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The battle for differentiated integration in the EU energy policy

Abstract. The main purpose of the article is to describe differentiated integration in the EU energy policy which concerns the exemption of the Nord Stream 2 and OPAL pipelines from European law, and more precisely from the so-called Third Energy Package. The attempt to derogate EU law in relation to these pipelines in Germany was of great economic and political importance for Central Europe as a whole. It also affected the modification of EU law and thus had systemic consequences for the entire EU. In this article, I will analyse the process aimed at derogation from the application of European law and its consequences. Furthermore, I will try to answer the question to what extent the public discussion hindered the possibilities of exemption from European law. Finally, I will turn to clarifying the reasons why exclusion from EU law in the case under review has failed. This seems to be of great importance when explaining other failed attempts to diversify integration in recent years as well; it may also help delineate what limitations there are for the very process in the future.

Keywords: differentiated integration, Nord Stream 2, OPAL, the EU.

Zróznicowana integracja w polityce energetycznej UE

Streszczenie. Głównym celem artykułu jest opisanie zróżnicowanej integracji w polityce energetycznej UE, która dotyczy wyłączenia gazociągów Nord Stream 2 i OPAL spod prawa europejskiego, a dokładniej z tzw. Trzeciego Pakietu Energetycznego. Próba derogacji prawa UE w odniesieniu do tych gazociągów miała ogromne znaczenie gospodarcze i polityczne dla całej Europy Środkowej. Wpłynęło to również na modyfikację prawa unijnego, a tym samym miało konsekwencje systemowe dla całej UE. W niniejszym artykule przeanalizuję proces mający na celu odstępstwo od stosowania prawa europejskiego oraz jego konsekwencje. Ponadto postaram się odpowiedzieć na pytanie, w jakim stopniu dyskusja publiczna utrudniła możliwość wyłączenia spod prawa europejskiego gazociągów. Na koniec przejdę do wyjaśnienia powodów, dla których wyłączenie spod prawa Unii w rozpatrywanej sprawie nie powiodło się. Wydaje się to mieć duże znaczenie dla wyjaśnienia innych nieudanych prób dywersyfikacji integracji w ostatnich latach; może również pomóc w nakreśleniu, jakie ograniczenia istnieją dla samego procesu w przyszłości.

Słowa kluczowe: Zróznicowana integracja, Nord Stream 2, OPAL, UE.

Introduction

Differentiated integration is defined either as the exemption or exclusion from specific areas of European policy or law or, conversely, the creation of new forms of political and legal cooperation between only certain Member States or countries outside the EU (Schimmelfennig, Leuffen, Rittberger, 2015: 767). Crucial to this definition is the fact that instead of legal harmonisation and uniform regulations defining a given policy area for all EU Member States, more flexible cooperation structures are being created; these structures can either advance the integration process or, quite the opposite, exclude individual states from cooperation processes. Moreover, flexible forms of differentiated integration do not only apply to EU Member States. They can allow to include countries from outside the Community, such as the EU's neighbours. They can also require exemption from certain areas of EU law.

Thus, on the one hand, differentiated integration has a positive character, e.g. connected with the process of creating a group of states which deepen cooperation in a particular area of public affairs. On the other hand, it can also have a negative character, i.e. associated with an opt-out from the form of cooperation adopted by the other EU states. As described by one of the researchers in the field, differentiated integration is a process of unequal reduction in the level, scope, or membership of the EU" (Schimmelfennig, 2018: 1155).

Negative differentiated integration may be of a definitive nature, i.e. entirely excluding from such cooperation in perpetuity, or it may only be a temporary derogation from a particular regime of European law. The exemption may concern the whole area of European law or only a part of it, such as certain provisions in a specific public policy. It may apply to a Member State, but also to infrastructure located in a given state or to specified economic operators. What can serve as an example of a negative trend within differentiated integration is Denmark's opt-out from the euro and its participation in the Economic and Monetary Union, as well as its exclusion from the Area of Freedom, Security and Justice and the Common Security and Defence Policy (CSDP). In turn, Poland has been excluded from the Charter of Fundamental Rights, and Ireland – from the Schengen area (Gsthöhl, Frommelt, 2017; Olsen, 2011).

Differentiated integration can fulfil several functions. It can constitute a kind of vanguard for integration processes within a selected group of states, which, as it were, pave the way for enhancing cooperation in a certain area. Concurrently, the process is supposed to encourage the remaining states, referred to as laggards, to catch-up by demonstrating the benefits which accrue to members of the in-group (Leruth, Gänzle, Trondal 2019a: 1385). In such a case, differentiated integration would only serve as a transitional period until full harmonisation is achieved and as a means of deepening European integration. This type of temporary differentiation is often advocated by German diplomacy (Grosse, 2018; Paterson, 2018: 93; Turner *et al.*, 2019: 231; Schimmelfennig, 2019).

Its other function is related to the permanent division between a group of leading and more strongly integrated states and the rest of the integration circle. These less integrated states may be largely subject to political or regulatory decisions taken by more strongly integrated states. This way of permanent differentiation is also called Multi-speed Europe or two-speed Europe and is customarily promoted by France (De Witte, 2018: 227; Pisani-Ferry *et al.*, 2016). It can therefore lead to the establishment of a permanent hierarchy of power amongst different groups of EU states.

Thus, the differentiated integration favoured by French diplomacy is linked to another of its functions. It concerns the enhancement of economic and political benefits by some countries, but also the risk of increasing the dependence of some countries over others. In another variant, the attempt to differentiate integration may be connected with the desire to curtail the costs of common European policy for a given state, e.g. economic or social costs. It may also entail an attempt to reduce potential political or economic dependence on other states, usually those more economically developed or more politically influential in the EU.

A further function of differentiated integration is related to this. Namely, it may be strongly linked to social expectations, e.g. positive feelings towards integration, or, contrariwise, towards Eurosceptic sentiments. In this manner, politicians' decisions regarding, for example, exclusion from a given integration

regime perform a function or role of local or pan-European public debate and stem from how the public perceives the costs or benefits of integration as well as what the electorate prefers in terms of deepening integration in a particular area of EU law.

Thereby differentiated integration can potentially be seen as a positive factor for the EU or, quite the opposite, a negative phenomenon for the integration processes. It can, for example, increase the flexibility of governance according to local voter preferences and thus respect the subjectivity of national democracies. It can counteract the excessive costs of integration for some societies or the excessive dependence of weaker countries on the stronger ones in the EU. However, it can also be seen as a factor that increases divisions within the EU, causing excessive differentiation and fostering a growing lack of solidarity among European nations.

A special challenge for the EU at the beginning of the 21st century were successive crises. These usually required increased centralisation of management in the EU as well as forcing adaptations to EU regulations on the part of Member States, sometimes under the threat of financial sanctions. Thus, the crises contributed to increasing harmonisation of solutions across the EU, while at the same time causing attempts to opt out of certain areas of integration to be received with growing reluctance. This was the case in the migration crisis when the preferred option in the initial period was to impose uniform refugee relocation mechanisms for all Member States by majority vote. Nevertheless, when the resistance to such forceful solutions in many Member States, as well as among a large group of voters, turned out to be very strong, the mechanisms for resolving the dispute by majority vote were abandoned. Yet the demand remained for solutions that would apply universally in all EU countries, and so the permanent exclusion of some countries from the negotiated anti-crisis package was rejected.

One particular crisis was Brexit, i.e. the UK's exit from the EU. This was an important stimulus to the debate about the need for a more flexible approach to integration, i.e. creating more opportunities for differentiation of integration across Member States. The UK was known to be reluctant to participate in certain areas of integration, and even just before the 2016 referendum campaign sought further exemptions from EU law. Insufficient concessions from the EU to these expectations of London – and thus to a stronger differentiation of integration – may have contributed to the British public's eventual vote to leave the EU.

Academics express differing opinions on the implications of Brexit for differentiated integration. Some have encouraged the European Union to be more flexible. The lesson of Brexit is that the EU needs more, not less, differentiation. Bickerton, for example, has argued the Brexit vote resulted from the problematic externalities of the combination of common EU rules and diverse national economic models, claiming that “the only way of managing the tensions thrown up by this combination of national diversity and deep interdependence is exit” (Bickerton, 2019: 243). Several scholars have indeed predicted a move towards greater differentiation in the post-Brexit EU (e.g. De Witte, 2018). V.A. Schmidt

argues that “the future of Europe will be one of differentiated integration” (2019: 294), predicting movement towards a soft-core Europe comprising “overlapping clusters of Member States participating in the EU’s many different policy communities” (2019: 307). J. Pisani-Ferry *et al.* maintain that Brexit marks “a major constitutional change for the UK and a significant rupture for the EU” and suggest that the EU moves towards a model based on distinct clubs of insiders and outsiders (2016: 1).

But it has also been suggested that Brexit may bring about greater harmonisation with “the exit of the EU’s most Eurosceptic and ‘awkward partner’” (Leruth, Gänzle, Trondal 2019b, 1015). Other scholars also predict that post-Brexit reforms in the EU may be associated with an increasing trend towards regulatory harmonisation and strong pressure not to allow exemptions from certain areas of EU law (Martill, Sus, 2018). Brexit is not likely to bring about movement towards a more starkly differentiated EU, not least because the political context of withdrawal mitigates against this. It does so by disincentivising the creation of viable forms of external differentiation, downplaying problematic lessons from the Brexit process for EU governance, and leading pivotal Member States to double down on the long term unity of the EU27 (Martill, 2021).

As it seems, those who foresee an increased tendency towards harmonisation and even regulatory expansion of the EU and, at the same time, stronger political pressure against exclusion or periodical derogation from selected areas of EU law are mainly right. Such trends are not only due to the lesson learned from Brexit, but also to the conflicting interests of Member States which, for various reasons, are reluctant to diversify the integration of some countries. This may be related both to the desire to limit the political or economic burdens arising from differentiated integration, but also to the desire for economic or political benefits that differentiated integration could limit. The clear conflicts of interest among Member States are exploited by some of the EU’s supranational institutions, including the European Commission and the Court of Justice of the EU. They seek to increase their own competences, and thus are interested in increasing the harmonisation of EU law and even in extending its scope. Thus, they oppose the exclusion of certain states from the obligation to apply European law or from participation in any EU policy.

The aim of this article is to describe an attempt to introduce differentiated integration in EU energy policy. It concerned the exclusion of the Nord Stream 2 (NS2) gas pipeline and the OPAL gas pipeline from European law, more precisely from the so-called Third Energy Package. The attempt to derogate from the application of EU law to these pipelines within Germany had enormous economic and political significance for the whole of Central Europe. It also influenced the modification of EU law and thus had systemic consequences for the entire EU. According to researchers, under the influence of the Nord Stream pipeline expansion, the EU’s energy and climate strategy has been largely based on gas as

a fuel for climate transformation during the transition period (Proedrou, 2020). Therefore, I have assumed that the present case can serve as an example of differentiated integration.

This example of differential integration was to serve mainly the geoeconomic purposes of the Russian Federation. It was also supposed to strengthen the geoeconomic position of Germany in Central Europe. Nevertheless, Berlin's policy failed. First of all, it was not possible to exclude the Nord Stream and OPAL gas pipelines from European law. Moreover, the expansion of Nord Stream turned out to be a trap set for Germany and the EU by Moscow, which brought a number of geopolitical and economic costs for the entire Community. Thus, the German leadership in the EU and Central Europe also wavered.

In this article I will analyse the process aimed at derogation from the application of European law and what effect it has had. Furthermore, I will try to highlight the debate surrounding attempts to introduce differentiated integration. In particular, I will want to answer the question of the extent to which public discussion has hindered the possibilities of exclusion from European law. I will seek to answer the question of whether attempts at such exclusion have been perceived as un-European, unreliable, stemming from Eurosceptic sentiments or otherwise detrimental to the progress of European integration. Finally, I will turn to explaining the reasons why the exemption from European law in this case has failed. As it seems, this may be of great importance in clarifying also other unsuccessful attempts to diversify integration in recent years as well as indicating the limitations to this process more broadly in the future.

Example of Nord Stream 2 and OPAL

The struggle to stop the construction of the Nord Stream 2 pipeline and then to have it included in EU law or, just the opposite, to have it excluded from it has been intense and ongoing since at least 2015. From the beginning, EU institutions, including the European Commission (Šefčovič, 2016) and the European Parliament (2016), have taken the position that the pipeline must be covered by EU law, especially in terms of the so-called Third Energy Package adopted in 2009. The point was to ensure that such important infrastructure and the related EU and non-EU investors operated in accordance with the rules of the internal market. In particular, this concerned compliance with ownership unbundling, third party access rules and transparent tariffs in the Gas Directive 2009/73/EC. The expectations of the European Commission were perceived by some as an expansion of European law beyond the provisions of the aforementioned directive as well as an attempt to take the opportunity to increase the powers of the Commission itself (de Jong, Van de Graaf, 2021: 501). The Commission's Legal Service (2016) even issued a legal

opinion concluding that the Gas Directive did not cover offshore or import pipelines with third countries and that demanding Nord Stream 2's adherence to the Directive would be discriminatory. German Federal Network Agency, the Bundesnetzagentur (2017) agreed with the Legal Service's interpretation that Nord Stream 2 does not fall under internal market rules, and that it would not demand Nord Stream 2 adherence to internal market rules.

Other German authorities also stressed that the pipeline should be exempted from EU law. In 2015, the Minister for Energy and the Environment had made it clear in Moscow that the German government would seek to "prevent external meddling".

What's most important [...] is that we strive to ensure that all this remains under the competence of the German authorities, [...] if we can do this, then opportunities for external meddling will be limited. [...] What's most important is for German agencies to maintain authority over settling these issues. And then, we will limit the possibility of political interference (President of Russia, 2015).

In 2018, the Prime Minister of Mecklenburg West-Pomerania similarly asserted the federal states' decision-making authority on NS2. These assertions were anchored in a claim that the Third Gas Directive was not applicable to German coastal waters, and that decisions on NS2 were a national prerogative (Schmidt-Felzmann, 2020: 135).

Another attempt on the part of the European Commission to incorporate NS2 into European law was the 2017 proposal to grant it a negotiating mandate to engage in negotiations with the Russian Federation. The said mandate was aimed at ensuring that NS2 "operates with an appropriate degree of regulatory oversight, in line with key principles of international and EU energy law" (European Commission, 2017). Germany, Austria and France, backed by a couple of other EU states rejected the mandate (Schmidt-Felzmann, 2020: 137). The position of the largest Member States was supported by the Legal Service of the Council in 2017, which stated that the Gas Directive was non-applicable to import or offshore pipelines with third states (Council's Legal Service, 2017). Simultaneously, the Council's lawyers made it clear in their opinion that this was a political dispute and not a legal one at this stage.

In other words, the European Commission sought to extend European law to include NS2, bearing in mind, *inter alia*, the possibility of increasing its own competences. The Commission took the view that external pipelines should be covered by the Community law, especially when they reach the territory of a Member State and its territorial waters, thus entering the EU borders. Other EU institutions or Member States supported the Commission in this action because of their own political or economic interests. At the same time, some Member States insisted on the exclusion of NS2 from European law, which was also dictated by

their own interests or those of a third country. Thus, the dispute over differentiated integration referred to the conflicting interests of individual actors on economic, geopolitical, and also constitutional grounds, as it related to the scope of EU institutions' scope of authority.

What constituted yet another attempt by the European Commission to bring NS2 under EU law was the proposal to amend the Directive in such a way that it would cover Nord Stream 2, while also giving the Commission more competence in the external energy domain (de Jong, Van de Graaf, 2021: 501). The Commission's proposal gained support in the European Parliament. In April 2018, the Industry, Research and Energy Committee issued its report on the proposal, offering additional revisions to the Directive that ensured the Directive's applicability to Nord Stream 2 and the exclusion of derogation options for Nord Stream 2 considering the sanctions imposed against Russia (European Parliament, 2018). In the Council, the amendment proposal was supported by Poland, Romania, Estonia, Latvia, and Lithuania, which condemned NS2 on the grounds of geopolitical and energy risks. Opposing the Commission's action were mainly Germany, Austria and Bulgaria, who were in favour of excluding NS2 from European law. There was a stalemate in the Council for a long time during the negotiations, which made it impossible both to reject the amendment and to formulate it in such a way that NS2 could be excluded from the Community law. Both the Bulgarian and Austrian presidencies of the EU Council proposed such a legislative compromise, which in fact allowed for a derogation of EU law or an opt-out clause for NS2 (de Jong, Van de Graaf, 2021: 502–503).

The negotiation stalemate was resolved by a change in France's position, which initially sympathised with the German position (Siddi, Kustova, 2021: 12). Subsequently, however, it decided to support the amendment of the Gas Directive, and clarified its position on the issue during bilateral talks between Paris and Berlin. In addition to resolving the contentious issue of the amendment in question, the talks included the issue of the budget for the eurozone, which the French desired to resolve (Gotev, 2019). As a result, an amendment to the Gas Directive was adopted in 2019, which formally incorporated NS2 into European law, but at the same time provided a number of legal possibilities expected by the Germans. Firstly, it allowed a procedure for the exclusion of gas pipelines from EU law (Article 9), a procedure for their derogation from EU law (Article 49) (Hancher *et al.*, 2021). Secondly, the EU rules will apply only to the territory and territorial waters of the state where the first entry point is located, and not, as proposed by the European Commission, to the EU as a whole. Consequently, the German Bundesnetzagentur retained a decisive say over how the EU's gas market rules are to apply to NS2, albeit under the oversight of the European Commission. Furthermore, the implementation of the directive in question into German law increased the scope of interpretative possibilities regarding the derogation provisions of NS2 from EU law (Schmidt-Felzmann, 2020: 138).

Thirdly, the Commission explicitly broadened the scope of European law in the field in question and thus expanded its power to control the application of EU law, in that – through the amendment – it gained new powers to control this law in relation to NS2 (Schmidt-Felzmann, 2020: 137).

However, the battle on differentiated integration with regard to the exclusion of NS2 from EU law was not over. Back in 2014, the Russian Federation demanded that Nord Stream be excluded from the Third Energy Package. At that time, it filed a complaint on this issue in the World Trade Organisation. Nevertheless, its dispute settlement panel confirmed that the EU had the right to include the pipeline in the Third Energy Package (Schmidt-Felzmann, 2020: 137). Subsequently, the Russian side started to question the legality of the revised EU Gas Directive, or more precisely that it was supposed to cover NS2. Among other things, it was expected that due to the advancement of this investment it would be derogated from the provisions of the Gas Directive for up to 20 years. Although the pipeline was not completed when the Directive came into force (23 May 2019), it was expected that it would be treated as an already completed pipeline, which implied a right to derogation.

In 2019, a private company which is building NS2 (Nord Stream 2 AG) filed two court cases against the EU. The first was referred to the Court of Justice of the EU (CJEU) requesting the annulment of the directive, while the second was filed under the Energy Charter Treaty claiming protection of Gazprom's investment from EU discrimination, which meant in practice that the investment was not covered by the new EU laws (Siddi, Kustova, 2021: 13). In other words, the Russian Gazprom subsidiary was effectively forcing the EU to exclude the Russian company's infrastructure within the EU (i.e. Germany) from EU law applicable to the internal market.

At the same time, Nord Stream 2 AG asked the German Federal Network Agency (Bundesnetzagentur) to agree to the derogation of the NS2 pipeline from EU law on the basis of Article 49 of the amended Gas Directive. The Federal Network Agency in May 2020 rejected the application of the Russian Gazprom subsidiary and thus refused to agree to the exemption of NS2 from the Community law. The reason was that it considered that the pipeline had not been completed before the date on which the amendment to the EU directive came into force and therefore did not qualify for a derogation (Bundesnetzagentur, 2020).

German Chancellor Angela Merkel admitted that after the amendment to the Gas Directive had been adopted and NS2 had been brought under EU law the planned gas pipeline was already legitimised by European law. In her opinion, this should mean that the investment must be completed (Formuszewicz, Kardaś, 2020). Thus, the German authorities' failure to exempt NS2 from European law amounted, in a way, to a price for the completion of the controversial investment. Accordingly, the German side expected consent for the completion of the pipeline from both its opponents within the EU and beyond its borders, primarily from

Washington. Such expectations were confirmed in a joint US-German statement in July 2021 in which, in exchange for the lifting of US sanctions on NS2, the German government pledged to respect “the key principles enshrined in the EU’s Third Energy Package of diversity and security of supply.” Germany underscored “that it [would] abide by both the letter and the spirit of the Third Energy Package with respect to Nord Stream 2 under German jurisdiction to ensure unbundling and third-party access” (US Department of State, 2021). In this way, a non-European power, i.e. the USA, indirectly influenced the inclusion of NS2 in European law, while another non-EU power, i.e. the Russian Federation, demanded that this gas pipeline be excluded from the Third Energy Package, a goal for which it had initially received support from the largest EU state, Germany.

According to experts, this still does not end the battle for the exemption of NS2 from EU law, as there are possible organisational changes carried out within Nord Stream 2 AG, which, while maintaining formal compliance with EU law, will make it possible to actually circumvent the rigours of the Third Energy Package (Strategic Comments, 2021). In addition, in 2021 Russia put pressure on the EU and Germany by influencing the increase in natural gas prices, including by limiting the possibility of replenishing Gazprom’s gas storage facilities in the EU. According to commentators, the goal was to legalize and launch NS2 as quickly as possible, but also to obtain the best possible gas transmission conditions through the new line of this gas pipeline, in order to maintain the monopolistic position of the Russian company on the domestic market (Sheppard, 2021).

Such expectations were all the more plausible as the actions of the German authorities in relation to other pipelines linked to Nord Stream have largely favoured Russian objectives. A case in point is the battle to exempt the OPAL gas pipeline from the Third Energy Package, specifically from the principle of third-party access to the grid and tariff regulation, i.e. transparency in pricing. In 2009, the Federal Network Agency (Bundesnetzagentur) decided to exempt the OPAL gas pipeline (Ostseepipeline-Anbindungsleitung) for a period of twenty years from these two principles introduced by the EU Gas Directive. However, this decision was subject to a number of conditions, the most important of which was that only 50 per cent of the OPAL pipeline capacity would be made available to Gazprom. In 2016, the Federal Network Agency requested the European Commission to be able to waive these restrictions. In the same year, the Commission issued a decision agreeing to relax the conditions for exempting the OPAL pipeline from EU law, effectively allowing Gazprom to use the entire capacity of the pipeline. In practice, the contested decision paved the way for Gazprom to control flows along the OPAL pipeline and, by the same token, for gas flows through the Yamal and Brotherhood pipelines potentially to be reduced and for Gazprom’s position to be strengthened on the gas markets in the countries of Central and Eastern Europe (Opinion of Advocate General..., 2021: 23).

Poland brought an action before the General Court of the European Union which – in a judgment of 10 September 2019 – annulled the Commission’s decision

of 2016. Germany brought an action before the CJEU appealing the decision of the EU General Court and thus advocating the exclusion of the OPAL pipeline from the regime of EU law. In particular, the German side argued that the exemption of the OPAL gas pipeline from the rules of the Third Energy Package was not related to the principle of energy solidarity, as it had only a political dimension and therefore did not concern the legal questions and obligations of the Member States with regard to the adoption or exemption (derogation) from EU law for the application of the Gas Directive. It is worth noting that the EU Court presented an interpretation of EU law which, in the name of the Treaty principle of solidarity between Member States, imposes an obligation on a Member State, in this case Germany, to comply with European law, i.e. the Gas Directive. This is a very important ruling, as it means in practice that, in the opinion of the European court, the principle of solidarity prevents differentiated integration in this particular area of EU law. This argumentation was reiterated by CJEU Advocate General Manuel Campos Sánchez-Bordony in his opinion (Opinion of Advocate General..., 2021), followed by the CJEU judgment (C-848/19 P).

Thus, the attempt to exempt the NS2 and OPAL pipelines from EU law was opposed by many actors in the EU and was effectively prevented. Among the opponents of such an exemption were some Member States that were critical of NS2, but also EU institutions that rejected differentiated integration for, *inter alia*, constitutional reasons. This was because they wanted to unify and even increase the scope of European law, thus increasing the competences of supranational institutions. The battle for differentiated integration was accompanied by a public debate, which proved crucial in stopping the possibility of excluding the above-mentioned pipelines from internal market law.

Role of public debate

The dispute over differentiated integration, and therefore over the exemption of NS2 and OPAL pipeline from European law, was directly linked to the fundamental debate over the need to build the second Nord Stream pipeline. Opponents of this pipeline wanted above all to block its construction. They considered it a threat both economically, geopolitically, and ecologically, and thought it detrimental to the ambitious climate policy goals of the EU. The countries of Central Europe, above all Poland, Slovakia, Romania, and the Baltic States, saw this project as one that may increase the economic dependence of the EU and Central Europe on Russia and Germany.

Indeed, with the expansion of Nord Stream, Germany was becoming an important energy hub for the region (Siddi, 2020: 554; Tomaszewski, 2017: 90; Jirušek, 2020). This had the consequence of increasing the dependence of, *inter*

alia, Czechia and Slovakia on gas supplies flowing through German pipelines. The said dependence was to be exacerbated by withdrawing the possibility that EU funds could be used to build new gas transmission facilities, thus hampering the construction of pipelines in the EU that would be competitive with NS2. German diplomacy very actively supported such a solution in Brussels (EUobserver, 2021). Moreover, according to experts, Central Europe's energy dependence on the NS2 and German pipelines would be price advantageous for Germany, while it would increase gas prices in Central Europe.

Germany would only profit at the expense of its neighbours, who would find themselves paying more at the end of the transport route through Germany. Most alarmingly, Gazprom would gain another tool to discriminate between countries. Gazprom could then credibly threaten to cut off gas supplies in Eastern Europe without threatening its markets in Western Europe. In this way Gazprom could achieve higher prices in Central and Eastern Europe (Zachmann, 2016).

As summarised by one Polish MEP, "Central and Eastern Europe would finance lower energy prices in Western Europe, i.e. it would be indirectly robbed through the price mechanism" (Saryusz-Wolski, 2021). In addition, the Visegrad Group States felt that their sovereignty was threatened by attempts to impose the German energy model (the so-called *Energiewende*) on them, including an increase in the share of gas in the energy mix and the exclusion of nuclear energy. This approach by Berlin was seen as Germany's exploitation of its dominant position and promotion of its own interests at the expense of other nations' (Křížet *et al.*, 2021: 144–146).

Simultaneously, there was concern that energy dependence would be used by both countries for geopolitical purposes. This was exemplified by the armed conflict in eastern Ukraine that began in 2014 and resulted in hostile relations between Moscow and Kiev. NS2 made it possible not only to limit the transit of natural gas supplies flowing from Russia to the EU through Ukrainian territory, but also to suspend gas supplies to Ukraine itself. Similar pressure from the Kremlin was also possible in relation to other transit countries, such as Poland. Therefore, Polish politicians considered the NS2 gas pipeline as a weapon used in the hybrid war waged by Russia against the EU (Siddi, 2020: 554). On top of this, the increase in gas supplies to the EU through the expansion of Nord Stream allowed for increased revenues for the Russian Federation, which could then be used to fund the conflict in eastern Ukraine or to build up weapons capabilities that would threaten countries on NATO's so-called eastern flank. The Polish minister for European affairs told *Financial Times* that "by supporting Nord Stream 2, the EU in effect gives succour to a regime whose aggression it seeks to punish through sanctions. This contradiction is unsustainable" (Szymanski, 2016).

There were also fears of an economic and political alliance between Moscow and Berlin, which – as history has shown – usually took place at the expense of the

interests of the countries in Central and Eastern Europe. This is why Polish Foreign Minister Radosław Sikorski likened Nord Stream to the Molotov-Ribbentrop Pact, which preceded the partition of the Polish Republic by Soviet Russia and Nazi Germany at the beginning of World War II (Puls Biznesu, 2006). Unfortunately, later Sikorski changed his mind and publicly criticized the Polish government for opposing NS2, proclaiming the slogan that if you can't defeat someone or something, you should join it (Sikorski, 2015; 2021). Another Polish Minister of Foreign Affairs Witold Waszczykowski claimed that the pipeline undermined trust among EU Member States, struck "a blow against not only Central and Eastern Europe's security of gas supplies, but also Ukraine's stability" (2016). One more Polish minister compared NS2 to "a Trojan horse capable of destabilizing the economy and poisoning political relations inside the EU" (Szymanski, 2016).

This was how Polish politicians described the NS2 project as destabilising European integration and considered its promotion as an un-European activity. In their view, it was a project which violated the principle of European solidarity across Member States. It undermined the key strategic interests of certain EU Member States. It also brought benefits to non-European countries and, at the same time, serious costs to some Member States, both in economic and geopolitical terms. In turn, Czech researchers were concerned about the negative consequences of German energy policy for the perception of integration by Central European societies (Kříž *et al.*, 2021: 152). Even in the German press there were claims that NS2 was an anti-European project and politically damaging to Germany's authority in Central Europe. It was described as "the most embarrassing problem in German foreign policy" and Chancellor Angela Merkel was urged to withdraw from it as soon as possible (Rohr, 2021).

For the NS2-supporting countries, above all Germany, Austria, and the Netherlands, it was primarily an economic project, so any worries about geopolitical risks were, in their view, unjustified. Merkel emphasised for many years that NS2 was entirely economic in its nature (German Federal Government, 2018). Moreover, on the economic level, German politicians emphasised that the project was beneficial both for Germany and the EU as a whole. Contrary to what the opponents of this project claimed, it did not pose a threat to economic security, but rather increased it, as it was supposed to stabilise the supply of energy sources at relatively low prices over a longer period of time. The perception of energy security by the majority of the German elite was thus diametrically opposed to the approach to this problem taken by politicians from the Baltic States and Central Europe.

Nonetheless, some German politicians did recognise the geopolitical aspect of the NS2 gas pipeline. They also considered it to have a positive geostrategic significance, as deepening economic cooperation with Russia must positively stabilise geopolitical relations with this largest eastern neighbour of the EU (Siddi, 2020: 548; Siddi, Kustova, 2021: 11). This was a reference to the Ostpolitik

initiated by West Germany in the late 1960s, i.e. during the Cold War and during the confrontation between the two hostile blocs: West and East. At that time, West Germany's eastern policy was based precisely on energy cooperation with the USSR. This brought a number of geopolitical benefits to Germany. It led not only to an improvement in bilateral German-Russian relations but also to Moscow's consent to Germany's reunification in 1990, which was a great geopolitical success for Germany. No wonder, therefore, that German politicians treated Russia as a reliable economic partner and wanted to spread the Ostpolitik model throughout the EU. The German Foreign Minister even stated that "the only possible answer [to the crisis with Russia] is a European Ostpolitik" (Maas, 2018).

Another geopolitical aspect used to defend NS2 by the German authorities, *inter alia*, was the appeal to anti-American sentiment in the era of Donald Trump's presidency, as well as to the idea of "EU strategic autonomy." This was linked to the sanctions imposed by the US authorities on companies building NS2. German and Austrian politicians argued that Nord Stream was a European project and a matter of internal affairs of the EU, so it should not be subject to external interference from Washington (Gabriel, Kern, 2017). The NS2 pipeline was, in their view, directly pertinent to enhancing the competitiveness of European industry, especially energy-intensive industries in an era of climate change in the EU. Furthermore, NS2 – as a European project – directly challenges the US export interests in supplying gas to the EU. Thus, other EU Member States were encouraged to show solidarity with this project and to stand against external sanctions imposed by non-European economic competitors.

What constituted an important field of confrontation were two aspects, i.e. the ecological one and one regarding the energy and climate transformation. It is worth noting that the aforementioned argumentation was much less present during the disputes around NS2 than references to energy or national security (de Jong, Van de Graaf, Haesebrouck, 2021: 6). For opponents of NS2, it was a project that threatened the environment of the Baltic Sea as well as slowed down the climate transition in the EU as it increased Europe's dependence on natural gas supply in the long run. Such voices were also heard in Germany itself. On the other hand, for the proponents of this gas pipeline, it was a project fully in line with the EU's climate policy and having a stabilising effect on the energy transition in the medium term through the use of gas that is less harmful to the climate than oil, coal or lignite (Siddi, Kustova, 2021: 6).

This exchange of opinions showed that the same arguments could be heard in the discussion on NS2, although in support of opposite political camps. For some, NS2 was conducive to climate transformation, while for others it was incompatible with the EU's ambitious climate agenda. Just as much as it increased energy and economic security for the pipeline's advocates, it represented a serious risk in both cases for its opponents. For the supporters of NS2, it was a European project which stabilised energy security and the Union's geopolitical relations with the

Russian Federation. Its opponents, on the other hand, argued that it contradicted the principle of energy solidarity and threatened integration by reducing trust among Member States. This testifies to different perceptions of fundamental challenges concerning security, the economy, and climate transformation. At the same time, it may indicate a rather instrumental approach to the arguments undertaken in the public debate and attest to the fact that these arguments served the interests of particular parties.

The disputes surrounding NS2 overlapped with a discussion on the possibility of exempting this gas pipeline and other related pipelines from the Community law. In part, the latter echoed the earlier strands of the public debate, although new arguments on the matter also emerged. The European Commission's primary motivation was the need to protect the internal market and for all actors to comply with EU law in that market, and the need to extend this law to all energy infrastructure (de Jong, Van de Graaf, 2021: 496). Attempts to exempt from the Community law would therefore be detrimental to competition in the internal market, and thus to the equal treatment of all economic actors, as well as to the authority, coherence, and compliance with EU law. Thereby, the Commission deemed attempts at differentiated integration as a threat to internal market freedoms and the rule of law, and thus to European integration processes.

Furthermore, the Commission argued that the Third Energy Package as well as the Energy Union Initiative aim to increase the diversification of imports in energy sources (Siddi, 2016); hence, it advocated such an understanding of energy security that does not lead to overdependence on a single supplier. At the same time, the rules introduced by the Gas Directive were supposed to increase competition in the energy market and thus promote liberalisation in that market. In contrast to some Member States, the Commission did not intend to stop the construction of NS2, but strongly argued against the exclusion or derogation of this gas pipeline (and others related to it) from European law.

In contrast to the Commission, the opinion of a large number of MEPs in the European Parliament was critical of the very idea of expanding Nord Stream. Jerzy Buzek, on behalf of the Committee on Industry, Research and Energy, considered that the gas pipeline opposes the objectives of the Energy Union and should in no way benefit from European funding or other forms of EU aid, let alone the derogations from the Third Energy Package (European Parliament, 2015). Also representatives of the Polish government emphasised that NS2 undermines the Energy Union initiative as well as European solidarity (Szymanski, 2016).

The Court of Justice of the EU took a similar position in the case of NS2, namely the possibility of its exclusion from the gas directive. It concluded that "Nord Stream 2 is the only gas pipeline to which none of the exemptions or derogations provided for in the Directive could apply". Moreover, it stated that the German public authorities "have no discretion as to the possibility of granting such exemptions or derogations to Nord Stream 2 AG as it does not fulfil the

conditions laid down in that directive” (Case C-348/20 P). In other words, EU judges voted in favour of the inclusion of NS2 under European law, as well as forbidding the German authorities to exclude this gas pipeline from EU law in the future.

European judges also referred to the issue of the opt-out of the OPAL pipeline from European law. In his opinion, Advocate General Manuel Campos Sánchez-Bordony accorded the principle of solidarity greater weight than national sovereignty in the energy field, which, in his view, has legal consequences, namely that the exclusion of the gas pipeline from Community law is inadmissible (Opinion of Advocate General 2021, pts 102, 174). Both Germany and the previous position of the CJEU in a similar case assumed that the security of a country’s energy supply was an overriding reason in the general interest falling within the scope of national security (an exclusive competence of the Member States under Article 4(2) TEU). In this manner, the protection of national sovereignty in the field of energy (C-72/83, par. 34 and 35; C-503/99, par. 46), which took precedence over the principle of solidarity, resounded in the judgments of the CJEU.

However, the position of the EU courts has changed over time in favour of energy solidarity in relation to both energy security and national sovereignty. At the same time, the Advocate General’s position made it clear that energy solidarity (under Article 194 TFEU) should have the same legal consequences as solidarity in asylum policy (Article 67 TFEU) (Opinion of Advocate General 2021, pt. 98). In other words, regarding both policies, the Advocate General argued against differentiated integration involving exemptions from EU law. His opinion was upheld by the CJEU judgment. The Court stated that the actions of the European Commission and the Member States in the field of energy policy should be assessed in the light of the principle of energy solidarity (C-848/19 P, par. 44). In particular, this principle should apply in the context of the establishment and functioning of the internal market in natural gas (C-848/19 P, par. 46). Whereas attempts to exclude the OPAL gas pipeline from EU law violate the principle of solidarity (C-848/19 P, par. 97). In this way, the European courts have stood up for a uniform obligation to apply Community law in all Member States and against differentiated integration in EU energy policy, and regardless of the Treaty guarantees for national sovereignty in this area.

The position of the CJEU was supported by Poland and Lithuania, which resulted from their critical approach to NS2. However, by doing so, both states effectively accepted the diminution of the importance of state sovereignty in relation to the CJEU’s new interpretation of the Treaty principle of solidarity. In the case of the Polish Government, this was all the more surprising as it had previously repeatedly defended the sovereign competences of the Member States against the expansion of EU competence; it had also opposed solidarity in the area of asylum and migration policy in the EU. This example clearly shows that, in the name of short-term interests, not only do Member States oppose the exclusion

of other states from European law, but they are also ready to approve new interpretations of EU rules even when this may limit their sovereign competences and at the same time increase the powers of supranational institutions.

Conclusion

At the EU summit in December 2019, Poland did not want to join the other Member States in achieving climate neutrality by 2050. Prime Minister Mateusz Morawiecki stated that he was not rejecting the political goal itself, but would like to obtain a time derogation from climate policy, at least until 2070. The country's willingness to opt out of EU policy was therefore only for a specific period of time, which was linked to the high cost of Poland's energy transition, the highest in the entire EU. According to a report by an international consulting firm, Poland should spend around EUR 1.3 billion on this goal (Engel *et al.*, 2020: 10). However, other countries opposed such differentiated integration with regard to climate policy. French President Emmanuel Macron announced that if Poland wanted to opt out from the ambitious climate agenda, it would be financially penalised as it would be deprived of EU aid funds for climate transformation. Indeed, in such a case Poland could not expect solidarity from other Member States in the financial dimension (Khan, Brunsden, 2019). Moreover, he threatened that at the level of secondary legislation adopted by qualified majority in the EU Council, Poland would be outvoted and thus forced to adopt European law like all other Member States. The French president took a similar approach to the attempt to exempt Central European countries from the common asylum and migration policy. At that time he decided that such actions were un-European, violated the principle of solidarity with other States, and should result in financial penalties (Deutsche Welle, 2018).

Both examples show a clear reluctance on the part of some Member States towards differentiated integration, i.e. attempts to exempt another country from EU law and common European policy. Such resistance to differentiated integration was driven by the interests of individual countries, which feared the costs involved or a reduction in potential gains. They also feared that the exclusion of some countries from common policies might make it more difficult to adopt common European policies and to set ambitious or difficult goals for them. Simultaneously, opposition towards differentiated integration was peppered with epithets critical of the States seeking exemption from European policy since their attempts towards exemption were seen as an un-European attitude, contrary to the principle of solidarity among Member States and requiring punishment or coercion through sanctions to force compliance with common rules.

A similar situation occurred with the example of differentiated integration in EU energy policy discussed above in this article. The disputes surrounding the

exclusion of the NS2 and OPAL pipelines from European law were accompanied by a lively discussion in which the desire to expand the Nord Stream pipeline was described as an anti-European and non-solidarity stance. It is difficult to see Merkel's actions as the result of her Eurosceptic attitude to integration. However, Vladimir Putin's desire to exempt NS2 from European law was already regarded as a hybrid war against the EU. Conversely, the defenders of NS2 saw the project as European and beneficial to the EU. In the discussion around this infrastructure and its exemption from Community law, the same arguments were sometimes used by political opponents. For example, for supporters of NS2, the gas pipeline was a means of stabilising energy security and the Union's geopolitical relations with the Russian Federation. Opponents of this project, on the other hand, argued that it was a threat to both economic and geopolitical security. It would therefore jeopardise European integration, not only on the part of the Russian Federation, but also by reducing trust across Member States.

The aggression of the Russian Federation against Ukraine in 2022 showed who was right in this dispute and who was deluded or cynically misled public opinion and partners in the EU. Nord Stream turned out to be a project that served mainly Russian purposes and was detrimental to the EU. The attempt to exclude NS2 and OPAL from EU law was to increase the benefits of the Russian side and increase the EU's geoeconomic dependence on Moscow.

Debate about this differentiated integration may indicate both the instrumental approach to the arguments undertaken in the public debate by political opponents and the subordination of these arguments to the interests of individual parties. It also testifies to the different perceptions of the fundamental challenges and interests regarding security, economy, and climate transformation by the participants in the dispute. It was the conflicts of interests emerging among the Member States that provided the strongest reason to impede the exemption of the NS2 and OPAL pipelines from European law. The public debate merely fuelled those disputes thus increasing the level of emotions and mutual animosity. Only to a limited extent did it lead to a constructive and substantive resolution of the conflict. On some level, it even undermined certain concepts that should be important to all Member States, such as security, solidarity or Europeanness. These were used by all parties in the dispute to criticise their opponents.

An important function of the debate was to try and legitimise political action. In this way, after many years, Germany came to terms with the idea that the NS2 and OPAL pipelines should be covered by European law. By doing so, they seemed to forgo differentiated integration in this area of energy policy. Nevertheless, the price for this concession expected by German politicians from other actors was their agreement to the completion of NS2. Indeed, Chancellor Merkel believed that the inclusion of NS2 in EU law should legitimise the project as compliant with EU norms and principles. In this way, she gave expression to the legitimising function of European discourse.

The clash of interests amongst Member States thus stymied attempts at differentiated integration. At the same time, the focus of national politicians on these interests, as well as on ad hoc disputes with other countries, meant that the States were happy to accept support in these conflicts from supranational institutions such as the European Parliament, the Commission or the CJEU. This was the case even if these institutions were able to extend their own competences or reinterpret important European principles for further integration, e.g. by prioritising the norm of solidarity over national sovereignty. Thus, the immediate prospect of conflict around differentiated integration resulted in approval for more strategic changes of a constitutional nature in the EU, which could mean a reduction of national competences or national sovereignty in further integration processes.

In contrast to the Member States, supranational institutions seemed to participate in disputes around differentiated integration in a much more coherent and solidaristic fashion. All of them, i.e. the Commission, the Parliament, and the Court, generally argued against exemptions or derogations from Community law or a particular area of EU policy. Thus, they advocated increasing harmonisation of European law and even extending its scope into new areas. They saw this as beneficial to integration processes. Simultaneously, they perceived attempts at a more flexible approach to integration, e.g. differentiation among Member States over time, as a threat to the EU. At the same time, this attitude was beneficial for their own competences, as it usually meant an increase of their power in Europe and over integration processes.

In this fashion, supranational institutions made use of disputes amongst Member States to consistently promote their own political vision for the development of the Union, which also benefited their institutional interests. Researchers point out, for example, that during the dispute over the exclusion of the NS2 and OPAL pipelines from the Third Energy Package, the Commission's position ensured not only that EU law was extended, but also that the Commission's and other European institutions' power of scrutiny over compliance with that law in practice were increased (de Jong, Van de Graaf, 2021: 505). Thusly, with the support of the Parliament and the CJEU as well as some Member States, the Commission was able to overcome resistance from Germany, a country considered to be one of the most politically influential in the EU.

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