apparent in hindering the action of the Commission: divergences across the member states constrained the ability of the EU to put forward legislation able to extend the rules of the internal energy marked to pipelines coming from third countries in a reasonable amount of time.

In addition, the tormented adoption of the revised directive in April 2019 did not even fully appease the criticisms around NS2, both inside as well as outside the EU. As pointed out by several scholars (such as Hancher and Marhold 2019; Talus 2019) as well as interviewees (Interview No 1 and 3), the revised gas directive is indeed very unlikely to dissolve the uncertainty around NS2 because even though it introduces some clarity in the application of EU rules to pipelines coming from third countries, it leaves many questions unanswered as much will depend on how the revised directive will be applied by the national regulators. In addition, some commentators have highlighted how the revised Directive violates general EU legal principles of non-discrimination, legal certainty, and legitimate expectations because the revision was designed specifically to target NS2 (Jeutner 2019, 505).

Indeed, the reaction of Nord Stream 2 AG to the revised directive has not been the most positive and this might impact on its implementation. On July 25<sup>th</sup>, 2019, Nord Stream 2 AG brought an action for annulment before the General Court of Justice of the European Union claiming an infringement of the EU law principles of equal treatment and proportionality (Nord Stream 2 2019).<sup>2</sup> In May 2020, the Court ordered that the action was dismissed as inadmissible.<sup>3</sup> In April 2019, a separate legal threat was also made by Nord Stream 2 AG to the Energy Charter Treaty, triggering the three-month consultation period during which parties must seek an amicable settlement before a notice of arbitration can be served. In doing so, the company warned it would sue the EU under international law unless it received a derogation from the rules.<sup>4</sup>

## Discussion of findings

The empirical analysis of NS2, offered through the lenses of the theoretical framework of actorness, has led to three main findings on the impact of the three components of actorness, that is, presence, opportunity, and capability.

First, the analysis suggests that the structural context of action of EU external governance (opportunity) has limited the scope for EU action. Indeed, the conflictual context characterized by Russia and the US not missing an opportunity to voice their position on the project, with the EU being ultimately limited by its energy dependence, has inhibited EU action. This confirms the first hypothesis according to which a moderate opportunity constrains EU actorness.

Second, moderate presence also has a constraining impact on actorness. Although the EU has an established energy acquis, with regulation on energy transit and trade, which makes this market particularly attractive for Russia (as well as for US shale gas), the EU's actorness is constrained by the fact that the EU has limited tools to apply its regulation beyond its borders. The attempt to revise existing legislation to make it applicable to pipelines coming from third countries has shown how complicated this can be. The reaction of Russia to the revision of the gas directive, with action before the General Court of Justice of the EU and to the Energy Charter Treaty, seems to confirm the uneasiness of the consortium with the revised directive. This supports the second hypothesis that a moderate opportunity constrains EU actorness.

Third, a moderate capability is possibly the most constraining of the three components. The EU has weak legal competence for external action and the decision-making procedure has shown little coherence between member states and between the

Commission and the member states. This moderate capability has translated into several constraints for actorness. First, the Commission has tried to negotiate a regulatory framework with Russia, but the Commission can do so only with a mandate and such a mandate has been denied by the Council. Here, internal rules and procedures together with a mismatch of member states and Commission's preferences have prevented the Commission from negotiating with Russia. Second, and as a consequence, the Commission had to revert to using regulatory tools proposing legislation. While proposing legislation is clearly one on the prerogatives of the Commission according to the Treaties, the legislative process unveiled a strong divergence of preferences across the member states with one side being strongly in favour of the revision (led by Poland and other Eastern European countries) and the other side being strongly opposed (for example, Germany and Austria). The conflictual and long legislative process hindered EU actorness by making it unable to promptly set out a clear regulatory framework.

## Conclusion

This article has applied the theoretical framework of EU actorness developed by Bretherton and Vogler (2006) and recently applied to a wide range of policies with an external dimension (Damro, Gstöhl, and Schunz 2018), to assess EU external actorness in the case of NS2. The analysis has suggested that EU actorness can here be defined as medium as a result of moderate opportunity presence and capability. These findings have three major implications.

First, from an empirical perspective, this article advances our understanding of the dynamics underpinning EU external governance in the field of energy. The analysis has suggested that the extent to which a conflictual global environment, an attractive but difficult to enforce externally EU energy market and a series of internal constraints limit the ability of the EU to act in the global energy field. This implies that the behaviour of the EU, in the institution of the Commission, is less likely to be merely the result of a liberal or geopolitical approach but more likely to be a more elaborate result of a variety of enabling and constraining factors.

Second, from a theoretical perspective, the article confirms the utility of this heuristic device in unpacking the components of actorness and assessing their individual as well as cumulative impact. While the three components have been operationalized here as moderate and leading to a medium degree of actorness, these values should not be seen as set in stone. Rather, further research might analyse additional case studies and at different times, which might present different values of opportunity, presence, and capabilities leading to different degrees of actorness. While a high degree of actorness scenario seems unlikely in the near future, it is worth keeping an eye on the developments of the EU Green Deal and its impact on external energy relations.

Finally, the article also raises some policy implications. The analysis of NS2 illustrates how EU actorness in external energy governance is inherently linked to the dynamics of the internal dimension of the EU energy policy as well as to the energy policies of the individual member states. Ultimately, member states' position in favour or against the pipeline and, in turn, of the revision of the gas directive, reflected

different energy preferences. This implies that EU external energy governance needs to tighten up to internal dynamics and member states' national energy policies because these dynamics will necessarily reverberate externally and impact on EU actorness.

## Notes

1. Directive (EU) 2019/692 of the European Parliament and of the Council of 17 April 2019 amending Directive 2009/73/EC concerning common rules for the internal market in natural gas.
2. See also Case T-530/19 – Nord Stream AG v European Parliament and Council and ST 11875 2019 INIT Case before the General Court – Case T-526/19 – Nord Stream 2 AG v Council and European Parliament.
3. Order of the General Court (Eighth Chamber) 20 May 2020 available at <https://curia.europa.eu/juris/document/document.jsf?text=&docid=226683&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=5168453>.
4. According to the Energy Charter Treaty website, the case is still pending <https://www.energychartertreaty.org/details/article/nord-stream-2-ag-v-european-union-uncitral/>, accessed June 2021.

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## ORCID

Dr Francesca Batzella  <http://orcid.org/0000-0001-7783-1804>

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