LUISS

Corso di laurea in Giurisprudenza

Cattedra di European Economic Law

# *Unveiling the EU's Strategic Autonomy: Constitutional Limits and Legal Instruments at the Intersection of Trade and (Economic) Security*


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ANNO ACCADEMICO 2024-2025

# TABLE OF CONTENTS

**INTRODUCTION** ..... 1

**CHAPTER I - THE HISTORICAL ORIGINS, EVOLUTION AND DEFINITION OF EU STRATEGIC AUTONOMY** ..... 4

1. The Evolution and Foundations of Strategic Autonomy ..... 4
2. The Origins of Strategic Autonomy: From Security and Defense to a Broader Vision ..... 7
   2.1 From Juncker to von der Leyen: Strategic Autonomy in EU Political Discourse ..... 16
3. COVID-19 and Russia's invasion of Ukraine as catalysts ..... 20
   3.1 COVID-19 ..... 20
      3.1.1 EU Policy Response to the COVID-19 pandemic ..... 23
   3.2 Russia's Invasion of Ukraine ..... 25
      3.2.1 Impact of the Russian invasion of Ukraine on European Security and Defence Policy ..... 26
      3.2.2 Impact of the Russian invasion of Ukraine on European Energy (In)dependence ..... 32
      3.2.3 Impacts of the Russian invasion of Ukraine: European Trade Policy and Economic Sovereignty ..... 34
4. Defining Strategic Autonomy ..... 35
   4.1 Political and Scholarly Debate on the notion of Strategic Autonomy ..... 40
   4.2 The Linguistic and Political Debate of Sovereignty vis-à-vis Autonomy in the EU's Discourse ..... 46

**CHAPTER II - CONSTITUTIONAL FOUNDATIONS, LEVERAGES AND LIMITS OF EUSTRATEGIC AUTONOMY** ..... 52

1. From Europeanism to Strategic Autonomy: Constitutional Reflections on the EU's Evolving Identity ..... 52
2. Unpacking Strategic Autonomy: Constitutional Foundations - A Functional Taxonomy of Values, Geoeconomics, and Security ..... 54
   2.1 Strategic Autonomy as Normative Power: Values and Constitutional Identity ..... 57

2.2 Geoeconomics and Strategic Autonomy: Reconciling Openness with Assertiveness....60
2.3 The Security Dimension of Strategic Autonomy: Critical Infrastructure, Technological Sovereignty and Internal Market Resilience 65
3. The Autonomy of the EU Legal vis-à-vis Strategic Autonomy ....67
3.1 Autonomy as a Leverage for Strategic Autonomy ....70
4. Constitutional Constraints on Strategic Autonomy ....79
4.1 Legal Autonomy as Constraint: Reassessing Openness to International Law and Strategic Autonomy in EU External Action ....80
4.2 Procedural Constraints and the Role of Mixed Agreements in Shaping EU External Action....87
4.3 Institutional Complexity and Competence Allocation as Structural Constraints on Strategic Autonomy ....96
4.4 Fundamental Rights as Constraints: Legal Boundaries to the EU's Strategic Autonomy ....99

**CHAPTER III - STRATEGIC AUTONOMY THROUGH ECONOMIC SECURITY: THE FDI SCREENING REGULATION AND THE ANTI-COERCION INSTRUMENT IN EU LAW** ....105

1. Strategic Autonomy and the Rise of Economic Security....105
2. The European Commission's 2023 Economic Security Strategy ....108
3. The 2024 Communication and Beyond: Advancing Economic Security Following the 2023 Economic Security Strategy ....117
4. The Draghi Report and the Competitiveness Compass ....120
5. Defining Economic Security....124
5.1 Policy Aims of Economic Security....124
5.2 The scope of Economic Security and its operationalization....128
6. FDI Screening and the ACI as Emblematic Instruments of the EU's Hybrid Economic Security Strategy: Operationalising Strategic Autonomy at the Intersection of Trade, Security, and Sovereignty....130
6.1 FDI Investment Screening: An Ex-Ante Approach....136
6.1.1 The concepts of National and European Security....141
6.1.2 The functioning of the Screening Mechanism....151

6.1.3 Regulation 2019/452 and the Pursuit of European Technological Sovereignty: A Critical Appraisal ..... 157
6.1.4 Toward a Revised Screening Framework: From Reactive Instrument to a Strategic Autonomy Tool ..... 161
6.2 The Anti-Coercion Instrument: An Ex-Post Deterrence Tool ..... 165
6.2.1 The Content of the ACI ..... 169
6.2.2 The ACI Between Trade and Security Policy ..... 176

**CONCLUSION** ..... 185

**BIBLIOGRAPHY** ..... 192

**OFFICIAL ACTS, LEGISLATION AND DOCUMENTS** ..... 217

**EUROPEAN UNION COURT OF JUSTICE CASE LAW** ..... 238

# INTRODUCTION

In recent years, the notion of "Strategic Autonomy" (SA) has emerged as a central, yet elusive, theme in the discourse surrounding the European Union's external action and governance. Despite its growing prominence in legal, political, and institutional documents, SA remains conceptually nebulous. It resists a single, unified definition and is invoked across a wide range of contexts, including foreign policy, defence, trade, digital sovereignty, and industrial strategy, each attributing different meanings to the term. As a result, SA functions as a flexible political slogan but lacks analytical precision and operational coherence. There is no authoritative legal definition, nor a uniform institutional consensus regarding its precise contours.

This ambiguity is not merely semantic; it reveals a deeper structural tension within the EU's evolving role as a global actor. On one hand, SA aspires to signal the Union's capacity to pursue independent policies aligned with its strategic interests. On the other, it must navigate foundational legal constraints embedded in the EU Treaties, namely, the principle of conferral, the principle of autonomy of the EU legal order, the division of competences between the Union and the Member States, and the binding obligation to respect international law. It is this duality between aspirational autonomy and constitutional constraint that motivates the present inquiry.

This thesis does not aim to offer a new definitional taxonomy of Strategic Autonomy or merely reconstruct its political evolution. Instead, it investigates whether and to what extent the pursuit of SA is compatible with the European Union's constitutional architecture and international obligations. The analysis focuses on how the EU operationalises SA through autonomous legal instruments, particularly in the areas of trade and investment, by examining the Foreign Direct Investment (FDI) Screening Regulation and the Anti-Coercion Instrument (ACI) as case studies. In doing so, the thesis adopts a legal perspective that moves beyond the predominantly political science and strategic studies literature. It situates Strategic Autonomy at the intersection of EU constitutional law, external relations, and common commercial policy, thereby exposing the institutional dynamics, competence boundaries, and normative tensions that shape its legal feasibility.

Specifically, the thesis asks: to what extent is the European Union legally, institutionally, constitutionally, and politically equipped to realise Strategic Autonomy as a concrete and actionable policy objective, particularly in domains at the intersection of economic and security considerations?

The work proceeds in three parts. Chapter I traces the historical development and evolving definitions of SA. Initially rooted in the defence and security realm, particularly following the Saint-Malo Declaration and the institutionalisation of the Common Security and Defence Policy (CSDP), SA has gradually broadened its scope. Through key political moments such as the 2016 EU Global Strategy and subsequent Commission communications, the concept has expanded to encompass resilience, technological sovereignty, and industrial policy. Particular attention is given to the emergence of "Open Strategic Autonomy" (OSA) in the 2021 Trade Policy Review, which underscores the discursive shift from strategic autonomy as a defence concept to a transversal policy principle. This shift is further contextualised by recent geopolitical and economic disruptions, such as the COVID-19 pandemic and the Russian invasion of Ukraine. These crises exposed the vulnerabilities of economic interdependence and the imperative to secure critical assets and supply chains, reinforcing the relevance of SA across a range of policy areas.

Chapter II turns to the constitutional framework underpinning Strategic Autonomy. It examines the legal basis for external action under the Treaties, including Article 21 TEU and the principles of conferral and competence distribution. The chapter explores how the foundational principle of autonomy of the EU legal order functions both as an enabler and a constraint: while it ensures the coherence and primacy of EU law, it also restricts the Union's ability to participate in binding international dispute settlement mechanisms or adopt flexible forms of cooperation that might enhance its global influence. Particular attention is given to the relationship between the Common Commercial Policy (CCP) under Article 207 TFEU, an area of exclusive Union competence, and the Common Foreign and Security Policy (CFSP), which remains predominantly intergovernmental. The legal and procedural asymmetries between these two domains raise important questions of coordination and legitimacy, especially where strategic and security interests intersect. The chapter also addresses the legal complexities surrounding the negotiation and conclusion of mixed agreements.

Drawing on Opinion 1/19, it examines how institutional practices such as the common accord technique, though not legally mandated, can de facto introduce unanimity requirements that impede swift EU action. While the Court's recognition of incomplete mixity offers some flexibility, the absence of a clear distinction between facultative and mandatory mixity continues to generate legal uncertainty. These dynamics highlight the procedural fragility that can undermine the EU's ability to act autonomously in international relations.

Chapter III analyses how Strategic Autonomy is operationalised in the domain of economic security, focusing in particular on two emblematic legal instruments: the Foreign Direct Investment Screening Regulation (EU) 2019/452 and the Anti-Coercion Instrument (Regulation (EU) 2023/2675). The FDI Regulation reflects the EU's growing concern with technological sovereignty and the protection of strategic sectors. The ACI, by contrast, is a more assertive legal innovation. Although based on the CCP legal basis, its substantive objectives extend beyond trade to include foreign policy and security considerations. This hybridity raises constitutional concerns about competence boundaries and the use of supranational legal bases to achieve objectives traditionally reserved for intergovernmental domains.

This thesis approaches Strategic Autonomy not as a fixed doctrine but as a dynamic, evolving legal and policy framework. It shows how SA has come to function as both a constitutional aspiration and a strategic method, shaped by internal legal norms, external pressures, and institutional improvisation. While the concept risks dilution if applied too broadly, its growing presence in EU legal texts and policy instruments suggests it has become a structuring feature of the Union's external posture. By unpacking its historical trajectory, legal foundations, and operational manifestations, this thesis aims to clarify the legal possibilities and constitutional constraints of Strategic Autonomy within the EU legal order.

Ultimately, the goal is to assess whether SA, as defined by Hoffmeister as the capacity of "striving for multilateral solutions, while being able to take lawful action alone to safeguard the Union's values, fundamental interests, security, independence and integrity", can be meaningfully pursued within the existing legal framework of the Union, and what this pursuit reveals about the evolving constitutional identity of the EU.

# CHAPTER I
# THE HISTORICAL ORIGINS, EVOLUTION AND DEFINITION OF EU STRATEGIC AUTONOMY

## 1. The Evolution and Foundations of Strategic Autonomy

Despite its growing prominence in policy discourse, Strategic Autonomy ("SA") remains a nebulous and evolving concept, lacking a universally accepted and official definition and often employed with varying meanings depending on the institutional, political, or sectoral context. Two political scientists have described Strategic Autonomy as "the political, institutional and material ability of the EU and its Member States to manage their interdependence with third parties, with the aim of ensuring the well-being of their citizens and implementing self-determined policy decisions"[1]. Another scholar from the same field has identified two principal dimensions within the concept: a "geopolitical understanding" and an "institutional understanding"[2]. According to the first interpretation, SA primarily addresses the EU's positioning in relation to the growing rivalry among global powers, and therefore has a strongly relational nature as it concerns how the EU should define its cooperation with its partners[3]. The second understanding places greater emphasis on the EU's internal capacity for autonomous collective action, essentially asking: whether the EU is equipped with the necessary instruments to be able to defend its autonomy.[4]

Combining these political developments under the lens of EU external relations law, Hoffmeister defines SA as follows: "striving for multilateral solutions, while being able to take lawful action alone to safeguard the Union's values, fundamental interests, security, independence and integrity".[5]

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[1] Helwig, N., & Sinkkonen, V., 'Strategic autonomy and the EU as a global actor: The evolution, debate and theory of a contested term', 27 EFA Rev. (2022), Special Issue, 1–20, at 4.
[2] Morillas, P., 'An architecture fit for strategic autonomy', *Foundation for European Progressive Studies,* Policy Brief Nov. 2021, 4–7.
[3] Political scientists submit case studies on the significance of the concept with respect to e.g. China (Poutalas, Sinkkonen & Mattlin, 'EU strategic autonomy and the perceived challenge of China: Can critical hubs be de-weaponized?', 27 EFA Rev. (2022), Special Issue, 79–98); the United States (Martin & Sinkkonen, 'Past as prologue? The United States and European strategic autonomy in the Biden era', 27 EFA Rev. (2022), Special Issue, 99–120), or Russia (Utkin, 'Suspicious neighbour: Russia's role in the quest for the EU's strategic autonomy', 27 EFA Rev. (2022), Special Issue, 121–136.
[4] Hoffmeister, F., 'Strategic Autonomy in the European Union's External Relations Law', in *Common Market Law Review*, 60, pp. 667–700, at 673, (2023).
[5] ibid.

Despite this, from a legal perspective, the concept implies both an enhanced emphasis on the constitutional objective articulated in Article 21(2)(a) TEU[6], namely, the safeguarding of the EU's independence and integrity, and a drive to expand the Union's competences in external relations.

An alternative, but accurate, representation of SA can be found in the following definition: "the ability of the EU to secure its citizens a life to the standards of prosperity, safety, health, and general well-being they are used to expect"[7]. This objective aligns with the Union's foundational commitments as enshrined in Articles 2(1)[8] and 3(1)[9] TEU, and is, therefore, entirely legitimate[10]. Nonetheless, it is argued that such a formulation renders the concept somewhat imprecise and lacking in analytical specificity[11].

While originally rooted in the sphere of foreign and security policy, the concept of SA has progressively become central to both the practice and the discourse of EU external action. It has developed into a multifaceted notion, at once an ambition, a political objective, and a new method of governance, which raises fundamental legal questions about the kind of international actor the European Union aspires to be, and the structural and institutional obstacles that

[6] Art. 21(2) TEU, Consolidated version of the Treaty on European Union [2016] OJ C 202/1: "The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: (a) safeguard its values, fundamental interests, security, independence and integrity; (b) consolidate and support democracy, the rule of law, human rights and the principles of international law; (c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders; (d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty; (e) encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade; (f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development; (g) assist populations, countries and regions confronting natural or man-made disasters; and (h) promote an international system based on stronger multilateral cooperation and good global governance."

[7] 'Keeping Europeanism at bay? Strategic autonomy as a constitutional problem', Editorial Comments, *Common Market Law Review*, 59 (2022), pp. 313–326.

[8] Art. 2 TEU: 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'

[9] Art. 3(1) TEU: 'The Union's aim is to promote peace, its values and the well-being of its peoples.'

[10] See *supra* (n.7), Common Market Law Review 59 (2022) Editorial Comments.

[11] ibid.

may hinder this evolution.[12] Against this backdrop, the invocation of SA in EU legal and political discourse serves a dual political purpose: it seeks to ensure not only that the Union is capable of influencing the course of global events through its external action, but also that it can act independently when necessary to uphold its own strategic choices and safeguard its constitutional identity[13].

The first chapter of this thesis will begin by tracing the historical roots of SA, highlighting its emergence in the field of Common Foreign and Security Policy (CFSP) and its progressive extension into economic and trade policy[14]. Special attention will be paid in Section II to the institutional provisions that first introduced and formalised the concept within the Union's legal and political framework. Among these, the European Council Conclusions of 20 December 2013[15], which referenced SA in the context of defence capabilities, are particularly significant. The concept then gained further prominence in the Global Strategy for the EU's Foreign and Security Policy of June 2016[16], which provided a comprehensive articulation of the Union's ambitions in global affairs.

This evolution continued with the European Council Conclusions of October 2020[17], which confirmed the strategic relevance of technological sovereignty, and the European Commission's Communication COM(2021) 66 final of 18 February 2021, entitled *Trade Policy Review – An open, sustainable and assertive trade policy*[18], which marked the expansion of SA into the realm of trade. These developments culminated in the EU Strategic Autonomy Monitor Briefing from the European Parliament of July 2022**,** titled *EU Strategic Autonomy*

[12] Beaucillon, C., 'Strategic Autonomy: A New Identity for the EU as a Global Actor', in Beaucillon, C. – Poli S. (eds.), EU Strategic Autonomy and Technological Sovereignty, (2023). *European Papers – Insight.*
[13] ibid.
[14] This shift reflects the EU's response not only to military threats, such as those posed by Russia, but also to the economic and technological pressures originating from global actors like China and the United States. See also, Beaucillon, C., and Montaldo, S., (eds), 'Special Focus on "The Russian War Against Ukraine and the Law of the European Union". The EU in the Face of War' (2023), *European Papers*.
[15] European Council. European Council Conclusions on Common Security and Defence Policy, EUCO 217/13, Brussels, 20 December 2013.
[16] European Union External Action Service, Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the European Union's Foreign and Security Policy', Brussels, June 2016.
[17] European Council, European Council Conclusions, EUCO 13/20, Brussels, 2 October 2020, p. 1.
[18] European Commission, Trade Policy Review – An Open, Sustainable and Assertive Trade Policy, COM(2021) 66 final, Brussels, 18 February 2021.

*2013–2023: From concept to capacity*[19], which offers a retrospective overview of the institutionalisation of the concept over the past decade. Section III will focus on the impact of recent systemic crises, namely, the COVID-19 pandemic, the Russian invasion of Ukraine, and the ensuing energy crisis, and will analyse how these critical events have acted as catalysts in reshaping the European Union's strategic posture. Building on these foundational developments, Section I**V** turns to the core theoretical and legal analysis of the concept of Strategic Autonomy. It explores the evolving definitions of SA across political, academic, and legal discourses, identifying its contested nature. Furthermore, the section examines the conceptual tension between autonomy and sovereignty. In tracing both the origins and conceptual evolution of the term, this Chapter aims to provide a comprehensive account of how Strategic Autonomy has emerged and developed as a political and legal notion within the EU, laying the groundwork for its contemporary significance in a rapidly changing global order.

## 2. The Origins of Strategic Autonomy: From Security and Defense to a Broader Vision

Despite its contemporary prominence, SA is not a novel concept; its historical roots trace back to security and defence policy, particularly as a French-driven initiative aimed at reinforcing the EU's ability to address its own security needs autonomously, while ensuring that it remained a relevant and credible international actor. Historically, the EU's defense has relied on cooperation with international partners as the North Atlantic Treaty Organization ("NATO")[20], the Organization for Security and Co-Operation in Europe ("s")[21] and the United Nations ("UN").[22] The idea of SA gained traction, among European policymakers,

[19] Damen, M., 'EU Strategic Autonomy 2013–2023: From Concept to Capacity', *European Parliamentary Research Service* (EPRS), July 2022.
[20] The North Atlantic Treaty Organization (NATO) is an intergovernmental transnational military alliance established by the North Atlantic Treaty (Washington Treaty) on 4 April 1949. It comprises 32 member states and focuses on collective defense, crisis management, and cooperative security. See NATO, 'The North Atlantic Treaty', 1949.
[21] The Organization for Security and Co-operation in Europe (OSCE) is a regional security organization with 57 participating states, focusing on conflict prevention, arms control, and human rights monitoring. See OSCE, 'Helsinki Final Act', 1975.
[22] The United Nations (UN) is an international organization founded in 1945, with 193 member states, aimed at maintaining international peace and security, promoting human rights, and fostering development. See UN, 'Charter of the United Nations', 1945.

as a way to strengthen the EU's ability to conduct military and crisis-management operations without necessarily depending on NATO.

The 1998 Saint-Malo Declaration[23] is generally acknowledged as the political and conceptual foundational moment of the EU's pursuit of SA. The Declaration is a bilateral document signed by the United Kingdom ("UK") Prime Minister Tony Blair and French President Jacques Chirac, where they concurred that the EU must be given the ability to act decisively and independently, supported by credible military capabilities, in order to respond to international crises when NATO decides not to be involved[24]. Nevertheless, the EU's independent military capability had to be pursued by avoiding the duplication of NATO's structures and capabilities.[25]

Following the Franco-British Summit held in Saint-Malo, the European Security and Defence Policy (ESDP) was officially established in 1999. In 2009, with the implementation of the Treaty of Lisbon[26], the ESDP was replaced by the Common Security and Defense Policy (CSDP) as an integral part of the Common Foreign and Security Policy (CFSP). Despite these advancements, SA remained largely confined to defense and security policy (particularly within the framework of the CSDP), and the EU continued to rely on NATO for collective security. However, this military-centered notion of SA would soon expand, as new geopolitical and economic challenges reshaped the EU's strategic landscape.

The December 2013 European Council's conclusions on the EU common security and defence policy (CSDP)[27] are credited as the first official EU document to explicitly reference SA. At that time, the EU was closely monitoring the developments in Ukraine after then-President Viktor Yanukovych announced that they would not move forward with the long-anticipated Association Agreement

[23]The Franco-British Summit, held in Saint-Malo, France, on December 3–4, 1998, culminated in the Joint Declaration on European Defence, commonly known as the 'Saint-Malo Declaration Franco–British Summit', 1998.

[24] ibid, where it establishes that "the European Union must have the capacity for autonomous action, backed up by credible military forces, the means to decide to use them, and a readiness to do so, in order to respond to international crises."

[25] ibid, where it establishes that "[…] this must be done without unnecessary duplication of NATO structures."

[26] European Union, 'Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community'. OJ C 306, December 17, 2007.

[27] See *supra* (n.15), European Council Conclusions on Common Security and Defence Policy.

(which included a Deep and Comprehensive Free Trade Area, DCFTA)[28] with the EU. In response to this decision, mass protests erupted across Ukraine against the pro-Russian government, ultimately leading to its overthrow. Subsequently, Russia annexed Crimea and initiated military intervention in Eastern Ukraine. It was within this context of heightened Russian assertiveness that the EU first introduced the concept of SA as part of its broader effort to reassess its security and foreign policy strategy. The term appears once in the document, more precisely, in paragraph 16[29], where it is stressed that "Europe needs a more integrated, sustainable, innovative and competitive defence technological and industrial base (EDTIB) to develop and sustain defence capabilities […]. This can also enhance its SA and its ability to act with partners". While at this stage the term was still primarily associated with security and defense, the Ukraine crisis exposed broader vulnerabilities, highlighting Europe's reliance on Russian energy supplies[30] and raising concerns about economic dependencies that could be leveraged as geopolitical tools. These concerns would later influence the expansion of SA into economic and industrial domain.

In the 2016 EU Global Strategy[31] ("EUGS"), agreed immediately after the Brexit referendum but when the Union still included 28 Member States ("MS"), the European External Action Service ("EEAS"), under High Representative of the Union for Foreign Affairs and Security Policy and Vice-President of the European Commission Federica Mogherini, formally and systematically incorporated the term "Strategic Autonomy" into EU policy discourse for the first time. More precisely, the EUGS refers to the notion of SA four times, predominantly in the context of security and defense. The 2016 EUGS states, in a more general sense, that SA is "necessary to promote the common interests of our citizens, as well as our principles and values"[32]. SA is further mentioned as a precondition for Europe's ability to promote peace and security[33]. It is also

[28] The Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part (OJ L 161, 3–2137) was eventually signed on June 27th by the former Ukranian President Petro Poroshenko.
[29] See *supra* (n.15) European Council Conclusions on Common Security and Defence Policy, at p. 7.
[30] See *infra,* Chapter I, section 3.2.2.
[31] See *supra* (n.16), A Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the European Union's Foreign and Security Policy'
[32] ibid.
[33] ibid, at 9 and 22.

affirmed "sustainable, innovative and competitive European defence industry is essential for Europe's SA and for a credible CSDP."[34]

The EU Implementation Plan on Security and Defence[35], approximately two months after the publication of the 2016 EUGS, provided a loose definition of SA: "the EU's ability to act and cooperate with international and regional partners wherever possible, while being able to operate autonomously when and where necessary"[36]. This document signified a conceptual broadening of SA, setting the stage for its subsequent integration into various policy fields, including industrial strategy, technological innovation, and digital sovereignty.

Since the adoption of the 2016 EUGS the concept of SA has become a recurring theme in EU policy discussions, appearing in numerous official documents, conclusions, and communications from the European Commission, the European Council and the Council of the European Union. The term has evolved in meaning and scope, reflecting the EU's response to shifting geopolitical challenges and its ambition to reduce external dependencies in key sectors. For instance, the European Commission's 2021 Trade Policy Review, shying away from ESA, to which the concept of the European Defense Union was preferred in the military domain originally connected to defend matters, defined the concept of "Open Strategic Autonomy" ("OSA")[37], describing it as "the EU's ability to make its own choices and shape the world around it through leadership and engagement, reflecting its strategic interests and values." [38]

The 2021 EU Trade Policy Review presents OSA as a response to the need for the EU to 'manage interdependence' while "assertively defending its interests".[39] OSA entails "cooperating multilaterally wherever we can, acting autonomously wherever we must".[40] This formulation, which has an explicit focus

[34] ibid, at 49.
[35] Council of the European Union, Implementation Plan on Security and Defence (14392/16), 14 November 2016, p. 4.
[36] ibid, at p. 4.
[37] The concept of Open Strategic Autonomy is also mentioned in the European Commission's Communication Europe's moment: Repair and prepare for the next generation, COM(2020) 456 final, p. 12, May 27, 2020.
[38] See *supra* (n.18), European Commission, Trade Policy Review – An Open, Sustainable and Assertive Trade Policy.
[39] ibid,
[40] See also "cooperating multilaterally wherever we can, acting autonomously wherever we must" in 'Remarks by Executive Vice-President Dombrovskis at the press conference on the fostering the openness, strength and resilience of Europe's economic and financial system', 19 January 2021; and "Open strategic autonomy is a mindset which means we act together with others, multilaterally,

on economic rather than defend matters, balances the need for autonomy with global economic integration, emphasizing that the EU's objective is not autarky or economic isolation, but rather greater economic resilience while maintaining strong multilateral and international cooperation in light of the EU's commitment to fair and open trade.

In other words, OSA is defined as the EU's commitment to open and fair trade, preserving the benefits of an open economy and supporting partners around the world to lead the renewed and reinvigorated form of multilateralism the world needs. At the same time, the EU is aware of the need to reduce its dependency and strengthen its security of supply across key technologies and value chains. This perspective aligns with the Clausewitzian strategy, where the ability to act independently does not necessitate isolation but rather enhancing leverage in an interdependent system.[41]

In the 2021 Trade Policy Review, the European Commission further elaborates that OSA involves a dual approach: reaping the benefits of international economic integration while simultaneously taking assertive action to defend EU's autonomy, defined as independence from external control over strategic assets such as advanced technologies and critical resources. This entails protecting the EU economy from unfair trade practices, ensuring a level playing field, and reinforcing domestic policies to enhance the EU's global economic standing[42]. The Commission emphasized that OSA implies supporting domestic policies to strengthen the EU's economy and to help position it as a global leader in pursuit of a reformed rules-based system of global trade governance. The Commission underscores that this is not merely a policy framework but also a mindset for decision-makers, fostering: *i*) resilience and competitiveness to strengthen the EU's economy; *ii*) sustainability and fairness, reflecting the need for responsible

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or bilaterally, wherever we can. And we act autonomously wherever we must", Weyand, S., Comments on Trade Talks Podcast, 17 January 2021.

[41] The Clausewitzian approach is fundamentally connected to the relationship between means and ends in the context of war and strategy. Clausewitz, in 'On War', conceptualizes war as a tool (means) employed to achieve political objectives (ends). His famous assertion that *"*war is the continuation of politics by other means*"* underscores this idea. See Clausewitz C. V., 'Vom Kriege'*,* Berlin, 1832; trans. Howard M. and Paret P., *On War*, Princeton University Press, Princeton, 1976.

[42]Alcidi, C., Kiss-Gálfalvi, T., Postica, D., Righetti, E., Rizos, V., & Shamsfakh, F. 'What ways and means for a real strategic autonomy of the EU in the economic field?', *Centre for European Policy Studies* ("*CEPS*") *Report (for the European Economic and Social Committee - EESC* (2023).

and fair EU action, and *iii*) assertiveness and rules-based cooperation to showcase the EU's preference for international cooperation and dialogue, but also its readiness to combat unfair practices and use autonomous tools to pursue its interests where needed.

This vision is central to President von der Leyen's "geo-political Commission", which seeks to strengthen the EU's role in global governance while maintaining economic openness. The EU, under this framework, leverages its economic influence to promote high standards and best practices through trade agreements, investment screening, and regulatory tools such as the proposed Carbon Border Adjustment Mechanism[43] and investment screening.[44]

A fundamental pillar of OSA is the revitalization of industrial policy. The resurgence of industrial strategies globally, following decades of market-driven economic policies, is central to this shift. Historically, since the 1970s, industrial policy fell out of favor due to inefficiencies, vested interests, and the perception that government intervention distorted competition. However, multiple crises, including the 2008 financial crisis, the rise of economic competitors such as China, and the increasing necessity for infrastructure investment, have led to a renewed interest in industrial strategies.[45] In this context, OSA is characterized by two main aspects: *i*) the central role of industrial policy, and *ii*) the integration of competitiveness with continental sovereignty and security concerns.[46] This means that the EU must not only foster domestic production capabilities in strategic sectors but also balance this approach with the principles of a free and competitive market. The focus extends beyond self-sufficiency to building resilient supply chains, reducing dependency on foreign actors, and leveraging new technologies for critical raw materials.[47] This industrial policy-driven vision aligns with the

[43] The Carbon Border Adjustment Mechanism (CBAM) is an initiative by the European Union (EU) designed to place a fair price on the carbon emissions associated with the production of certain imported goods. This mechanism aims to encourage cleaner industrial practices in non-EU countries and prevent "carbon leakage," where companies might relocate production to countries with less stringent emissions regulations. See Regulation 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism, OJ L 130, 16.5.2023, p. 52.

[44] Conway, A., 'Strategic autonomy: A spectrum of choices for the EU and Ireland'. *Institute of International and European Affairs*, (2021).

[45] Mariotti, S., '"Open strategic autonomy" as an industrial policy compass for the EU competitiveness and growth: The good, the bad, or the ugly?' *Journal of Industrial and Business Economics*, (2024).

[46] ibid.

[47] ibid.

objectives set out in the Spanish Presidency of the EU's *non-paper* on OSA (October 2023)[48], which prioritizes: *i*) bolstering and securing internal production capacities, ensuring the EU can produce key goods and services domestically; *ii*) enhancing circularity and smart consumption, reducing resource dependencies by promoting sustainability and efficient resource use; and *iii*) reinvigorating global trade and the multilateral system, engaging with international partners to strengthen open trade while safeguarding EU interests.

The EU's approach to OSA reflects a delicate balance between protectionist measures and global economic integration. The European Commission emphasizes that the EU will seek partnerships where possible, lead international cooperation when feasible, but also act unilaterally when necessary to defend its interests. This approach was notably expressed by former High Representative Federica Mogherini, who framed EU autonomy as a strategic choice allowing both cooperation and independent action. To operationalize this principle, the EU has developed autonomous tools to safeguard its economic security, including: *i*) (FDI) Screening Regulation (EU 2019/452)[49]; *ii*) supply chain diversification and resource stockpiling, particularly in sectors such as medical supplies, defense, energy, and microelectronics; *iii*) industrial cooperation with third countries, aimed at bolstering manufacturing capabilities in partner states, thereby strengthening the EU's global supply chains.

This evolving framework was further developed in subsequent communications from the European Commission, which linked Strategic Autonomy with broader economic and security concerns. Notably, the 2023 Communication on the European Economic Security Strategy[50] introduced a structured approach to identifying and mitigating risks stemming from excessive dependencies and potential economic coercion, thus intersecting economic resilience with Strategic Autonomy. Similarly, the 2024 Communication entitled "Advancing Economic Security in the European Union"[51] expanded this rationale by outlining the need for coordinated instruments to protect critical supply chains,

[48] Spanish Presidency of the Council of the European Union. (2023). Resilient EU2030.
[49] See *infra*, Chapter III, section 6.1.
[50] Joint Communication to the European Parliament, the European Council and the Council on "European Economic Security Strategy", JOIN(2023) 20 final.
[51] European Commission, 'Communication to the European Parliament and the Council – Advancing European economic security: an introduction to five new initiatives', COM(2024) 22 final, Brussels, 24 January 2024.

assert Union interests in global trade, and reinforce strategic capacities across key technological sectors. Moreover, in 2025, the Commission's Competitiveness Communication, the so-called "Competitiveness Compass"[52], explicitly reiterated the Union's commitment to "Open Strategic Autonomy" as a guiding principle for maintaining the EU's global positioning, technological leadership, and sustainable growth. Although not directly framed within the economic security discourse, this reference underscores the increasing institutionalization of Strategic Autonomy as a transversal objective across internal and external dimensions of Union policy.

As far as the European Council is concerned, as of May 2021, a total of five sets of European Council conclusions had mentioned SA. As anticipated, it was first included in 2013[53], where it related to a discussion on EU's defence industry. Subsequently, in 2018, the notion of SA was mentioned in two conclusions of two European Council meetings, related, once again, to security and defence[54]. In 2020, two additional conclusions referred to SA, one in relation to the European Defence Fund (under Next Generation EU, "NGEU")[55] and another one in the context of the Covid-19 Recovery package (which included the green transition and digital transformation pillars)[56]. Furthermore, the Council of the EU has published several additional conclusions and other official documents mentioning SA. Council documents from 2013 onwards support the enhancement of European Strategic Autonomy ("ESA") through the European Defence Technological and Industrial Base (EDTIB)[57], Common Security and Defence Policy, European Defence Industry Development[58], the EU's Global Strategy for Security and

[52] European Commission, Commission Communication 'Competitiveness Compass for the EU', COM(2025) 30 final, Brussels, 29.1.2025.
[53] See *supra* (n.15) European Council Conclusions on Common Security and Defence Policy.
[54] European Council, European Council Conclusions, EUCO 17/18, Brussels, 14 December 2018, p. 4. At point 11 the Conclusion states that: "these initiatives contribute to enhancing the EU's strategic autonomy and its capacity to act as a security provider, while complementing and reinforcing the activities of NATO and strengthening EU-NATO cooperation, in full respect of the principles of inclusiveness, reciprocity, and decision-making autonomy of the EU." See also, European Council, European Council Conclusions, EUCO 9/18, Brussels, 28 June 2018, p. 4.
[55] European Council, European Council Conclusions, EUCO 10/20, Brussels, 21 July 2020, p. 53.
[56] European Council, European Council Conclusions, EUCO 13/20, Brussels, 2 October 2020, p. 1. At point 3 the European Council states "[…] the green transition and the digital transformation, together with a strong and deep Single Market, will foster new forms of growth, promote cohesion and convergence, and strengthen the EU's resilience. Achieving strategic autonomy while preserving an open economy is a key objective of the Union."
[57] Council of the European Union, Guidelines for the Work of the European Defence Agency in 2016, 14121/15, Brussels, 17 November 2015.
[58] Council of the European Union, Council Conclusions on Common Security and Defence Policy, 15992/13, Brussels, 25 November 2013.

Defence[59], and the European Defence Agency[60]. The Council of the European Union, in numerous documents, emphasized the relevance of SA in crucial areas as digital sovereignty and cybersecurity[61] in order to face threats in the digital domain. Additionally, in 2020, the Council of the EU started to stress the need to enhance SA through technological innovation[62]. With regards to resources, the Council of the European Union also proposed that SA should be improved through strong and diversified value chains[63] and industrial competitiveness[64].

In light of this progressive evolution, the concept of SA has crystallized as a programmatic orientation of the Union, reflecting a growing institutional awareness of the need to enhance its capacity for independent action across multiple policy domains. From its initial formal recognition in the Council Conclusions of December 2013, through its conceptual structuring in the 2016 EU Global Strategy and subsequent elaboration in the Commission's Trade Policy Review to the most recent strategic communications on economic security and competitiveness, SA has become a defining theme in the EU's external action. These developments mark a shift from the initial security-based conception of Strategic Autonomy toward an integrated paradigm in which trade, industrial policy, and economic security are intrinsically interlinked. The increasing relevance of economic security as a functional dimension of Strategic Autonomy will be critically assessed in Chapter III, through the lens of two emblematic instruments, the FDI Screening Regulation and the ACI which translate the EU's strategic objectives into legal mechanisms designed to protect technological sovereignty and respond to external economic coercion, while revealing structural tensions within the Union's constitutional architecture.

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[59] Council of the European Union, CFSP Report - Our Priorities in 2018, 11161/18, Brussels, 16 July 2018.
[60] Council of the European Union, Council Guidelines for EDA's Work in 2019, 14410/18, Brussels, 19 November 2018.
[61] Council of the European Union, Council Conclusions on Strengthening Europe's Cyber Resilience System and Fostering a Competitive and Innovative Cybersecurity Industry, 14540/16, Brussels, 15 November 2016.
[62] Council of the European Union, Proposal for a Regulation of The European Parliament And Of The Council establishing Horizon Europe - the Framework Programme for Research and Innovation, laying down its rules for participation and dissemination, 14239/20, Brussels, 18 December 2020.
[63] Council of the European Union, An EU Industrial Policy Strategy: a Vision for 2030 - Council conclusions, 9706/19 Brussels, 27 May 2019.
[64] Council of the European Union, A recovery advancing the transition towards a more dynamic, resilient and competitive European industry, 13004/20, Brussels, 16 November 2020.

### 2.1 From Juncker to von der Leyen: Strategic Autonomy in EU Political Discourse

As evidenced by the Conclusions and official documents of the European Council and the Council of the European Union, the concept of SA has progressively evolved, expanding beyond its originally military-centric scope to encompass a broad array of EU policies with external dimensions**,** including trade, industrial strategy, technological sovereignty[65], and economic resilience.[66]

The evolution of this comprehensive approach was further solidified by French President Emmanuel Macron's vision of *souveraineté européenne*.[67] Although the French President did not explicitly use the term "Strategic Autonomy", he emphasized the necessity of ensuring the EU's capacity to operate independently in defense matters and the importance of developing a common strategic culture to enhance coordination and effectiveness in European security and defense policies. Following, Macron's speech, the Institut français des relations internationales ("IFRI"), in 2018, reflected on the ambitions of SA for the EU, while being aware of other Member States' "fear that France would love to commit the EU to a Gaullist turn, pushing it to sever the transatlantic link while bolstering French influence".[68]

The concept of SA, frequently used interchangeably with that of European sovereignty, was later reinforced by former European Commission President Jean-Claude Juncker in his 2018 State of the Union Address.[69] Juncker's speech underscored a comprehensive understanding of European sovereignty, advocating

[65] See *infra*, Chapter III, section 6.1.
[66] Economic resilience's purpose is ensuring that the EU does not fall (too far) behind in the economic and technological race with the USA and China. See Csernatoni, R., 'The EU's Rise as a Defense Technological Power: From Strategic Autonomy to Technological Sovereignty', *Carnegie Europe*, (2021).
[67] In his 2017 Speech at Sorbonne University, Initiative for Europe: A Sovereign, United, Democratic Europe, President Emmanuel Macron affirmed that "the only way to guarantee our future is to re-establish a sovereign, united and democratic Europe".
[68] Brustlein, C., (Director of IFRI's Security Studies Center), 'European Strategic Autonomy: Balancing Ambition and Responsibility', *IFRI*, 16 November 2018.
[69] In his 2018 State of the Union Address Juncker stated that "I want Europe to get off the side-lines of world affairs. Europe can no longer be a spectator or a mere commentator of international events. Europe must be an active player, an architect of tomorrow's world. […] There is strong demand for Europe throughout the world. To meet such high demand, Europe will have to speak with one voice on the world stage. In the concert of nations, Europe's voice must ring clear in order to be heard […]".

for the EU to assert itself as a global leader across various domains, while no longer being excessively dependent on external actors.

SA is interpreted as a means of increasing the EU's influence in global governance. In his Address, Juncker affirmed that *"*it is time Europe developed what I coined "Weltpolitikfähigkeit" – the capacity to play our role in shaping global affairs. Europe has to become a more sovereign actor in international relations".[70]

Together, Macron's sovereigntist vision and Juncker's call for a globally influential Europe played a key role in shaping the EU's approach to SA. Their perspectives contributed to a shift in EU discourse, where SA is viewed as a multidimensional objective encompassing security, economy, digital policy, and industrial strategy which reflect a broader ambition to enhance the EU's capacity for independent action on the global stage.

This broader conceptualization of SA was formally embraced by President Ursula von der Leyen's **"**geopolitical" Commission[71] during the autumn of 2019. The notion of a "geopolitical Commission" implies that the EU should no longer be a passive global player, whereas it should instead develop its own strategic capabilities, defend its interests, and act as a global power in its own right. SA became one of the core principles guiding von der Leyen's Commission, particularly in response to global shocks such as the COVID-19 pandemic[72], supply chain disruptions, and the energy crisis triggered by the Russian invasion of Ukraine.[73] Von der Leyen's geopolitical vision is reflected in key policy initiatives, such as: *i)* the European Chips Act[74]**,** aimed at reducing Europe's reliance on foreign semiconductor production and securing a more resilient supply chain**;** *ii)* the Foreign Direct Investment (FDI) Screening Regulation[75]**,** which

[70] ibid.

[71] In the Speech by President-elect von der Leyen in the European Parliament Plenary on the occasion of the presentation of her College of Commissioners and their programme, on September 27 November 2019, President-elect Ursula von der Leyen outlined her vision for a "geopolitical Commission", emphasizing the need for the European Union to be more strategic, assertive, and united in its external actions.

[72] See *infra*, Chapter I, section 3.1.

[73] *See infra*, Chapter I, section 3.2.

[74] Regulation (EU) 2023/1781 of the European Parliament and of the Council of 13 September 2023 establishing a framework of measures for strengthening Europe's semiconductor ecosystem and amending Regulation (EU) 2021/694 [2023] OJ L229/1 (*European Chips Act*).

[75] See *infra*, chapter III, section 6.1. Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union [2019] OJ L79I/1 (FDI Screening Regulation).

strengthened EU oversight of foreign investments in critical sectors to prevent undue influence from third countries; *iii)* The Anti-Coercion Instrument[76], designed to counter economic pressure from non-EU countries and safeguard the EU's trade interests; and *iv)* the European Green Deal[77]and; *v*) the NextGenerationEU Recovery Plan[78], which linked climate and digital transformation to SA, reinforcing Europe's capacity to lead the transition toward a more sustainable and self-sufficient economy.

This increasingly comprehensive conceptualization of SA was later reaffirmed by former High Representative of the Union for Foreign Affairs and Security Policy and former Vice-President of the European Commission Josep Borrell, who underscored the necessity for the EU to master the "language of power". [79]

In his 2020 Speech at the Bruegel Think Tank, Charles Michel, former President of the European Council, described SA as "the aim of our generation."[80] He continued, stating that "our strategic autonomy must pursue three objectives. One: stability. Two: disseminating our standards. And three: promoting our values."[81] He defined stability, the first objective, as physical, social and economic security, emphasizing that the "EU must constitute a favourable environment for investment and trade, both within our market and with the rest of the world. Upholding fair market conditions and reciprocity with our trading partners is one of our priorities. We advocate free and open economies, and we are opposed to protectionism. But access to our large market cannot be given away for free. The

[76] See *infra*, chapter III, section 6.2. Regulation (EU) 2023/2675 of the European Parliament and of the Council of 22 November 2023 on the protection of the Union and its Member States from economic coercion by third countries (Anti-Coercion Instrument) [2023] OJ L 2023/2675.
[77] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions – The European Green Deal [2019] COM(2019) 640 final (*European Green Deal*).
[78] Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility [2021] OJ L57/17 (*NextGenerationEU Recovery Plan*).
[79] During his introductory speech to the European Parliament on October 7, 2019, High Representative/Vice-President-designate Josep Borrell emphasized the necessity for the European Union to adopt a more assertive stance in global affairs. He remarked: ″To sum up, in a single sentence, the EU has to learn to use the language of power". Borrell reiterated these thoughts in a speech at the Hoover Institution, Stanford University, in May 2024, stating: "Europe has to learn to speak the language of power. […] This is not a luxury. This is not something that you may have or not. This is indispensable if we want to protect our lifestyle, our social fabric and our values".
[80] Michel C., 'L'autonomie stratégique européenne est l'objectif de notre generation', Speech at Bruegel Think Tank, 28 September 2020.
[81] ibid.

lower your compliance with standards, the more restricted your access*"*.[82] As for the second objective, Michel referred to the EU's capacity to safeguard their capacity to set standards which constitutes a key factor to the Union's current power.[83] Lastly, with regards to the third objective Michel affirmed that "the strength of our economic and social model lies in the fact that it is founded, in a way which is unique, on the bedrock of our values. It gives us great legitimacy and makes us hugely attractive in the eyes of many partners around the world."[84]

Former President Michel then concluded stating that "Sovereignty, independence, empowerment... Whichever word you use, it's the substance that counts. Less dependence, more influence. Effective strategic autonomy is the credo that brings us together to define our destiny, and to have a positive impact on the world."[85] In addition to this, in May 2022, European Council President Michel referred the election of Donald Trump, the COVID-19 crisis, and the war as constituent elements that have reinforced the EU's need for SA[86].

From the political discussion on SA, it is clear that although the concept initially emerged within the domain of foreign and security policy, it has increasingly been invoked in broader economic contexts as well. In addition to the military aggression by Russia, the economic challenges posed by global actors such as the United States and China have underscored the need for a robust and coordinated response by the Union. Within this expanded framework, the notion of SA appears to function as a conceptual middle ground: it bridges the more ambitious vision of "European Sovereignty" advanced by French President Emmanuel Macron, and the more cautious interpretation favoured by the German government, which associates the term "sovereignty" with significant legal implications and heightened constitutional scrutiny by the Federal Constitutional Court in Karlsruhe.

While the political declarations made by institutional leaders significantly influenced the Union's evolving strategic orientation, particularly von der Leyen's

[82] ibid.
[83] ibid.
[84] ibid.
[85] ibid.
[86] President of the European Council Charles Michel, Speech 465/22 of 18 May 2022 at the plenary session of the European Economic and Social Committee.

"geopolitical Commission", Juncker's call for "Weltpolitikfähigkeit" and and Michel's framing of SA as "the aim of our generation", reveal a high degree of normative convergence and strategic consensus at the leadership level and thus signal the progressive consolidation of SA as a guiding principle of EU external action, they do not in themselves amount to a binding institutional programme.

Nonetheless, the recurring and increasingly structured references to SA in key European Council Conclusions, such as those of 20 December 2013**,** June 2016 (EU Global Strategy), October 2020, and the 2021 Trade Policy (COM(2021) 66 final), confirm that the concept has been progressively elevated to a programmatic line of the Union, particularly in the area of external relations. These policy documents, endorsed by the European Council and followed by legislative initiatives (e.g. the Chips Act[87], Anti-Coercion Instrument[88], and the FDI Regulation[89]), have contributed to transforming a political slogan into an operational and strategic policy framework.

Therefore, while declarations by EU presidents often serve a visionary or agenda-setting role, it is through the incorporation into the Conclusions of the European Council and subsequent implementation through secondary law that SA has acquired a genuinely programmatic status.

## 3. COVID-19 and Russia's invasion of Ukraine as catalysts

### 3.1 COVID-19

In July 2019, the European Council on Foreign Policy published a comprehensive paper[90] trying to summarize the debate and development of the notion of EU's SA at that point in time. The ECFR concludes that *"*to fulfil its true potential, the EU needs to end its strategic cacophony and focus on capability building". In other words, the authors affirm that the institutional and political fragmentation within the Union constrained the EU's geopolitical ambition. While some Member States see SA as a defense-oriented project, others, adopting a more

[87] See *supra* (n.74), European Chips Act.
[88] See *supra* (n.76), Anti-Coercion Instrument, *infra* Chapter III, section 6.1.
[89] See *supra* (n.75), FDI Screening Regulations, *infra* Chapter III, section 6.2.
[90] Franke, U. & Varma T., 'Independence Play: Europe's Pursuit of Strategic Autonomy'**,** *European Council on Foreign Relations* (ECFR), (2019).

comprehensive approach, prioritize economic resilience or technological sovereignty.

This lack of consensus on objectives and means leads to what the ECFR terms "strategic cacophony", a situation in which European actors speak with different voices, pursue disjointed policies, and fail to establish a credible, unified stance on global affairs. More precisely, the ECFR argues that capability-building is the key to overcoming these structural weaknesses. The report stresses that the EU must shift its focus from rhetoric to concrete action. Nevertheless, for this to happen, as emphasized by Damen[91], the EU needed another major crisis, which arrived the following year, the COVID-19 pandemic.

The COVID-19 pandemic marked a turning point in the EU's conceptualization of SA, revealing critical vulnerabilities in global supply chains and economic resilience. The crisis, in fact, acted as a catalyst in the EU's efforts to reduce dependencies on third countries in key areas, such as medical supplies, digital technologies, and industrial production. Furthermore, it starkly demonstrated the extent of the EU'S dependence on critical product imports from Asia, particularly China. Initially, this reliance became evident in the shortages of essential protective equipment, such as face masks, but it soon extended to other strategic sectors, including medical and pharmaceutical products, semiconductors (chips), and raw materials. Additionally, the pandemic-induced disruptions to global economic value chains limited the availability of essential raw materials, highlighting persistent vulnerabilities in the EU's supply chains and reinforcing the imperative of reducing external dependencies and bolstering internal resilience.

In June 2020, High Representative of the Union for Foreign Affairs and Security Policy and Vice-President of the European Commission Josep Borrell, and European Commissioner for the Internal Market (responsible for the defence industry), Thierry Breton published an opinion piece advocating for "a united, resilient, and sovereign Europe."[92] They linked pandemic-induced supply

[91] See *supra* (n.19), Damen.

[92] Borrell, J. & Breton T., 'For a United, Resilient and Sovereign Europe', *European Commission*, 2020. Beyond economic autonomy, Borrell and Breton, highlighted the importance of enhancing the EU's defense sector, protecting critical infrastructure (e.g., cybersecurity, drones, and quantum technology), and countering disinformation. The authors stressed that solidarity among EU Member States is essential to achieving a more autonomous and sovereign Europe, urging the EU to take decisive action in securing supply chains and asserting itself as a global actor.

shortages to the necessity of strengthening the EU's SA, emphasizing the need to reduce external dependencies in medical supplies, pharmaceuticals, and key technologies.[93]

The European Parliamentary Research Service, in its 2021 Report on the Resilience of Global Supply Chains,[94] underlined that the pandemic disrupted many supply chains at its outbreak, and the subsequent economic recovery, the strongest on record, led to enormous further strain on the global supply system. Additionally, the EPRS' report stressed that, even before the pandemic, the EU had recognized its strategic dependence on some foreign inputs and had started to seek ways to increase its autonomy. Such quest has been accelerated by the impact of the pandemic. Subsequently, assessing the overall scenario shaped by the outbreak of the Covid-19 pandemic and the progressive deterioration of global trade relations, mainly due to the increasing tensions between the United States and China, the Commission observed that: "the crisis has also revealed a number of areas where Europe needs to be more resilient to prevent, protect and withstand future shocks. We will always be committed to open and fair trade but must be aware of the need to reduce dependency and strengthen security of supply, notably for things like pharmaceutical ingredients or raw materials."[95]

The Commission affirmed that: "Our generational challenges - the green and digital transitions – are even more important now than before the crisis started. Through the recovery, we will press fast-forward on the twin green and digital transitions. We will strengthen our strategic autonomy while preserving the benefits of an open economy. We will support our partners around the world and lead a renewed and reinvigorated form of multilateralism the world needs."[96] A little further on, it introduced the key concept of Open Strategic Autonomy, stating: "Global trade and its integrated value chains will remain a fundamental growth engine and will be essential for Europe's recovery. With this in mind, Europe will pursue a model of open strategic autonomy. This will mean shaping the new system of global economic governance and developing mutually

[93] Renda, A. and Schaus, M., (2021), 'Towards a resilient and sustainable post-pandemic recovery', *CEPS Task Force on the New Industrial Strategy for Europe*, (2021).
[94] EPRS, "Resilience of Global Supply Chains: Challenges and Solutions," European Parliamentary Research Service, November 2021, PE 698.815.
[95] See *supra* (n.37), European Commission, Communication Europe's moment: Repair and prepare for the next generation.
[96] ibid, at p. 2.

beneficial bilateral relations, while protecting ourselves from unfair and abusive practices. This will also help us diversify and solidify global supply chains to protect us from future crises and will help strengthen the international role of the euro. In this spirit, the EU will undertake a Trade Policy Review to ensure the continuous flow of goods and services worldwide and to reform the World Trade Organization. At the same time, the EU also needs to protect its strategic assets, infrastructure and technologies from foreign direct investments that could threaten its security or public order, through a reinforced Foreign Direct Investment screening mechanism. In this crisis, state subsidies from third countries have the potential of further un-levelling the playing field in the Single Market. This will be addressed in the upcoming Commission White Paper on an instrument on foreign subsidies." [97]

### 3.1.1 EU Policy Response to the COVID-19 pandemic

Indeed, in response to the pandemic, the EU has implemented a policy mix aimed at increasing domestic capacity, diversifying suppliers, and supporting the multilateral rules-based trade environment.

The policy initiatives adopted by the EU's Institutions aimed at enhancing its resilience and self-sufficiency, include: *i*) The Pharmaceutical Strategy for Europe[98] (2020), which sought to strengthen the EU's ability to produce essential medicines and reduce dependence on third-country suppliers taking into account the weaknesses exposed by the coronavirus pandemic; *ii*) the EU Industrial Strategy[99] (Updated on May 11th 2021) which identified 137 strategic products with high external dependency and proposed measures to increase domestic production capabilities; *iii*) the European Health Union[100] (2020-2021), which reinforced health cooperation and established new crisis preparedness mechanisms which enhanced the EU's SA.

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[97] ibid, at p. 13.

[98] European Commission, Pharmaceutical Strategy for Europe, COM(2020) 761 final, 25 November 2020.

[99] European Commission, Updating the 2020 New Industrial Strategy: Building a Stronger Single Market for Europe's Recovery, COM(2021) 350 final, 5 May 2021. The Commission updated the EU Industrial Strategy to ensure that its industrial ambition takes full account of the new circumstances following the COVID-19 crisis and helps to drive the transformation to a more sustainable, digital, resilient, and globally competitive economy.

[100] European Commission, Building a European Health Union: Reinforcing the EU's Resilience for Cross-Border Health Threats, COM(2020) 724 final, 11 November 2020.

Besides the policy responses, the most extensive and structurally significant initiative within this framework was the adoption of Next Generation EU (NGEU)[101], a temporary recovery instrument amounting to €750 billion.[102] This initiative, both in terms of scale and of the mechanisms employed to distribute the resources among the Member States, represented an unprecedented intervention in EU economic governance. A defining feature of NGEU was the conditionality attached to the disbursement of funds. Specifically, recipient states were required to allocate these resources towards the twin transition, namely, the ecological and digital transformation of their economies. This dual objective was not merely an economic modernization strategy but, as emphasized by Damen[103], was conceived as a mechanism to fortify the EU against future economic disruptions and enhance its strategic resilience in a volatile global landscape. The creation of Next Generation EU was embedded within the framework of the 2021-2027 Multiannual Financial Framework (MFF)[104]**,** the EU's long-term budgetary planning instrument.[105]

Despite broad consensus on the necessity of a recovery package, negotiations among Member States were highly contentious. The key points of contention revolved around: *i)* the balance between grants and loans; *ii)* the conditionality mechanisms*; iii)* budgetary allocations. Following intense deliberation[106], the European Council reached an agreement on 21 July 2020. The final package consisted of €750 billion in total funding, with €390 billion allocated as grants and €360 billion as loans. A legal framework allowing the European

[101] European Commission, Next Generation EU: A European Instrument to Counter the Impact of the Coronavirus Pandemic, Brussels, 2020.
[102] €750 billion in 2018 prices, €806.9 billion in current prices.
[103] See *supra* (n.19), Damen.
[104] European Council, Conclusions – Special Meeting of the European Council, EUCO 10/20, Brussels, 2020.
[105] This ensured that the recovery fund was not an isolated emergency measure but rather a structured financial initiative aligned with the EU's broader policy priorities. The Commission put forward its proposal for the EU's next long-term budget on 2 May 2018. On 27 My 2020, in response to the unprecedented crisis caused by the COVID-19 pandemic, the European Commission formally presented the temporary recovery instrument NGEU, linking it to the new MFF (2021-2027), which would be reinforced to accommodate the exceptional financial package.
[106] A crucial aspect of the agreement was the inclusion of the Rule of Law Mechanism, which made access to NGEU funds contingent on compliance with fundamental EU values (art. 2 TEU), such as judicial independence and democratic governance. This provision was met with resistance from Hungary and Poland, leading to further negotiations before a compromise was reached.

Commission to borrow funds on capital markets on behalf of the EU was an unprecedented step in the history of European integration.[107]

Beyond its immediate recovery objectives, NGEU played a crucial role in advancing the EU's SA. The crisis, by revealing the EU's vulnerabilities (in global supply chains, energy dependencies, and technological infrastructure), prompted a recalibration of economic policies towards greater self-sufficiency. By prioritizing investments in renewable energy, industrial innovation and digital infrastructure, NGEU sought to strengthen internal market resilience and reduce dependence on third countries for energy resources and critical technologies, this aligns with other policies implemented by the EU, as the European Chips Act[108] aimed at securing semiconductor supply chains.

The NextGenerationEU was not merely a fiscal response to an unprecedented crisis, but a transformative initiative aimed at modernizing the European economy, reducing external dependencies, and strengthening the EU's long-term SA. The NGEU laid the groundwork for a more resilient, self-sufficient, and economically integrated Union serving as a steppingstone towards greater strategic sovereignty in an era of geopolitical uncertainty.

### 3.2 Russia's Invasion of Ukraine

The Russian invasion of Ukraine in 2022 was another defining moment for the evolution of SA exposing the EU's deep dependence on Russian energy and raising urgent questions about military and economic resilience. In fact, the invasion has underscored the necessity for the EU to enhance its SA across various sectors. By addressing vulnerabilities in trade, energy, financial markets, and technology, the EU aimed to strengthen its capacity to act independently in the face of the evolving geopolitical challenges. Russia's full-scale invasion of Ukraine on 24 February 2022 shattered long-held assumptions that war had

[107] Once agreed upon at the European Council level, NGEU went through multiple legislative and national approval stages: *i*) European Parliament Approval (European Parliament, Legislative Resolution of 16 December 2020 on the Council Regulation laying down the Multiannual Financial Framework for the years 2021 to 2027*,* P9_TA(2020)0357, OJ C 445, 29.10.2021, p. 1.); *ii*) Ratification by National Parliaments; *iii*) Operationalization (Member States submitted their National Recovery and Resilience Plans, NRRPs).

[108] See *supra* (n.74), European Chips Act.

become obsolete in Europe.[109] This military escalation represented the culmination of nearly a decade of rising tensions between Moscow and Kyiv, which can be traced back to 2013, when Ukraine undertook a series of internal reforms aimed at deeper integration with the EU. Russia viewed Ukraine's rapprochement with the EU as a geopolitical threat therefore, in response, Moscow imposed economic sanctions on Ukraine, applying financial pressure to dissuade Kyiv from signing the Association Agreement.[110] In the aftermath of these events, Russia adopted an assertive and interventionist approach, leading to the annexation of Crimea in 2014.

The annexation of Crimea marked a turning point, drawing widespread condemnation from the international community and leading to the first rounds of EU and U.S.[111] sanctions against Russia. Despite diplomatic efforts to stabilize the situation, including the Minsk Agreements[112], tensions between the two nations persisted, with continued fighting in eastern Ukraine involving Russian-backed separatists in the Donbas region. By early 2022, Russian military build-up had reached critical levels, and on 24 February, the invasion commenced.

### 3.2.1 Impact of the Russian invasion of Ukraine on European Security and Defence Policy

In response to the Russia-Ukraine conflict, the EU, often criticized for its fragmented security policy, took unprecedented steps, including breaking long-standing taboos by financing the delivery of lethal weapons to Ukraine. This marked a significant evolution in the EU security policy, demonstrating unified military and financial support against Russian aggression.

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[109] Schouenborg, L., 'Why War Has Become Obsolete in Europe', Stanford University, *Freeman Spogli Institute for International Studies*, (2010).
[110] See *supra* (n. 28), The Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part.
[111] On March 6, 2014, President Obama signed Executive Order 13660, authorizing sanctions against individuals and entities responsible for undermining Ukraine's sovereignty and territorial integrity. U.S. President. Executive Order 13660, 'Blocking Property of Certain Persons Contributing to the Situation in Ukraine.' *Federal Register* 79, no. 46 (March 6, 2014): 13493.
[112] Organization for Security and Co-operation in Europe (OSCE), Protocol on the Results of Consultations of the Trilateral Contact Group, Minsk, 5 September 2014 and the Package of Measures for the Implementation of the Minsk Agreements, Minsk, 12 February 2015 https://www.osce.org/files/f/documents/5/c/140156.pdf.

In what has been characterized as a "watershed moment"[113], EU Member States reached an agreement to jointly finance the supply of lethal weapons to Ukraine. HR/VP Josep Borrell emphasized that this decision marks the breaking of a long-standing *taboo*[114]. The significance of this move was underlined by Commission President Ursula von der Leyen[115], who stated that it is the first time in history that the EU will finance the procurement and delivery of weapons and other equipment to a country under attack. The mechanism facilitating this initiative is the European Peace Facility (EPF)[116], a financing instrument outside the EU's budget, amounting to €5.69 billion and operational since July 2021. The EPF can be utilized for capacity-building in partner countries and organizations, including the provision of lethal weapons. The provision of military assistance by the EU to Ukraine is undoubtedly one of the most debated topics. This is because it marks the first instance in its history where the EU has supplied lethal weaponry to a third country.

On 28 February 2022, the EU approved the supply of military equipment to Ukraine worth €500 million, including weapons intended for lethal use. Based on the data provided by the Ukraine Support Tracker developed by the Kiel Institute, the combined support from the EU institutions and its member states to Ukraine as of 15th February 2024 amounted to over €144 billion[117] across various forms of military, financial, humanitarian, and emergency aid[118].

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[113] von der Leyen, U., 'Statement by President von der Leyen on further measures to respond to the Russian invasion of Ukraine'. *European Commission*, Brussels, (2022).
[114] Borrell, J., 'Putin's War Has Given Birth to Geopolitical Europe'*, Project Syndicate*, (2022).
[115] See *supra* (n.71), Speech by President-elect von der Leyen in the European Parliament Plenary on September 27 November 2019.
[116] The EPF was set up by Council Decision (CFSP) 2021/509 of 22 March 2021, and entered into force on the same day. The EPF has a financial ceiling of €5.692 billion (in current prices) for 2021-2027, with an annual ceiling that will gradually increase from €420 million in 2021 to €1.132 billion in 2027. Council of the European Union. (2021, March 22); Council Decision (CFSP) 2021/509 of 22 March 2021 establishing a European Peace Facility and repealing Decision (CFSP) 2015/528. OJ L 102/14.
[117] The figure of €144 billion refers to the total committed aid by European donors, which includes both allocated funds and pledged amounts not yet disbursed. As of February 15, 2024, there was a notable gap between commitments and allocations, with €144 billion committed versus €77 billion allocated.
[118] Trebesch, C., Antezza A., Bushnell K., Frank, A., Frank P., Franz L., Kharitonov I., Kumar B., Rebinskaya E., Schramm S., Dyussimbinov, Y., Weiser L., Schade C., (2024), Ukraine Support Tracker Data. *Kiel: Institute for the World Economy.*

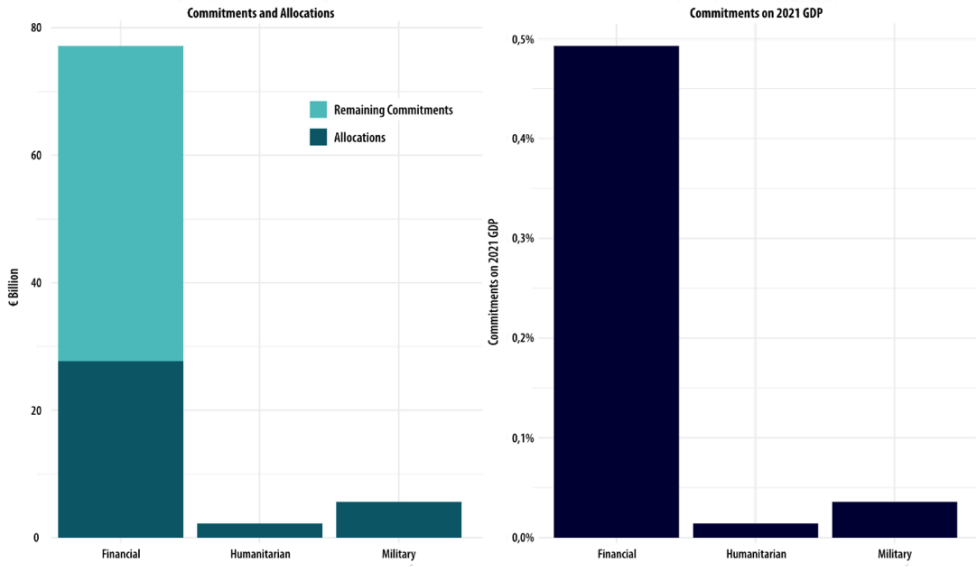


**Figure 1: Total bilateral aid commitments provided to Ukraine by EU institutions in billion euros between January 24, 2022, and January 15, 2024 (Trebesch et al. 2024).**

*Source*: M. Sguazzini, M. Mazziotti di Celso, *The Road to Strategic Autonomy: Reflections from the Russia-Ukraine War,* (2024).

The European Union has implemented a series of sanctions in response to Russia's war, extending beyond Russia to also target Belarus, due to its direct involvement in the invasion of Ukraine, and Iran, in light of its provision of drones used in the conflict. Concerns initially arose regarding the EU's ability to achieve the necessary unanimity required for the approval of sanctions, particularly given opposition in certain Member States. Hungary, in particular, posed a challenge, as public opinion within the country was largely against the imposition of sanctions. Nevertheless, despite repeated efforts to weaken the sanctions packages or remove specific individuals and entities from the EU's sanctions list, Hungary has not exercised its veto in any of the previous sanction rounds.

As of February 23rd, 2024, the EU has adopted 13 packages of sanctions (European Commission 2024c)[119] which encompass a wide range of restrictive measures targeting key sectors, including finance[120], business, defense,

[119] European Commission (2024c). EU Adopts 13th Package of Sanctions against Russia after Two Years of Its War of Aggression against Ukraine. Brussels, 23 February 2024. Update: as of 14 March 2025, the European has adopted the 16th package and has renewed the sanctions until 15 September 2025.

[120] For instance, bans on financial transactions with all state-controlled banks and certain state-owned enterprises; financial deposits from Russia in EU banks exceeding €100 000; accounts belonging to Russian clients in EU banks; provision of credit rating services to Russian individuals

technology, media[121], and energy. These sanctions involve freezing assets of designated entities and individuals[122], restricting transactions with Russia's central bank[123], and prohibiting the export of specific goods.[124] Additionally, certain activities have been explicitly banned, such as transactions with Russian military-industrial enterprises and the broadcasting of content from designated Russian media outlets. However, despite these measures, the EU continued and continues to face significant challenges in ensuring the full enforcement of sanctions, particularly due to its ongoing dependence on Russian energy resources.[125]

Since 24 February 2022, the EU "advanced more in building a geopolitical Europe in one week than ... in several years" according to HR/VP Borrell.[126]

A key moment in the EU's coordinated response, following Russia's invasion of Ukraine on 24 February 2022, is the EU Heads of States and Governments informal meeting in Versailles on 10 and 11 March 2022, were it was observed that: "Confronted with growing instability, strategic competition and security threats, we decided to take more responsibility for our security and take further decisive steps towards building our European sovereignty, reducing our dependencies and designing a new growth and investment model for 2030. In this respect, we addressed today three key dimensions: a) Bolstering our defence capabilities; b) Reducing our energy dependencies; and c) Building a more robust economic basis."

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and entities; the sale of eurodenominated securities to Russian clients; participation in Russian Direct Investment Fund projects.

[121] A ban on broadcasts by Kremlin propaganda channels RT and Sputnik.

[122] Individual "targeted" sanctions, applicable to almost 2400 individuals and entities, consisting of travel bans and financial restrictions (asset-freezing and a prohibition on making funds or economic resources available); individual assets frozen in the EU amount to €24.9 billion so far. Among the individuals sanctioned, Vladimir Putin, senior government ministers, members of the National Security Council and Russian Federation Council. Measures also target oligarchs – e.g. Roman Abramovich and German Khan – in the finance, energy, digital and metallurgical sectors, and propagandists such as Margarita Simonyan, head of the RT news channel, and Konstantin Ernst, chief executive officer of Channel One Russia.

[123] Immobilisation of Russia's Central Bank reserve holdings, estimated at €210 billion worth of assets in the EU (Article 5a Council Regulation (EU) No 833/2014) and exclusion of 10 leading financial institutions from the SWIFT financial messaging system.

[124] Restrictions on exports of high-tech goods with potential military applications, such as electronics, computers, information security, telecoms, sensors and lasers, avionics equipment, maritime navigation and radio communication technology to all Russian purchasers.

[125] See *infra*, Chapter I, section 3.2.2.

[126] Borrell, J., 'Defending Ukraine in its hour of maximum need', Project Syndicate, (2022).

The European Council meeting of 10-11 March 2022 resulted in the adoption of the Versailles Declaration.[127] In the March 2022 Versailles Declaration EU leaders reiterated the Union's commitment to "take more responsibility for its own security", inter alia by "investing more and better" in defence capabilities, strengthening its defence industry and increasing the EU's "capacity to act autonomously", while stressing close EU-NATO cooperation as key to European security. While the Declaration only explicitly referenced "European Sovereignty" once (in point seven), it nevertheless represented a robust political commitment toward strengthening ESA. Regarding defense, point eight emphasized the need for increased joint investments in military capabilities, encouraging Member States to collaborate on joint defence projects and procurement[128]. Furthermore, at the Versailles Summit, EU leaders agreed to "resolutely invest more and better in defence", a commitment subsequently enshrined in the Strategic Compass.

Moreover, the adoption of the Strategic Compass[129], a comprehensive framework designed to guide EU security and defence policy until 2030, on 24-25 March 2022, reinforced and confirmed the direction expressed in the Versailles's Declaration. The Strategic Compass is the result of an almost two-year process of reflection and negotiation launched during the German Council Presidency in the second half of 2020. The Heads of State or Government subsequently endorsed it on 24 March 2022.[130] In contrast to the EU Global Strategy, the Strategic Compass was a Member State-driven process from the beginning, which the Council adopted in order to avoid the pitfalls that plagued implementation of the EU Global Strategy.[131] More precisely, although it can be considered as an additional tool to increase EU-SA in defence matters, it was HR/VP Borrell that emphasised in his

[127] European Council, Declaration, adopted at the Informal Meeting of Heads of State or Government. March 11, 2022.
[128] On 10-11 March 2022, EU leaders also *to*: *i*) substantially increase defence expenditure; *ii*) Invest in strategic enablers and critical emerging technologies for security and defence; *iii*) strengthen resilience against cyber and hybrid threats and step up the fight against disinformation; *iv*) accelerate military mobility efforts in the EU; *v*) continue to support partners through the EPF.
[129] Council of the European Union, 'A Strategic Compass for Security and Defence – For a European Union that Protects its Citizens, Values and Interests and Contributes to International Peace and Security' (2022) 7371/22 approved by European Council, European Council Meeting (24 and 25 March 2022) – Conclusions' (2022) EUCO 1/22.
[130] ibid.
[131] Biscop, S., 'The Lonely Strategist: Who but the High Representative and the EEAS Cares about the EU Global Strategy?' *European Foreign Affairs Review*, 26(1), 5-23, (2021).

foreword that "This a Member States-owned document now adopted by the Council. Throughout the process, Member States have been in the driving seat".

The Strategic Compass[132] assessed threat perceptions from various geopolitical regions and was described by HR/VP Josep Borrell as a "quantum leap" in European defence integration. Notably, Borrell underscored that while the Strategic Compass had been developed prior to Russia's invasion, the war had instilled a renewed sense of strategic urgency across Europe. According to various analyses, the Strategic Compass has been described by some as the EU's first defence white paper[133], while others[134] contend that it does not yet meet the criteria to be classified as a white paper.

The outbreak of war triggered a paradigm shift in European security and defence policy, prompting Member States to reassess their defence postures, even leading some historically neutral[135] countries to reconsider their non-alignment status. Indeed, one of the most widely discussed developments in the context of European security has been Finland and Sweden's NATO membership, described as "a potentially seismic shift driven by Russia's invasion of Ukraine ... that would reshape European geopolitics." [136] Both countries have historically maintained long-standing policies of neutrality[137] but have subsequently identified as militarily non-aligned. Nevertheless, some observers[138] argue that Finland and Sweden effectively relinquished their neutrality upon joining the European Union (EU)**,** as EU membership implied a degree of security alignment with the bloc.

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[132] Following Russia's invasion of Ukraine, several last-minute amendments were introduced into the Strategic Compass, primarily aimed at strengthening the language concerning Russia. For instance, in the earlier drafts of the document, Russia was not mentioned in the executive summary; however, in the final version, it is explicitly referenced. The document now states that "the return of war in Europe, with Russia's unjustified and unprovoked aggression against Ukraine… [is] challenging our ability to promote our vision and defend our interests."

[133] Arnold, E., 'An unprecedented week for European security." *Royal United Services Institute*, (2022).

[134] Gnesotto, N., 'The Compass is not yet a European White Paper on defence: it sets an industrial direction, but definitely not a strategic course', Strategic Compass: Industry or Power*?* Institut Jacques Delors, (2022).

[135] Cramer, C. & Franke, U., (eds.), 'Ambiguous Alliance: Neutrality, opt-outs, and European Defence*',* European Council on Foreign Relations (ECFR), (2021); Clapp S., 'Russia's War on Ukraine: Reflections on European Security, Neutrality, and Strategic Orientation', *European Parliamentary Research Service*, (2022).

[136] Feldscher, J., 'NATO membership for Sweden would be 'a small step for the military, but a giant leap for the political system'*, Defense One*, (2022).

[137] See *supra* (n. 135), Cramer *et al*.

[138] Braw, E., 'Sweden, Finland Gave Up Neutrality a Long Time Ago'. *American Enterprise Institute"*, (2022).

Ultimately, in response to Russia's invasion of Ukraine, both Finland and Sweden formally applied for NATO membership on 18 May 2022, marking a historic shift in their defence policies. Finland officially became a NATO member on 4 April 2023[139], following the ratification of its accession protocol by all 30 NATO member states. Sweden's accession was finalized on 7 March 2024[140], after Hungary and Turkey, the last two holdouts, approved its membership.

### 3.2.2 Impact of the Russian invasion of Ukraine on European Energy (In)dependence

The Russian invasion of Ukraine in February 2022 triggered a fundamental reassessment of the EU's energy security and dependence on Russian fossil fuels.

Prior to the war, Russia was the EU's largest supplier of oil, natural gas, and coal, accounting for approximately 40% of the EU's gas imports and playing a crucial role in Europe's energy-intensive industries, heating systems**,** and electricity generation. However, the invasion underscored the geopolitical risks of this reliance, prompting swift sanctions, supply diversification efforts, and energy-saving measures aimed at reducing the EU's vulnerability to energy coercion.

It should be noted that while all EU countries adhered to the sanctions policy[141], the effects on the economies of these countries varied significantly. Specifically, Central and Eastern European (CEE) countries were particularly vulnerable to disruptions in trade relations with Russia, as many of them relied heavily on Moscow, especially in terms of energy. In addition to the CEE countries, Germany and Italy were also severely affected, given their substantial trade dependencies on Russia. Before February 2022, Germany imported 55% of its gas from Russia, while Italy imported around 40%[142]. The impact was significant not only in the energy sector, prompting both countries to seek alternative sources (Germany turning to Norway, Italy to Algeria), but also in the

[139] Finland: NATO. Protocol to the North Atlantic Treaty on the Accession of the Republic of Finland. Signed July 5, 2022. Entered into force April 4, 2023.
[140] Sweden: NATO. Protocol to the North Atlantic Treaty on the Accession of the Kingdom of Sweden. Signed July 5, 2022. Entered into force March 7, 2024.
[141] See *supra*, Chapter I, section 3.2.1.
[142] Andreolli F., Bellisai F., Bienati M., Giordano G., Governatori M., Panzeri D., 'Energy without Russia: The Case of Italy', *Berlin: Friedrich Ebert Stiftung*, (2023).

automotive industry, where both nations excel due to their reliance on palladium sourced from Russia.[143]

The REPowerEU Plan[144], introduced by the European Commission**,** constitutes the EU's principal framework to accelerate the phase-out of Russian fossil fuels while advancing the transition to renewable energy sources. The REPowerEU Plan is structured around three key pillars: *i*) energy savings; *ii*) diversifying energy supplies; *iii*) accelerating the rollout of renewables. The Recovery and Resilience Facility (RRF)[145] is at the core of this plan, providing financial and policy support to Member States for energy diversification and infrastructure improvements. The EU has committed to phasing out all imports of Russian fossil fuels, including natural gas, before 2030. By the end of 2022, pipeline gas from Russia represented approximately 8% of EU gas imports, down from 40% in early 2022, although this reduction partly reflects Russia's decision to decrease deliveries. Meanwhile, EU imports of Russian liquefied natural gas (LNG) slightly increased during the same period. In 2023, EU data indicated further declines in Russia's share of EU coal, oil, and pipeline gas imports and a slight decrease from 2022 in Russia's share of EU's LNG imports[146]. This shift underscores the urgency of diversifying energy sources, prioritizing investments in hydrogen production and critical energy infrastructure, and accelerating the transition to renewable energies to avoid new dependencies on other authoritarian regimes.[147]

Nevertheless, despite this overall decline, recent data from CREA[148] indicates that in the final months of 2024, Russian revenues from LNG increased by 20%, while revenues from pipeline gas rose by 19%, with the EU remaining the largest purchaser of both energy sources, accounting for 49% of Russia's LNG

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[143] Redeker N., 'Same Shock, Different Effects EU Member States' Exposure to the Economic Consequences of Putin's War'. *Berlin: Hertie School, Jacque Delors Centre*, (2022). s/6_Jacques_Delors_Centre/Publications/20220307_Economic_Consequences_Ukraine_Redeker .pdf.

[144] European Commission, Communication REPowerEU Plan COM(2022)230, Brussels, 18 May 2022.

[145] To support this transformation, the EU has committed €225 billion in loans under the RRF, with an additional €20 billion in grants to be financed through the EU Emission Trading System (ETS)**.**

[146] 'Russia's War Against Ukraine: European Union Responses and US-EU Relations'*, Washington: Congressional Research Service*.

[147] Sguazzini, M. & Mazziotti di Celso, M., 'The Road to Strategic Autonomy: Reflections from the Russia-Ukraine War'*, De Europa* Vol. 7, No. 2 (2024), 109-134.

[148] 'December 2024 — Monthly analysis of Russian fossil fuel exports and sanctions', Centre for Research on Energy and Clean Air, (2024).

exports and 40% of its pipeline gas exports. Furthermore, sanctions exemptions continue to allow pipeline crude oil imports to Hungary, Slovakia, and Czechia, as these countries remain heavily reliant on Russian supplies.

The persistence of the refining loophole enables non-sanctioning countries to import Russian crude oil**,** refine it, and subsequently export the refined products to sanctioning states. In 2024, this loophole resulted in €15.8 billion worth[149] of oil products being imported into sanctioning countries from six refineries located in India and Turkey**,** further boosting Russia's crude export revenues despite EU efforts to restrict its access to Western energy markets.

### 3.2.3 Impacts of the Russian invasion of Ukraine: European Trade Policy and Economic Sovereignty

Since the start of the Russian war against Ukraine the importance of an autonomous European trade policy for Strategic Sovereignty has further increased. The EU's ambition for Strategic Sovereignty encompasses all policy areas where an independent and autonomous capacity to act is crucial under new geopolitical conditions. In trade policy, the EU holds exclusive competence and, given its economic weight, considerable instruments of power.[150]

As outlined in Article 3(1)(e**)** of the Treaty on the Functioning of the European Union ("TFEU"), the Union has exclusive competence in the area of the Common Commercial Policy ("CCP") [151]. This exclusive competence enables the EU to implement coordinated economic sanctions against Russia. In its trade relations with third countries, the EU seeks to diversify partnerships to reduce dependencies on specific nations (as Russia), particularly in critical sectors such as energy and technology. For instance, the EU has been negotiating trade

[149] Caprile, A. and Cirlig C., 'EU sanctions against Russia 2025: State of play, perspectives and challenges'*, EPRS*, (2025).
[150] Lippert B., von Ondarza N. and Perthes V., (Eds.). 'European strategic autonomy: Actors, issues, conflicts of interests' (SWP Research Paper 4), *Stiftung Wissenschaft und Politik*, (2019).
[151] Article 3(1) TFEU: 'The Union shall have exclusive competence in the following areas: […] (e) common commercial policy'.

agreements with countries in Latin America[152] and Asia[153] to broaden its economic alliances and secure access to essential resources. These efforts are part of a broader strategy to enhance economic resilience and ensure that the EU and its Member States can act independently in the face of external pressures.

Protecting the European economy from strategic takeovers has also gained importance to ensure economic sovereignty. The EU, as shown in Chapter III, has implemented regulations to screen Foreign Direct Investments[154] that may threaten security or public order, thereby safeguarding critical industries and technologies from foreign control. This measure is crucial in maintaining the EU's SA and protecting its economic interests. The international role of the euro is pivotal for financial sovereignty. Together with the US and the United Kingdom, the EU has imposed unprecedented financial sanctions on Russia and its central bank. However, due to the central position of the dollar in the global financial system[155], US sanctions have the strongest impact. In the long term, Europe can only remain a capable actor in this area if a strong financial market emerges in the EU after Brexit and the euro strengthens as an international reserve currency.

### 4. Defining Strategic Autonomy

The term Strategic Autonomy has garnered significant traction among European policymakers, arguably due to its inherent ambiguity and its circumvention of the more contentious term sovereignty[156]. While experts in external policy have extensively deliberated on the various instruments necessary to achieve SA, the precise definition of the concept remains elusive. Indeed, this

[152] The European Union and four Mercosur countries – Argentina, Brazil, Paraguay and Uruguay reached – after 25 years of negotiations - a political agreement on 6 December 2024 for a ground-breaking partnership agreement. The Agreement has not entered into force as it has not been ratified or signed yet.
[153] The EU and the Association of Southeast Asian Nations (ASEAN) are conducing trade negotiations aimed at strengthening economic ties between the two regions.
[154] See *infra*, Chapter III, section 6.1.
[155] A large literature exists on the so-called dollar exorbitant privilege. For an analysis of the potential benefit for the euro, see Eichengreen, B. & Gros, D., 'Post-Covid-19 global currency order: Risks and opportunities for the Euro', *Study for the Committee on Economic and Monetary Affairs, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament,* September 2020.
[156] See *supra* (n.7), Editorial Comments.

ambiguity is further compounded by the European Commission's preference for the term "Open Strategic Autonomy".[157]

Despite its centrality in policy discussions, as anticipate, the concept of SA is not explicitly defined in the EU's primary legal texts, including the Treaty on European Union (TEU)[158], the Treaty on the Functioning of the European Union (TFEU)[159], regulations, or directives nor by the ECJ. Instead, its interpretation and application have evolved primarily through policy debates, strategic documents, and institutional communications, rather than through legally binding provisions.

The absence of a precise legal definition has contributed to divergent interpretations, influencing how the EU conceptualizes its capacity for independent action in foreign policy, defense, trade, technology, and economic resilience. A substantial share of the public discourse surrounding SA has been centered on clarifying what the concept does not entail, rather than providing a precise and universally accepted definition. Scholars and policymakers alike have emphasized that SA should not be conflated with autarky, protectionism, isolationism, or unilateralism. In fact, in response to the criticism that SA represents a form of "economic nationalism"[160], EU policy-makers have hastened to explain that "autonomy is not protectionism; quite the opposite", an assertion that necessitates artful qualification.[161] Furthermore, it does not imply a rejection of NATO or the transatlantic alliance, nor is it confined solely to matters of security and defense. Instead, SA extends across multiple policy areas, serving as a mechanism to promote EU interests and values, rather than an end in itself.[162]

This negative or defensive definitional approach has permeated debates at the Council level[163], largely in response to the sensitivities associated with the

[157] See *supra* (n.18), European Commission, Trade Policy Review – An Open, Sustainable and Assertive Trade Policy.
[158] Treaty on European Union (TEU) Consolidated Version of the Treaty on European Union, OJ C 202, 7.6.2016.
[159] Treaty on the Functioning of the European Union (TFEU) Consolidated Version of the Treaty on the Functioning of the European Union, OJ C 202 7.6.2016.
[160] Gros, D., 'The Siren Song of Strategic Autonomy', *Project Syndicate* (7 October 2019).
[161] See *supra* (n.80), Strategic Autonomy for Europe: The Aim of Our Generation', speech by President Michel.
[162] 'Strategic Autonomy, Strategic Choices', Analysis and Research Team of the Council, Issues Paper, (2021).
[163] See e.g. the remarks made by HR/VP Josep Borrell at the press conference following the Foreign Affairs Council meeting of 7 December 2020.

term's "semantic baggage".[164] However, the lack of a positive and uniform official definition has also contributed to the concept's intrinsic ambiguity, leading to varying interpretations across MS, scholars and policy domains. As noted by the Council's Analysis and Research Team, SA fulfills many of the characteristics of an "essentially contested concept"[165], whereby different stakeholders attach divergent meanings and priorities to the term, reflecting their respective geopolitical and economic perspectives. Notwithstanding the inherently blurred contours of the concept, numerous scholarly contributions have sought to articulate a more precise definition of SA, offering interpretative frameworks that range from geopolitical and institutional readings to legal-instrumental approaches.

Scholars across multiple disciplines have attempted to provide greater conceptual clarity to the notion of SA.[166] When grounded in the EU's nature as an autonomous legal order, some legal scholars have defined SA as the capacity of EU citizens to determine the legal norms by which they are governed.[167] Such approaches emphasize the foundational role of Treaty-based objectives and values, articulated and implemented through the instruments provided by the EU Treaties[168]. Other strands of scholarship have highlighted the so-called "managerial dimension" of SA, conceptualizing it as a balancing act between opposing global pressures.[169] It is generally acknowledged that, in an interconnected global economy facing transnational threats, complete independence is neither feasible nor desirable; the EU's security and economic prosperity inevitably depend on continued multilateral cooperation. Nonetheless, recent crises, such as the Covid-19 pandemic and Russia's military aggression

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[164] Leonard, M. & Shapiro, J., 'Empowering EU Member States with strategic sovereignty', European Council on Foreign Relations (ECFR), (2019), p. 5.

[165] The notion of essentially contested concept can be traced back to Plato, Xenophon and Aristotle. However, for a comprehensive and modern analysis of the concept see: Gallie, Walter Bryce 'Essentially contested concepts', Proceedings of the Aristotelian Society, (1956), vol. 56, pp. 167-198.

[166] The political science literature has been pioneered by giving contours to the concept of strategic autonomy. See Ryon, E., '*European Strategic Autonomy: Energy at the Heart of European Security?*', 19 European View (2021) 238, at 239; Lavery, S., & Schmid, D., 'European Integration and the New Global Disorder', 59 Journal of Common Market Studies (JCMS) (2021) 1322.

[167] See *supra* (n.7), Editorial Comments.

[168] Steinbach A., 'The EU's Turn to "Strategic Autonomy": Leeway for Policy Action and Points of Conflict'*, in European Journal of International Law,* vol. 34, n. 4, (2023), pp. 973-1006.

[169] Cagnin, C., *et al.*, 'Shaping and Securing the EU's Open Strategic Autonomy by 2040 and Beyond' (Publications Office of the European Union 2021), at p. 1.

against Ukraine, have exposed the vulnerabilities that arise from geopolitical interdependencies, including supply chain fragility and foreign dominance in critical technological sectors.[170] Finally, broader definitions have emerged which treat SA as a composite policy objective, referring to it as an overarching framework for measures that aim to *protect* (preserving self-sufficiency), *provide* (bolstering domestic economy), and *project* (the EU's interests and values in its international relations) .[171]

Furthermore, as outlined in Chapter I, a recent political science definition characterizes SA as "the political, institutional and material ability of the EU and its Member States to manage their interdependence with third parties, with the aim of ensuring the well-being of their citizens and implementing self-determined policy decisions"[172]. Another scholar has proposed a dual framework for understanding the concept, distinguishing between a "geopolitical understanding" and an "institutional understanding". According to the geopolitical understanding, as previously noted, SA is a relational concept, positioning the EU within a global landscape marked by intensified rivalry among major powers. The institutional understanding, by contrast, places emphasis on the operational dimension, namely the EU's ability to act jointly and autonomously, contingent upon its institutional capacity and legal tools.[173]

As far as legal-instrumental approaches are concerned, legal scholars such as Hoffmeister have contributed to clarifying the concept of SA by anchoring it in legal discourse. In particular, as anticipated, Hoffmeister articulates SA as the Union's capacity for "striving for multilateral solutions, while being able to take lawful action alone to safeguard the Union's values, fundamental interests, security, independence and integrity"[174]. Furthermore, other scholars define SA as the European Union's capacity to make independent decisions while aligning such

[170] Lavery, McDaniel & Schmid, 'European Strategic Autonomy: New Agenda, Old Constraints', in Babić, M., Dixon, A., & Liu, I., (eds), *The Political Economy of Geoeconomics: Europe in a Changing World* (2022) 57, at 58; Arteaga, F., *et al.*, 'Appropriate Level of European Strategic Autonomy', (2016), at 72.
[171] Helwig, N., 'EU Strategic Autonomy: 'A Reality Check for Europe's Global Agenda', *FIIA* Working Paper no. 119 (2020), at 12, available at https://www.fiia.fi/wpcontent/uploads/2020/10/wp119_strategic_au- tonomy-2.pdf.
[172] See *supra* (n.1), Helwig *et al*, at p. 4.
[173] See *supra* (n.2), Morillas, at pp. 4-7.
[174] See *supra* (n.4), Hoffmeister, at p. 673.

choices with its own interests and values[175]. SA is also defined, more generally, as "the EU's ability to ensure that its citizens continue to enjoy standards of prosperity, safety, health, and general well-being"[176]. However, the broad and somewhat nebulous nature of this objective and the absence of a formal legal definition in the EU treaties and regulatory framework contributes to the concept's lack of specificity. In fact, given the absence of an official definition in the EU's documents, no unanimous political consensus exists on its implications, scope, or the direction in which it may steer the EU as it seeks to consolidate itself as a global actor. The term is frequently invoked in political and academic discussions on the balance between resilience and economic openness, particularly in light of recent geopolitical events[177] which underscored the vulnerabilities of global supply chains and reinforced the need to strengthen Europe's capacity for autonomous action.

Despite this, some scholars emphasize that the appeal of SA does not stem from its theoretical precision but rather from its practical versatility as a unifying slogan encompassing a wide array of instruments aimed at enhancing the EU's position in a rapidly evolving global landscape.[178] As the Commission's Joint Research Centre's "Science for Policy" report on OSA articulates, "Open strategic autonomy is about equipping the EU to manage interdependence in line with its interests and values."[179] To comprehend the potential constitutional challenges posed by SA, it is imperative to examine the suite of policies and measures it encompasses, rather than merely seeking an overarching theoretical definition.[180]

The expansive scope of the EU's ambitions in this realm is exemplified by the Commission's 2021 Strategic Foresight Report: "The EU's capacity and freedom to act."[181] This report identifies ten strategic areas wherein the EU could bolster its open SA and global leadership, including: *i*) establishing a European Health Union; ii) ensuring a sufficient supply of decarbonized and affordable

[175] With marginal semantic variations, see European Council, A New Strategic Agenda 2019–2024; See also *supra* (n.170) Lavery *et al.*
[176] See *supra* (n.7), Editorial Comments.
[177] See *supra*, Chapter I. As the COVID-19 pandemic, the Russian invasion of Ukraine and Trump's Presidency.
[178] See *supra* (n.7), Editorial Comments.
[179] See *supra* (n.169), Cagnin *et al.*
[180] See *infra*, Chapter III, section 6.
[181] European Commission, COM(2021)750 final, '2021 Strategic Foresight Report, The EU's capacity and freedom to act'.

energy; iii) achieving digital sovereignty.[182] While the report's language is carefully measured and does not overtly advocate for an "EU first" approach, it signals the Commission's vision of the Union as an influential geopolitical actor, prepared to assert its interests on the world stage, leveraging its power when necessary, and operating independently when multilateral cooperation proves inadequate[183]. This vision aligns with President Ursula von der Leyen's ambition to lead a "geopolitical Commission."[184]

### 4.1 Political and Scholarly Debate on the notion of Strategic Autonomy

Due to absence of a formal definition of SA in primary EU law, the EU's institutions have thus relied on policy documents, Council Conclusions, and Communications from the European Commission to shape its practical application, However, this lack of formalization has led to ambiguity, indeed, despite its frequent use, divergent interpretations persist across Member States and policy fields, generating intense debate over its precise meaning and implications.

One of the most notable disputes arose, in 2020, between Germany's Defence Minister Annegret Kramp-Karrenbauer and French President Emmanuel Macron, with the former arguing in *Politico*[185] for an end to illusions about ESA, while the latter vigorously defended the concept in an interview with *Le Grand Continent*.[186] This disagreement underscores the broader fragmentation of views across the EU. Views have diverged not only on the concept, but even on the value of the debate itself. Some commentators have described the debate as a necessary step toward the formation of a European public sphere, where such politically sensitive issues can be discussed openly to find a common understanding of the concept that is necessary to effectively implement it. Others, however, have

[182] The other strategic areas are: iv) securing access to critical raw materials; v) attaining a leading global position in standard-setting.; vi) developing resilient and future-proof economic and financial systems; *vii*) implementing training and education policies to cultivate and retain skills and talents aligned with EU ambitions.; *viii*) enhancing security and defense capacities and access to space; *ix*) promoting peace, security, and prosperity globally; and *x*) adapting democratic institutions to strengthen their resilience and capacity to anticipate change.
[183] See *supra* (n.7), Editorial Comments.
[184] ibid.
[185] Kramp-Karrenbauer, A. 'Europe Still Needs America', in *Politico*, (2020).
[186] Macron, E., Interview Granted to Le GrandContinent Magazine, (2020).

dismissed it as a "war of words"[187] or even a "toxic quibble"[188], devoid of practical significance, that could hinder substantive discussions and limit policy flexibility.

The conceptual ambiguity surrounding SA is further exacerbated by the pronounced divergence among the preferences of EU MS in matters of strategic policy.[189] More precisely, significant disagreement exists regarding the extent of autonomy the European Union ought to pursue. Four principal positions can be identified in the current debate.[190] The *protectionist* camp places emphasis on political independence and self-sufficiency, viewing these as necessary responses to concerns related to supply chain security.[191] They also stress the strategic relevance of fostering globally competitive enterprises and support the use of sanctions as instruments to restrain foreign powers. The *market-oriented* faction, by contrast, upholds the value of free trade, the maintenance of a level playing field within the internal market, and the advantages derived from a globalized division of labour[192]. *Intergovernmentalists* advocate for retaining security and defence competences at the national level, and resist institutional reforms that would entail further transfers of competences to EU institutions[193]. In opposition to this, *supranationalists* emphasize the European Union's potential role as a geopolitical actor on the global stage and support enhanced centralization, particularly in areas such as security and defence policy[194].

The concept of SA remains contested, in academic literature, particularly with regard to the meanings attributed to its two core components: "autonomy" and "strategic". As far as "autonomy" is concerned, a first interpretation emphasizes that SA does not imply unilateralism, isolationism, or autarky. Rather, it designates the EU's capacity to act independently, when necessary, while remaining embedded in a multilateral order rooted in international law and cooperation. A second interpretation, often referred to as the "gradualist" or

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[187] The Economist, 'War of words: the imminent Biden Presidency reawakens Europe's defence debate'*, The Economist* (2020).
[188] Major, C & Mölling, C,. 'Toxische Wortklauberei', *Der Spiegel*, (2020).
[189] See *supra* (n.170), Lavery *et al*., at p. 64.
[190] Tamma, P., 'EU's Industrial Policy Stalls before Takeoff', *Politico* (2021); Molthof, L., Zandee., D & Cretti, G., "Unpacking Open Strategic Autonomy from Concept to Practice" *Clingendael Report*, (2021), at p. 10.
[191] See *supra* (n.168), Steinbach, at p. 978.
[192] ibid.
[193] ibid.
[194] ibid.

"spectrum-based" approach, regards autonomy not as an absolute status but as a matter of degree, varying across policy domains and depending on the Union's capacity to reduce critical dependencies while retaining strategic flexibility. Equally debated is the meaning of "strategic". One view understands it in military terms, focusing on Europe's ability to deploy autonomous defence capabilities; another, more expansive view links "strategic" to the protection of core political and economic interests, including technological sovereignty and supply chain security. These diverging interpretations not only reflect the multidimensionality of the concept, but also inform the broader debate about the Union's ambition to enhance its global agency in a complex and interdependent international system.

The notion of autonomy is fundamental to the broader discourse on SA, as it shapes the extent to which the EU can act independently in different policy areas. Accordingly, scholars have advanced diverse and conflicting definitions of autonomy, each of which reflects varying degrees of independence and positions the EU along a spectrum of autonomy, ranging from full self-sufficiency to managed interdependence within a multilateral framework**.** The Greek etymology of the word "autonomy" suggests that it consists in the ability of the self – *autos* – to live by its laws – *nomos*. More precisely, it is generally understood as the ability to set one's own course and self-regulate, or as a situation of "less dependence, more influence."[195] As noted by Nathalie Tocci[196], "European Strategic Autonomy is often conflated with sovereignty, independence, unilateralism and, at times, autarky. Yet, in truth, the term is rather specific in its meaning"[197]. SA does not inherently imply complete independence, nor does it equate to unilateralism or autarky. The EU, while maintaining the capacity to act alone when necessary, is not inherently predisposed to doing so.[198] Given that multilateralism[199] is a fundamental characteristic of both its internal governance and external engagement, the EU's natural inclination, as argued by Tocci, is to collaborate

[195] See *supra* (n.80), Strategic Autonomy for Europe: The Aim of Our Generation', speech by President Michel.
[196] Tocci, N., 'European Strategic Autonomy: What It Is, Why We Need It, How to Achieve It', *Istituto Affari Internazionali* (IAI), (2021), at p. 9.
[197] ibid.
[198] ibid.
[199] On the Treaty-based multilateral approach of the EU in its external action see *infra*, Chapter II, section 2.2.

with international partners rather than pursue isolated action.[200] The authors further emphasizes that even in its approach toward China and Russia, which the EU now explicitly recognizes as strategic rivals or competitors, and whose actions are occasionally classified as direct threats, the Union remains committed to a strategy of selective engagement. This approach prioritizes cooperation in areas where mutual interests align, ensuring that the EU continues to uphold its principles, strategic interests, and global stability objectives, while simultaneously safeguarding its autonomy in decision-making[201]. An autonomous EU one that can uphold and operate in accordance with its own laws, rules, norms, and values, not only by safeguarding them within its own institutional framework but also by serving as an active partner in a rules-based international order, an order that the EU itself has played a significant role in shaping.[202] In essence, Tocci underscores that the EU operates most effectively, if not exclusively, within a multilateral order rooted in legal norms and shared governance structures, wherein its liberal values are embedded and reinforced.

Daniel Fiott, further analysing the issue, distinguished between autonomy as "freedom to act*"* and autonomy as "freedom from dependencies*"*, pointing out that "autonomy is not a binary choice (of either having autonomy or not) but rather a spectrum that represents different degrees of autonomy and dependency."[203] Building on this gradualist perspective, another scholar reiterated this crucial aspect proposing different levels of autonomy. The author suggested that the EU should aim to "strengthen its strategic autonomy*"* (a moderate form), or to achieve "a significant degree of strategic autonomy" or even "full strategic autonomy" (a complete ability to act independently), depending on the specific policy areas, timeframe and geopolitical conditions under consideration.[204] The in-house think tank of the European Commission, in a paper on SA and digital technology,

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[200] See *supra* (n.196), Tocci. This is particularly evident in its cooperation with key allies, including the United Nations (see *supra* (n.22)), the United States**,** and NATO (see *supra* (n.20)), as well as with regional organizations such as the OSCE (see *supra* (n.21)),. the African Union, ASEAN (see *supra* (n.153)), and MERCOSUR (see *supra*, (n.152)).
[201] See *supra* (n.196), Tocci.
[202] ibid.
[203] Fiott, D., 'Strategic autonomy: towards "European sovereignty" in defence?', *EUISS Brief, no. 12*, (2018), p. 7. To these dimensions of autonomy to and from, Fiott later added a third dimension of autonomy for certain purposes: see D. Fiott (2020), The European space sector as an enabler of EU strategic autonomy, *European Parliament, Policy Department for External Relations*, (2020).
[204] Biscop, S., (2019), 'Fighting for Europe: European strategic autonomy and the use of force', *Egmont Paper 103*, January 2019.

clarified that "in practical terms" SA involves "a balancing act on a spectrum ranging from absolute self-sufficiency or autarky to full dependence."[205]

Grevi highlighted the aspirational and progressive nature of this understanding of autonomy, noting that it is "a matter of degree. Full autonomy is, in many cases, unachievable and not necessarily desirable, but progress can be achieved to make Europe more self-reliant in advancing its interests and values."[206]. A related interpretation by Timmers defines SA as "the ability, in terms of capacity and capabilities, to decide and act upon essential aspects of one's longer-term future in the economy, society and their institutions."[207] In his paper, Grevi, has argued that SA requires "the ability to set objectives and mobilise the necessary resources in ways that do not primarily depend on the decisions and assets of others"[208] and that it rests on four pillars, namely: *i*) the Single Market; *ii*) the euro; *iii*) the capacity for technological innovation and *iv*) the capacity to provide for Europe's security.[209] This approach suggests that SA extends beyond foreign policy and is fundamentally linked to the EU's economic security and institutional resilience.

The term "strategic" within the concept of SA carries significant implications, extending beyond mere self-sufficiency to encompass long-term planning, resilience, and the capacity to act independently in key areas of geopolitical and economic importance**.** The use of "strategic" implies that autonomy is not an end in itself but a deliberate and calculated approach to ensure the EU's ability to make sovereign decisions while remaining engaged in the global system. In other words, the inclusion of "strategic" signals that autonomy must be developed within a long-term framework, prioritizing policies that enhance the EU's resilience across economic, technological, and defense domains. Unlike short-term reactive measures, SA involves proactive governance to secure Europe's interests in an unpredictable global landscape. For instance, in industrial

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[205] European Political Strategy Centre (2019), 'Rethinking Strategic Autonomy in the Digital Age', *EPSC Strategic Notes*, issue 30, p. 2.
[206] Grevi, G., (2019), 'Strategic autonomy for European choices: the key to Europe's shaping power', *EPC Discussion Paper*, (2019), p. 11. In other words Grevi argues that while full autonomy may be unattainable or undesirable, progress can be made to enhance Europe's ability to act independently in critical sectors
[207] Timmers, P., (2018), 'Cybersecurity is forcing a rethink of strategic autonomy', *The Oxford University Politics Blog*, (2018).
[208] See *supra* (n. 206), Grevi, at p. 3.
[209] ibid, at p. 10.

policy, the EU's approach to OSA[210] reflects a forward-looking effort to secure supply chains, critical raw materials, and technological leadership, rather than simply reacting to crises as they emerge.[211] One of the earliest interpretations of "strategic" equated the term with military capability, leading to the definition of SA as simply "the ability to use military force autonomously"[212]. Under this view, SA is further divided into three analytical dimensions: political, operational, and industrial autonomy[213]. Even within a broader understanding of security and defense, this interpretation predominantly referred to "hard power instruments".[214] This military-centered perspective is evident in the 2016 EU Global Strategy[215], which described SA as "important for Europe's ability to foster peace and safeguard security". However, the concept had already been present in academic literature for years.[216] It is within this discourse that critiques of SA as a potentially isolationist or unilateralist concept first emerged. These concerns were countered by scholars and policymakers who argued that Europe can only achieve SA through NATO, and that it is essential for Europe's continued relevance within NATO.[217]

An alternative interpretation moves beyond the military dimension, understanding "strategic" as relating to the core interests of a political community[218]. From this perspective, SA refers to the "means and tools to reduce external dependencies in areas deemed strategic"[219] or in "areas in which …

[210] See *supra*, Chapter I, section II.
[211] See *supra* (n.45), Mariotti.
[212] See *supra* (n. 68), Brustlein.
[213] Kempin, R. & Kunz, B., 'France, Germany, and the quest for European strategic autonomy: Franco-German defence cooperation in a new era', *Notes de l'Ifri,* (2017). According to Ronja Kempin and Barbara Kunz, the political component concerns "the capacity to take security policy decisions and act upon them*",* operational autonomy is about the institutional and capability requirements to plan and carry out crisis management operations, and the industrial component has to do with the "ability to develop and build the capabilities required to attain operational autonomy".
[214] Tereszkiewicz, F., (2020), 'The European Union as a normal international actor: an analysis of the EU Global Strategy', *International Politics*, vol. 57, p. 103
[215] See *supra* (n.16), A Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the European Union's Foreign and Security Policy.
[216] For example, see Posen, R., 'European Union Security and Defense Policy: response to unipolarity?', *Security Studies*, (2006), vol. 15, p. 164.
[217] See, for example, Howorth, J., 'Strategic autonomy and EU-NATO cooperation: threat or opportunity for transatlantic defence relations?', *Journal of European Integration*, (2018), vol. 40:5, pp. 523-537.
[218] See *supra* (n.203), Fiott (2020), at p.9.
[219] Anghel, S., *et al*., 'On the path to "strategic autonomy": the EU in an evolving geopolitical environment', *European Parliamentary Research Service*, (2020), p. 3.

dependence on others could lead to a loss of sovereignty".[220] This broader understanding has largely superseded the earlier, military-focused definition, driven by global events that have exposed Europe's vulnerabilities beyond security and defense[221].

A third interpretation of "strategic" derives from the Clausewitzian[222] approach to strategy, which emphasizes the relationship between ends and means. Under this analytical framework, SA is defined as "the ability to set one's own priorities and make one's own decisions in matters of foreign policy and security, together with the institutional, political and material wherewithal to carry these through."[223] Similarly, another definition presents SA as "the ability of European states to set their own priorities and make their own decisions in matters of foreign policy, security and defense, and have the means to implement these decisions."[224] A more succinct formulation of such interpretation is offered by Grevi, who states that "the essence of strategic autonomy is [that Europeans] should have a purpose of their own and a stronger power base to fulfill it".[225] Grevi clarifies that Strategic Autonomy is not solely a foreign policy issue but also fundamentally concerns the preservation and deepening of European integration itself.[226]

### 4.2 The Linguistic and Political Debate of Sovereignty vis-à-vis Autonomy in the EU's Discourse

The concepts of SA and Strategic Sovereignty are often used interchangeably in European discourse, yet they carry distinct political, cultural, and conceptual nuances. While both terms refer to the EU's capacity to act independently and assert its interests on the global stage, their connotations and acceptability vary among policymakers and MS.

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[220] See *supra* (n.164), Leonard *et al*., at 3.
[221] This more comprehensive interpretation of Strategic Autonomy aligns more closely with the views expressed by Emmanuel Macron in his interview with Le Grand Continent. See *supra* (n.186), Macron, *Interview Granted to Le GrandContinent Magazine.*
[222] See *supra* (n.41), discussing the Clausewitzian approach.
[223] See *supra* (n.150), Lippert *et al*., at p. 5.
[224] Järvenpää, P., *et al*. (2019), 'European strategic autonomy: operationalising a buzzword' *Report, International Centre for Defence and Security*, (2019), p.1
[225] Grevi, G., 'Fostering Europe's strategic autonomy: a question of purpose and action', *European Policy Centre*, (2020), p. 6.
[226] ibid.

From a historical and political perspective, the term "sovereignty" has traditionally been associated with statehood and national authority, which has made it a politically sensitive concept within the EU. During the early 1990s, European policymakers deliberately avoided the use of sovereignty-related terminology, fearing that it might alienate MS by suggesting a movement toward a federal Europe.[227] Conversely, the term "autonomy" has also faced skepticism, as it often evokes notions of economic self-sufficiency and unilateralism, raising concerns about a potential retreat from multilateralism.[228]

The semantic and political distinction between these terms was particularly evident in France and Germany, where the cultural connotations of sovereignty differ significantly.[229] While French political discourse[230] has traditionally embraced the notion of European sovereignty as a means of asserting geopolitical strength, Germany has been more cautious, favoring terms that emphasize interdependence and cooperation.[231]

The relationship between SA and European Sovereignty remains the subject of an evolving and multifaceted debate within both academic and policy circles. On the one hand, scholars such as Grevi advocate a gradualist, functionalist understanding, viewing SA as a necessary precondition and structural pillar for achieving European Sovereignty. Tocci similarly supports this position, arguing that while sovereignty refers to a set of attributes**,** autonomy constitutes a condition for their effective exercise. These positions align with the functionalist approach, which sees SA not as an end in itself but as an operational mechanism

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[227] Hill, C., 'The capability-expectations gap, or conceptualizing Europe's international role', *Journal of Common Market Studies*, (1993), vol. 31:3, p. 309.
[228] See *supra* (n.160), Gros.
[229] ibid.
[230] As President Macron phrased it: "En France, la souveraineté résonne. En Allemagne, je sais qu'elle peut étonner ou effrayer." See Wieder, T., 'A Berlin, Macron souhaite une relance de l'Europe pour éviter un « chaos » Mondial', *Le Monde*, (2018).
[231] The EU Institute for Strategic Studies further explores this conceptual divide in its July 2021 Chaillot Paper on European Sovereignty. This analysis highlights two contrasting interpretations of the terminology. On the one hand, strategic sovereignty may have a stronger public appeal, as it emphasizes what the EU can actively achieve, rather than simply its capacity to act independently. On the other hand, sovereignty remains a contentious term, as it is historically associated with national sovereignty, a concept with which most people identify more readily than with a broader notion of European sovereignty. In this sense, strategic autonomy may be more politically acceptable, as it does not challenge national identities to the same extent. Fiott, D. (2021). 'European Sovereignty – Strategy and interdependence'. European Union Institute for Security Studies (EUISS), Chaillot Paper 169.

to secure the Union's foundational values, competences, and legal integrity in a volatile global environment. On the other hand, a more assertive vision is advanced by Leonard and Shapiro, who suggest a normative shift from SA toward Strategic Sovereignty**,** defined as the EU's ability to determine and pursue its policies autonomously, while actively shaping global rules and maintaining leverage in international negotiations.

SA extends beyond the basic capacity to act, as it fundamentally entails the ability to define one's own priorities, make independent decisions, and effectively implement them[232]. At the highest level of ambition is strategic sovereignty. Initially introduced into the policy discourse by French President Emmanuel Macron in his 2017 Sorbonne speech[233], the concept of sovereignty carries strong political implications, signifying the presence of a shared political authority. In democratic states, such authority is inherently derived from the people. Even more so than SA, strategic sovereignty necessitates a political framework that, beyond the nation-state, only the EU is positioned to provide. While the EU does not constitute a sovereign state in the traditional sense, it nonetheless represents a distinctive political entity capable of collectively exercising sovereignty across the full spectrum of state functions[234]. Consequently, strategic sovereignty has the potential to emerge as a pivotal narrative in the EU's process of further integration.

The notion of European Sovereignty is debated. For instance, an author claims that European Sovereignty has both an internal and external dimension: the first consists in taming national sovereignty of MS; the second one is defined as the EU's "attempt to restore and expand the rule of law not only by harnessing market forces but by using them in order to promote home-grown legal standards".[235] According to Grevi[236], SA should be understood as serving a precondition and pillar for the realization of European Sovereignty, defined by Draghi as *"*the ability to control outcomes and respond to the fundamental needs

[232] Kluge J. (2019), 'Mounting Pressure on Russia's Government Budget: Financial and Political Risks of Stagnation'*,* SWP Research Paper 2/2019, *Stiftung Wissenschaft und Politik* (SWP), *German Institute for International and Security Affairs*, Berlin, (2019).
[233] See *supra* (n.67), Marcon's Speech at Sorbonne University, Initiative for Europe: A Sovereign, United, Democratic Europe.
[234] Von Ondarza, N. & Overhaus, M., 'Rethinking Strategic Sovereignty: Narratives and Priorities for Europe after Russia's Attack on Ukraine', SWP Comment No. 31, *Stiftung Wissenschaft und Politik (SWP), German Institute for International and Security Affairs*, Berlin, (2022).
[235] Bailleux, A., 'The Two Faces of European Sovereignty', *5 European Papers*, (2020), p. 303.
[236] See *supra* (n.206), Grevi, at p. 11.

of the people.*"*[237] Consequently, pursuing SA is part of a broader effort to strengthen the foundations of European Sovereignty in response to evolving international and domestic challenges. Given the significant internal and external pressures affecting Europe's cohesion, Grevi argues that the requirements for European sovereignty today differ from those of the past and must be redefined accordingly.[238]

Tocci concurs with Grevi in distinguishing between autonomy and sovereignty, emphasizing that while autonomy constitutes a condition, sovereignty is characterized by a set of attributes. An entity that possesses sovereign attributes is inherently capable of ensuring its own autonomy. In this regard, autonomy serves as a prerequisite for sovereignty.[239]

Some scholars and policymakers advocate for a shift from SA to strategic sovereignty as a more comprehensive framework. They argue that sovereignty better captures the EU's ability to act within an interdependent global system, as opposed to autonomy, which suggests a preference for isolation. [240] They define strategic sovereignty as the EU's ability to determine its policies in dependently while still bargaining effectively within the global order.[241] This account implies a higher level of political integration and the construction of a common authority capable of exercising sovereignty across the full spectrum of state-like functions.

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[237] Draghi, M., 'Sovereignty in a globalised world'. *University of Bologna*, (22 February 2019).

[238] See *supra* (n.206), Grevi, at p. 11. Grevi identifies three keyways in which SA contributes to European Sovereignty: *i*) *Responsibility*: Grevi emphasizes that strengthening SA requires Europe to assume greater responsibility for its future. This entails fostering conditions that enable shared decision-making on critical issues, such as the regulation of new technologies, sustainable development policies, and major foreign policy matters. Moreover, he stresses that Europe must be equipped with the institutional and strategic capacity to effectively implement these decisions; *ii*) *Resilience* – According to Grevi, A is crucial for enhancing Europe's resilience in the face of challenges associated with globalization, such as financial crises and large-scale migration flows. He also highlights the importance of reducing the EU's vulnerability to external actors who may use political or economic tactics to exploit divisions within Europe; *iii*) *Peer Partnership* – Grevi makes it clear that SA does not equate to isolationism but rather seeks to provide EU with a stronger foundation for international cooperation. In an era where global powers are increasingly assertive, autonomy is to prevent asymmetric relationships in which individual MS lack bargaining power and strategic influence By reinforcing these three dimensions, Grevi sees Strategic Autonomy as a necessary instrument for ensuring European Sovereignty, equipping the EU with the capacity to effectively navigate an evolving geopolitical environment while preserving both its internal cohesion and global influence.

[239] However, Tocci underscores that sovereignty is traditionally an attribute of statehood, and there is no indication that, in seeking autonomy, the European Union aspires to statehood or considers it a viable objective. See *supra* (n.196), Tocci.

[240] Leonard, M., & Shapiro, J., 'Strategic sovereignty: How Europe can regain the capacity to act, European Council on Foreign Relations*',* (2019), p.5.

[241] ibid.

More recently, a functionalist interpretation of SA has gained traction, particularly among institutional actors and academics, who view it not as an end in itself, but as a pragmatic means of ensuring the EU's capacity to act under conditions of growing geopolitical uncertainty. It is within this framework that this thesis aligns. Giving a closer look it appears that the ambition and objectives underpinning the EU's pursuit of Strategic Autonomy closely mirror traditional definitions of sovereignty, the foundational principle of the post-Westphalian international order. As famously articulated by Max Huber in the Island of Palmas arbitration, "[s]overeignty in relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State."[242] From this classical view, two essential components of sovereignty in international law emerge: the autonomy of the state to freely determine its actions and policies, and the exclusive exercise of such authority within its territory, rooted in the sovereign equality of states[243]. However, a third element implicit in Huber's formulation, the performance of state functions, warrants closer attention in the EU context. While the European Union is not a state, it constitutes a unique international organisation grounded in two founding treaties, whose core objective is integration through law. In this capacity, the EU exercises competences conferred upon it by its MS, either independently or jointly with them. This governance model is underpinned by complex procedures that safeguard the vertical division of powers and ensure that sovereignty delegated to the EU is exercised according to the terms established by the Member States themselves [244].

Within this constitutional framework, the notion of SA does not purport to alter the source or holder of sovereignty; rather, it focuses on the effective exercise and protection of that sovereignty. It emphasises the EU's capacity to safeguard its collective independence and decision-making ability from both internal complexities of integration and external pressures by international actors[245]. This *functionalist* understanding of SA explains the (recent) increasing normalisation of sovereignty-related language in EU political discourse. As illustrated in the

[242] Permanent Court of Arbitration judgment of 4 April 1928 Island of Palmas (United States v The Netherlands).
[243] See *supra* (n.12), Beaucillon, at p. 421.
[244] ibid.
[245] ibid.

Franco-German Declaration of January 2023, the two countries affirmed: "To this end, we aim to strengthen our ties in all fields that form the basis for a genuine European sovereignty, starting with: a strong European foreign and security policy, a strengthening of European defence, strong industrial, technological and digital policy, economic strength, energy security, transition to a green economy and consolidation of the European democratic model."[1246]

At the institutional level, SA has also been presented as a geopolitical necessity, reflecting a realist interpretation of international relations that prioritises power distribution in a conflict-prone global environment. This perspective was clearly articulated in the 2020 address delivered by Josep Borrell, High Representative of the Union for Foreign Affairs and Security Policy, titled *Why European Strategic Autonomy Matters*. Borrell stated: "The conclusion is simple. If we do not act together now, we will become irrelevant, as many have forcefully argued. Strategic autonomy is, in this perspective, a process of political survival. [...] As power differentials narrow, the world will become more transactional, and all powers, including Europe, will tend to be so. This is an inescapable truth [...] The second factor is linked to the transformation of economic interdependence in which we Europeans have invested a lot, notably through the defence of multilateralism."[247]

In light of these developments, SA can be understood not merely as a political aspiration or objective, but as an evolving institutional dynamic within the EU. It serves to unite MS around a shared understanding of the need to collectively protect what is now increasingly referred to as "European sovereignty."[248]

[246] French Presidential Office, French-German declaration (22 January 2023) www.elysee.fr.
[247] Borrell, J., 'Why European Strategic Autonomy Matters', *European Union External action: The Diplomatic Service of the European Union*, (3 December 2020).
[248] See *supra* (n.12), Beaucillon, at p. 421.

# CHAPTER II
# CONSTITUTIONAL FOUNDATIONS, LEVERAGES AND LIMITS OF EU STRATEGIC AUTONOMY

## 1. From Europeanism to Strategic Autonomy: Constitutional Reflections on the EU's Evolving Identity

"Our hope that the emergence of a federated Europe and the dissolution of the present nation-state system will make nationalism itself a thing of the past may be unwarrantedly optimistic."[249] When Hannah Arendt wrote these words in 1954, she already perceived that "on its more popular levels — not, to be sure, in the deliberations of statesmen in Strasbourg, the movement for a united Europe has recently shown decidedly nationalistic traits", which she identified as "anti-American Europeanism." Arendt later witnessed the political ascendance of such Europeanism, particularly as embodied in Charles de Gaulle's vision of Europe [250] Undoubtedly, Arendt would have also recognised echoes of this tendency in contemporary notions such as "European Sovereignty"[251] or the assertion of a distinct "European way of life."[252]

Indeed, as noted by several scholars[253], the aspirational ideal of a supranational European Union has long coexisted with a less intellectually refined yet perhaps more pragmatically effective drive toward Europeanism, a dynamic that, despite its ideological limitations, may have served as a powerful motor of European integration. While the constitutional architecture of the Union was originally oriented toward containing the harmful effects of nationalism among its MS, it has been less rigorously tested with respect to whether its institutional checks and balances can equally curb nationalist tendencies emerging at the Union level. Alternatively, it remains an open question whether the EU's legal and political framework instead accommodates, or even implicitly fosters, a form of

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[249] Arendt, H., 'Dream and nightmare – Anti-American feeling in Europe', *Commonweal*, 10 Sept. 1954

[250] On the geopolitical and economic motives of de Gaulle's policy toward European integration, see Moravcsik, A., 'De Gaulle between grain and grandeur: The political economy of French EC policy 1958–1970' (Part 1), 2/2 *Journal of Cold War Studies* (2000), 3 and (Part 2), 2/3 *Journal of Cold War Studie*s (2000).

[251] See *supra* (n.67), Marcon's Speech at Sorbonne University, Initiative for Europe: A Sovereign, United, Democratic Europe.

[252] As coined by Commission President Ursula von der Leyen, <politico.eu/article/von- der-leyen-on-european-way-of-life-we-cant-let-others-take-away-our-language>.

[253] See *supra* (n.7), Editorial Comments.

Europeanism that appeals to citizens by offering them a substitute for the traditional nation-State, particularly in a world marked by disorienting interdependence and increasing geopolitical instability.

Today, this constitutional dilemma acquires renewed urgency as the EU is confronted with rising expectations to assume a more assertive global posture to pursue its SA. These expectations are most immediate in the context of the Union's response to Russia's war of aggression against Ukraine, but also extend to broader domains such as public health, environmental protection, and economic resilience. The Union is now under pressure to secure its strategic and economic standing, its own "place in the sun"[254], amid accelerating technological transformation, constrained access to natural resources, and vulnerable global supply chains. This raises a fundamental legal and political question: how can the EU develop the necessary independence and resilience to meet these challenges without falling into the trap of replicating the nation-State model it was historically designed to transcend?

From a legal standpoint, this inquiry can be pursued by analysing the constitutional constraints that ought to guide the Union's external and internal actions. Such an analysis would aim to ensure that these actions remain firmly rooted in the values articulated in the Treaties, while at the same time guarding against a eurocentric bias. It is precisely within this context that the recent policy developments under the banner of European SA warrant careful attention.

This chapter, in Section II, examines systematically the EU Treaties with the aim of constructing a normative taxonomy of the provisions that have, either directly or indirectly, contributed to the legal consolidation and development of the notion of SA within the EU legal order. Furthermore, in section III the analysis turns to an examination of the legal foundations underpinning the principle of autonomy of the EU legal order and of SA within the framework of EU law investigating how the former, as developed through the jurisprudence of the Court of Justice of the European Union, underpins the Union's capacity to act independently on the global stage and assert its regulatory influence. Finally, section IV of this chapter will consider the constitutional limits imposed on the EU when exercising its external powers, particularly the question of whether, and

[254] ibid.

to what extent, the Union may pursue an EU-centric approach in the implementation of its policies. Even in the pursuit of universally commendable objectives, such as climate protection or combating pandemics, a pertinent issue arises as to the extent to which the EU is permitted, under its own legal framework, to assert its interests and the full realization of its SA without breaching the principles of autonomy of the EU legal order, international law or neglecting the fundamental rights of individuals situated outside its territory but affected by its actions. The response to this issue crucially depends on the extent to which such constraints are internalised within the EU constitutional order and will be examined as part of the broader legal inquiry into the evolving notion of SA.

## 2. Unpacking Strategic Autonomy: Constitutional Foundations - A Functional Taxonomy of Values, Geoeconomics, and Security

The constitutional grounding of Strategic Autonomy in the EU legal order is intricately linked to the principle of conferral, as articulated in Article 5 TEU[255]. This principle, which governs both internal and external action, establishes that the Union can act only within the limits of competences conferred upon it by the Treaties, with all remaining powers reserved to the Member States (Articles 4(1)[256] and 5(2) TEU[257]). The Treaty of Lisbon introduced further clarity by codifying a catalogue of competences in Articles 2–6 TFEU, distinguishing between exclusive, shared, and supporting competences. Yet, as scholars have noted, this codification may generate a "false sense of legal certainty," as it fails to resolve complex interpretive questions regarding overlapping policy domains and mixed competences.[258]

[255] Article 5(1) TEU: 'The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality'.
[256] Article 4(1) TEU: 'In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States'.
[257] Article 5(2) TEU: 'Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States'.
[258] Govaere, I., 'To Give or to Grab: The Principle of Full, Crippled and Split Conferral of Powers Post-Lisbon.' In Cremona, M., (Ed.), *Structural Principles in EU External Relations Law* (pp. 71–91), (2018), Oxford: Hart Publishing, at p. 75.

The principle of conferral constitutes the foundational criterion for delineating competences between the European Union and its Member States.[259] Simultaneously, it exerts a direct influence on the conduct of external relations, shaping the interaction of both the Union and its Member States with third countries and international organisations[260]. In fact, the principle of conferral is applicable to both internal and external action, and to both express and implied powers. As expressed by the CJEU, "[The] principle of conferred powers must be respected in both the internal action and the international action of the Community. The Community acts ordinarily on the basis of specific powers which, as the Court has held, are not necessarily the express consequence of specific provisions of the Treaty but may also be implied from them.[261]

Both express and implied powers are referred to in this context as "specific powers," meaning that they originate expressly or impliedly from a precise provision within the Treaty, as opposed to the general or residual competence now enshrined in Article 352 of the TFEU.[262]

While the term "Strategic Autonomy" is not explicitly mentioned in the Treaty on European Union (TEU) or the Treaty on the Functioning of the European Union (TFEU), certain key provisions of the Treaties provide a strong legal foundation for the EU's ability and competence to act autonomously. Given the absence of a precise legal definition, the development of a coherent taxonomy of SA, one that differentiates among its policy objectives, may prove to be a fruitful approach in clarifying its legal implications and foundations. While policy and legislative objectives may not always coincide, the pursuit of SA must ultimately translate into the identification of the competent institutional actors.

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[259] Marise Cremona points to the following two dimensions for allocation of competence: the relationship between the EU–Member States and the relationship between internal and external powers, see Cremona, M., 'EU External Relations: Unity and Conferral of Powers' in Azoulai, L., (ed), *The Question of Competence in the European Union* (Oxford, Oxford University Press, 2014) 65.

[260] Article 47 TEU establishes that: "The Union shall have legal personality".

[261] Opinion 2/94, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, EU:C:1996:140, paras 24-25.

[262] ibid. The Court in Opinion 2/94, described this provision, sometimes called the "flexibility clause", as "designed to fill the gap where no specific provisions of the Treaty confer on the Community institutions express or implied powers to act, if such powers appear none the less to be necessary to enable the Community to carry out its functions with a view to attaining one of the objectives laid down by the Treaty" (para 29) and was careful to make clear that it could not be used to undermine the principle of conferral (para 30).

As such, determining the scope of EU competences necessarily involves a functional and teleological interpretation of the Treaties. Indeed, ECJ has consistently followed a teleological methodology when interpreting competences, identifying EU objectives as the starting point and construing competences as encompassing activities necessary to realise those objectives.[263] Furthermore, such interpretation is subject to the principle of proportionality, which requires that the content and scope of Union action must not exceed what is necessary to achieve the objectives of the Treaties, as expressly stated in Article 5(4) TEU.[264] In this framework, understanding SA as a set of objectives aligns with the CJEU's teleological reasoning and its competence-expanding effect. Thus, a taxonomy of SA objectives could serve as a foundational structure for evaluating how such objectives interact or potentially conflict with the existing distribution of competences under EU law, particularly in external relations. SA initiatives have been classified into three principal categories of motivation[265]: (*i*) the *advancement of European values*, with particular emphasis on sustainability and the broader ambition to shape global geopolitical relations in accordance with the Union's normative priorities; (*ii*) the *protection and promotion of European economic interests*, encompassing both defensive mechanisms against unfair competition and more assertive forms of coercive or unilateral action; and (*iii*) *the safeguarding of security*, understood and focusing - for the purpose of this thesis - not in traditional military and defence terms, but with regard to reducing excessive economic or technological dependence on non-EU powers.[266] Each of these motivational strands can be examined in light of the relevant legal frameworks.

[263] Case C-720/112, *Pringle v. Ireland* (EU:C:2012:756), para. 53; Case C-62/17, *Gauweiler and Others v. Bundestag* (EU:C:2015:400), para. 46; Douglas-Scott, S., 'Constitutional Law of the European Union' (2002), at 261.
[264] Article 5(4) TEU: "Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties".
[265] See *supra* (n.168), Steinbach, at pp. 979-980.
[266] See Gehrke, T., 'EU Open Strategic Autonomy and the Trappings of Geoeconomics', 27 *European Foreign Affairs Review* (*EFAR*), (2022), 61-72; Weinhardt, C., Mau, K., & Hillebrand Pohl, J., 'The EU as a Geoeconomic Actor? A Review of Recent European Trade and Investment Policies', in Babić, M., Dixon, A. D., & Liu, I. T., (eds), *The Political Economy of Geoeconomics: Europe in a Changing World* (2022) 107, at 111.

### 2.1 Strategic Autonomy as Normative Power: Values and Constitutional Identity

The notion of "values" in the context of SA is frequently associated with the "geopolitical turn" in the European Union's foreign policy agenda.[267] The term SA is generally employed to denote the Union's capacity to determine its own priorities and adopt decisions autonomously in areas of security and external relations.[268] This includes, by extension, the ability to shape and implement international rules, rather than merely adhering to frameworks established by other global powers.[269] Expressions such as Europe's "geopolitical awakening"[270] and Borrell's appeal for the Union to develop an "appetite for power"[271] reflect a broader discursive shift towards a more assertive and impactful posture in global affairs.[272] Within this evolving paradigm, the EU Treaties afford considerable flexibility for the development and implementation of policies guided by the EU normative values.[273]

This value-centred reading of SA corresponds to the constitutional objectives enshrined in Article 3(5) TEU, where it states that: "In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the

[267] Vallin, M., *et al.*, 'Europe and the World: Boosting International Academic Cooperation in a Time of Geopolitical Tension and Polarization', 31 *European Journal of Public Health* (2021) 929; Lehne, S., 'How the EU Can Survive in a Geopolitical Age', *Carnegie Europe*, (2020).
[268] See *supra* (n.168), Steinbach, at p. 980.
[269] See García Pérez, R., 'Strategic Autonomy of the European Union: A Perspective', in Conde, E., *et al*. (eds), *The Routledge Handbook of European Security Law and Policy* (2020) at pp. 81-82; see also Koeth, W., 'Member States and EU Agreements: Is It Really National Parliaments That Are Standing in the Way of EU Strategic Autonomy?' (2021), at 3.
[270] Bergmann, M., 'Europe's Geopolitical Awakening', *Foreign Affairs* (2020), available at https://www.foreignaffairs.com/articles/europe/2020-08-20/europes-geopolitical-awakening; See also, Meunier, S., & K. Nicolaidis, K.,'The Geopoliticization of European Trade and Investment Policy', 57 *JCMS* (2019) 103.
[271] Borrell, J., during the Munich Security Conference Panel, (16 February 2020); available at: https://www.reuters.com/article/ us-germany-security-europe-idUSKBN20A0BX.
[272] Helwig, N., 'Strategic Autonomy and the EU as a Diplomatic Actor', in Helwig, N., (ed.), *Strategic Autonomy and the Transformation of the EU* (2021) 69, at 79.
[273] See *supra* (n.168), Steinbach, at p. 980.

United Nations Charter".[274] Along the same lines, pursuant to Article 2 TEU, the EU is entrusted with the task of safeguarding its foundational values and promoting its core interests.[275]

Such geopolitical and value objectives of SA are further elaborated in Article 21(2) TEU.[276] In particular, Article 21(2)(a) TEU states that the Union "shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: (a) safeguard its values, fundamental interests, security, independence and integrity". Although this provision outlines what could be regarded as the core aim of SA, it exists alongside other foreign policy goals listed in subparagraphs (b) through (g), such as supporting democracy, promoting international law, and ensuring sustainable development. As a result, SA may be interpreted as a form of political guidance to EU lawmakers and policymakers, directing them to attribute greater normative weight to the objective identified in Article 21(2)(a) TEU within the broader constellation of the Union's external goals.[277] As noted by Hoffmeister[278], Article 21(2)(a) TEU protects the power of the Union to exercise its regulatory power in absence of external pressure or coercion[279], therefore, it can also be viewed as a safeguard for the Union ability to act free from external coercion or undue influence.[280] In this context, SA refers to the EU's capacity to act autonomously in the international sphere.[281] The EU's commitment to shaping its

[274] Article 3(5) TEU.
[275] Article 2 TEU: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."
[276] Article 21(2) TEU.
[277] See *supra* (n.4), Hoffmeister, at 672.
[278] ibid.
[279] Cremer, W., 'Article 21 TEU' in Calliess and Ruffert (Eds.), *EUV/AEUV*, 5th ed. (Beck, 2016), at para 24.
[280] Sahin, S., 'Die Handels und Investitionspolitik der Europäischen Union im Zeichen 'Strategischer Autonomie', (2021) EuZW, 348–354, at 350.
[281] However, this dimension also introduces additional legal constraints. See *infra,* Chapter II, section IV. Any new EU measure designed to enhance such autonomy must be consistent with the Union's legal framework, specifically, it must fall within the scope of EU competences as defined under Article 3 TEU and must adhere to overarching principles of primary law, including the protection of fundamental rights as enshrined in Article 6 TEU. Furthermore, the Union remains bound by its obligations under international law, whether derived from customary international norms or from international agreements concluded under Article 216 TFEU (See Case C-366/10*, Air Transport Association of America and others* v. *Secretary of State for Energy and Climate Change*, EU:C:2011:864, para 101; Case C-561/20, *United Air- lines*, EU:C:2022:266, para 46).

external policies around its values is far from a recent development. Historically, the European Union has embraced the identity of a "normative power," grounded in the aspiration to disseminate values rather than to pursue material interests or geopolitical advantage.[282] This normative orientation has been evident in the Union's use of trade agreements, which have often served as instruments for promoting sustainable development across various global regions.[283] The broad latitude granted by the EU Treaties has enabled trade policy to be deployed in the service of objectives extending well beyond traditional trade concerns. The Treaty of Lisbon marked a pivotal evolution by formally linking trade policy to the advancement of European values.[284] In this context, as highlighted by Zamfir, the conditionality of human rights has become a standard feature in most EU bilateral and regional free trade agreements. These agreements typically include provisions whereby the contracting parties "[confirm] their attachment to democratic principles, human rights and fundamental freedoms, and the rule of law."[285]

Steinbach noted that, while this practice of embedding values into external action represents a continuation of established norms, the contemporary discourse on SA introduces a new dimension.[286] Indeed, it signals a shift toward reinforcing the EU's "value base in its external relations"[287], particularly by enhancing the emphasis on sustainability, environmental standards, human rights protection, and the rule of law.[288] This evolution finds explicit constitutional grounding in Article 3(5) TEU[289], which mandates the Union to contribute to "sustainable development" and the "protection of human rights" in its "relations with the wider

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[282] Manners, I., 'Normative Power: A Contradiction in Terms?', 40 *JCMS* (2002), 235.
[283] Poletti, A., Sicurelli, D., & Yildirim, A., 'Promoting Sustainable Development through Trade? EU Trade Agreements and Global Value Chains', 51 *Italian Political Science Review/Rivista Italiana Di Scienza Politica* (2021) 339; See also Gehrke, T., 'Treading the Trade Needle on Open Strategic Autonomy', in Helwig., N., (ed.), 'Strategic Autonomy and the Transformation of the EU' (2021) 87, at 91.
[284] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community 2007, OJ 2007 C 306; Cremona, M., 'Human Rights as a Value of EU Trade Policy' in Balboni, M., & Danisi, C., (eds), *Human Rights as a Horizontal Issue in EU External Policy* (2021) 161; Wouters, J., & Ovádek, M., 'Human Rights in EU Trade Policy', in J Wouters, J., & Ovádek, M., (eds.), *The European Union and Human Rights: Analysis, Cases, and Materials* (2021), 646.
[285] Zamfir, I., 'Human Rights in EU Trade Agreements, July 2019, at 4, available at www.europarl.europa. eu/RegData/etudes/BRIE/2019/637975/EPRS_BRI(2019)637975_EN.pdf.
[286] See *supra* (n.168), Steinbach, at p. 981.
[287] ibid.
[288] Helwig, N 'Introduction: The EU's Choices in Advancing Strategic Autonomy', in Helwig., N., (ed.), *Strategic Autonomy and the Transformation of the EU* (2021) 87, at p. 23.
[289] Article 3(5) TEU.

world." Similarly, Article 21 TEU[290], which defines the EU's external action framework, enshrines the promotion of democracy and human rights as key foreign policy objectives. These commitments are further echoed in Article 205 of the Treaty on the Functioning of the European Union (TFEU)[291], which extends these values-based objectives to the broader domains of trade, international cooperation, and humanitarian aid. Collectively, these Treaty provisions affirm the EU's constitutional orientation towards a values-driven approach in the conduct of its international relations.

### 2.2 Geoeconomics and Strategic Autonomy: Reconciling Openness with Assertiveness

The economic dimension of SA is grounded in the growing recognition that the liberal international order, which historically underpinned the foundation of the European Union, is now being destabilised by the rise of unilateralism and protectionist policies adopted by external powers, thereby giving rise to significant political and economic tensions.[292] This shift is particularly relevant in light of the EU's long-standing constitutional commitment to openness, The notion of "openness" is not explicitly codified in the EU Treaties as a standalone legal principle. Nonetheless, despite this apparent silence, openness emerges as a latent constitutional theme, discernible in particular through the provisions of Articles 3(5) and 21 TEU, which, as anticipated, articulate the Union's external action objectives.[293] Furthermore, the Treaty norms also reflect a clear constitutional orientation in favour of multilateral engagement and international cooperation, as opposed to unilateralism, and a preference for trade liberalisation over protectionism, coupled with a commitment to respect international law.[294] While

[290] Article 21 TEU: "The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law".
[291] Article 205 TFEU: "The Union's action on the international scene, pursuant to this Part, shall be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in Chapter 1 of Title V of the Treaty on European Union."
[292] European Commission, European Security Strategy 2003, 12.12.2003, at 37.
[293] Kübek, G., & Mancini, I., 'EU Trade Policy between Constitutional Openness and Strategic Autonomy', in *European Constitutional Law Review*, 19, 2023, pp. 518–547.
[294] ibid.

"openness" is not and cannot be classified as an autonomous constitutional norm, it attains particular constitutional relevance by virtue of a systematic interpretation of the Union's external objectives. In this regard, Larik has compellingly argued that EU foreign policy objectives possess the legal status of binding constitutional norms, characterising them as belonging to "the norm category of constitutional objectives as well as of the foreign affairs constitution of the Union."[295] These objectives, moreover, are not novel developments, but have long formed a substantive component of the Union's foundational texts, including the, ultimately unsuccessful, Constitutional Treaty.[296] The ECJ has, in several decisions, acknowledged the binding nature of these external action objectives, confirming that Union institutions are under an obligation to actively pursue them.[297] However, the Court has also introduced important qualifications, limiting the binding nature these objectives by recognising the inherent challenges in their full realisation.[298] As a result, although the EU institutions enjoy a broad margin of discretion in the conduct of external action, they remain nonetheless duty-bound to act in a manner consistent with, and aimed at achieving, the objectives set out in the Treaties.[299]

Therefore, multilateralism has traditionally represented the EU's preferred modality of engagement in external relations and has been described as "a common thread" running through the Union's foreign policy.[300] Other scholars characterise this commitment as a "methodological imperative" binding upon the EU, requiring it to conduct its external action through multilateral channels

[295] Larik, J., 'Foreign Policy Objectives in European Constitutional Law' (Oxford University Press 2016) p. 126, 169.
[296] ibid.
[297] ECJ 21 February 1973, Case 6/72, *Continental Can*, ECLI:EU:C:1973:22, para. 25; ECJ 3 December 1996, Case C-268/94, *Portugal v Council*, ELCI:EU:C:1996:461, para. 23; ECJ 3 September 2009, Case C-166/07, *Council v Parliament* (International Fund for Ireland), ECLI:EU:C:2009:499, para. 45.
[298] ECJ 21 June 1958, Case 8/57, *Groupement des hauts fourneaux et aciéries belges v High Authority*, ECLI:EU:C:1958:9, p. 253.
[299] They pursue those objectives within the limits of their competencies, consistent with the structural principles of the EU legal order, and within the bounds of what is internationally feasible; See *supra* (n.295), Larik, pp. 168-173.
[300] de Búrca, G., 'The EU as a Legal Power in Global Governance?' in Van Vooren, B., *et al*. (eds.), *The EU's Role in Global Governance: The Legal Dimension* (Oxford University Press 2013); See also Ramopoulos, T., 'Article 21 TEU', in Kellerbauer, M., *et al*. (eds.), *The EU Treaties and the Charter of Fundamental Rights* (Oxford University Press 2019).

grounded in the rule of law.[301] Nevertheless, as noted in scholarly reviews[302], "the constitutional commitment to multilateralism and international cooperation is, however, not absolute. […] First, the Treaties do not expressly ban unilateralism, which therefore escapes any positive or negative connotation*"*.[303] Furthermore, as noted, the EU's commitment to multilateralism has increasingly come under strain. As some authors observe, we are witnessing a "crisis in multilateralism,"[304] triggered by the structural limitations of global institutions such as the WTO, the intensification of geopolitical rivalries, and the "weaponisation of interdependence"[305] by major powers. For example, the Trump and Biden administrations, for example, have blocked the appointment of new members to the WTO's Appellate Body, thus paralyzing its multilateral dispute settlement function. [306]

Against this background, the evolving role of the Common Commercial Policy in the Treaties provides a particularly illustrative example of how the Union's constitutional commitment to openness and multilateralism is reconciled with new imperatives of SA. Article 3 (1)(e) TFEU[307], establishes the EU's exclusive competence over the Union's CCP. This competence is further elaborated in Article 207 TFEU, which governs the CCP, and defines the Union's over matters such as foreign direct investment, export policy, and trade defense instruments[308]. Since its inception, the CCP has been fundamentally oriented towards the objective of trade liberalisation. As stipulated in Article 206 TFEU, the Union "shall contribute, in the common interest, to the harmonious

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[301] Van Vooren, B., & Wessel, R.A., 'EU External Relations Law: Text, Cases and Materials' (Cambridge University Press 2014)., at p. 12.
[302] See *supra* (n.293), Kübek *et al.*
[303] Odermatt, J., 'Convergence through EU Unilateralism', in E. Fahey (ed.), *Framing Convergence with the Global Legal Order: The EU and the World* (Hart Publishing 2020).
[304] See *supra* (n.168), Steinbach, at p. 986.
[305] Farrell, H., & Newman, A. L., *Weaponized Interdependence: How Global Economic Networks Shape State Coercion*, 44(1) *International Security (IS*) (2019) 42.
[306] Gehrke, T., 'Treading the Trade Needle on Open Strategic Autonomy', in Helwig, N., (ed.), *Strategic Autonomy and the Transformation of the EU* (2021) 87, at 94; See also Petersmann, E. U., & Steinbach, A., 'Neo-Liberalism, State-Capitalism and Ordo-Liberalism: "Institutional Economics" and "Constitutional Choices" in Multilevel Trade Regulation', 22 *Journal of World Investment and Trade* (*JWIT*) (2021).
[307] Article 3(1)(e) TFEU.
[308] Article 207 TFEU constitutes the legal basis for both the Anti-Coercion Instrument (See *supra* (n.76, Anti-Coercion Instrument) and the FDI Screening Regulation (See *supra* (n.75, FDI Screening Regulation), while the Foreign Subsidies Regulation relies on a dual legal basis: Articles 114 and 207 TFEU.

development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers."[309] Moreover, "free and fair trade" features among the values and interests listed in Article 3(5) TEU, which the EU is expected to uphold and promote in its relations with the wider world. [310]

The Treaties do not negate unilateralism. Indeed, the scope of the CCP encompasses not only liberalising measures but also instruments designed to protect EU trade interest, such as anti-dumping and countervailing duties, which are by their nature unilateral.[311] Moreover, the EU Treaties do not establish a hierarchy among the various foreign policy objectives articulated therein[312]. The Union is required to ensure coherence in its external action, which entails a continuous balancing of competing objectives.[313] In certain circumstances, this balancing act may justify temporary limitations on multilateral cooperation, particularly when the unilateral pursuit of alternative goal, such as environmental protection or security, yields significant benefits.[314] Furthermore, Article 21(1) TEU[315] provides that the Union is to develop its international relations and partnerships with states and organisations that "share the principles" outlined in the first sentence of the article, namely, "democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms." In this way, the Treaties themselves place a normative condition upon multilateral engagement, qualifying the objective of broad international cooperation in light of the Union's foundational values.

Furthermore, following the entry into force of the Lisbon Treaty, the CCP has also become subject to the general external action objectives laid down in

[309] Article 206 TFEU.
[310] Larik observes that international trade liberalisation is not typically found in national constitutions and is unique to the EU: trade liberalisation is one of the first codified objectives in the founding Treaties, reflecting the historical origins of the EU as an economic project. See Larik, J., 'Good Global Governance through Trade: Constitutional Moorings', in Wouters, J., *et al*. (eds.), Global Governance through Trade: EU Policies and Approaches (Edward Elgar 2015) p. 54-56.
[311] Art. 207(1) TFEU.
[312] See *supra* (n.293), Kübek *et al.*
[313] Canamares, M.E., '"Building Coherent EU Responses": Coherence as a Structural Principle in EU External Relations', in Cremona, M.(ed.), Structural Principles in EU External Relations Law (Hart Publishing 2018).
[314] See *supra* (n.293), Kübek *et al*.
[315] Article 21(1) TEU.

Article 21 TEU, by virtue of Article 207(1), second sentence, TFEU[316]. This development has enabled a combined reading of the CCP's traditional liberalisation goals with the broader geopolitical objectives enshrined in the Treaties, thus giving rise to the notion of "OSA."[317] As noted by Cremona, the Treaty of Lisbon presents trade liberalisation not only as an end in itself but also as a means of achieving other non-economic goals, through measures promoting free trade as well as measures limiting trade[318]. In other words, the objective of trade liberalisation is subject to institutional policy choices. According to settled case law, the scope of Article 207(1) TFEU must not be construed as prohibiting the Union from adopting measures that may affect trade with non-member countries.[319] In this regard, the Union's objective of contributing to the progressive[320] abolition of restrictions on international trade, as codified in Article 206 TFEU[321], cannot be interpreted as imposing an unconditional obligation to liberalise imports from third countries, particularly where such liberalisation would conflict with the Union's broader interests.[322] The same reasoning may be extended, by analogy, to other non-trade values enshrined in Articles 3(5) and 21 TEU.[323]

Notably, the Treaties do not impose an outright prohibition on protectionism. As such, while the EU Treaties do express a clear constitutional preference for balanced trade liberalisation, they simultaneously provide a wide margin of discretion for integrating non-trade objectives, such as sustainability and security, into trade policy, even when doing so necessitates limitations on the liberalisation mandate laid down in Article 206 TFEU[324]. This structural

[316] Article 207(1) TFEU: "The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action."
[317] See *supra* (n.266), Gehrke, at p. 62.
[318] Cremona, M., 'The Union's External Action: Constitutional Perspectives', in Amato, G., *et al*. (eds.), Genesis and Destiny of the European Constitution (Bruylant 2007) p. 1213.
[319] See, ECJ 19 November 1998, Case C-150/94, *United Kingdom v Council of the European Union*, ECLI:EU:C:1998:547; ECJ 5 May 1981, Case 112/80, *Firma Anton Dürbeck v Hauptzollamt Frankfurt am Main-Flughafen*, ECLI:EU:C:1981:94.
[320] Article 206 TFEU does not call for a swift and full but a progressive removal of barriers to trade; See Dimopoulos, A., 'EU Foreign Investment Law' (Oxford University Press 2011) p. 160-161
[321] 206 TFEU.
[322] See *supra* (n.319), UK v Council, para. 67. This interpretative approach has been further reinforced by the Court in Opinion 2/15, which confirmed that EU policymakers are constitutionally mandated to integrate sustainability considerations into the Union's external trade policy; Consult ECJ 16 May 2017, Opinion 2/15, FTA with Singapore, ECLI:EU:C:2017:376.
[323] See *supra* (n.293), Kübek *et al*.
[324] ibid.

framework supports the idea that SA, including its 'open' dimension, is not antithetical to unilateralism, but rather entails a calibrated and principled flexibility in the pursuit of EU external objectives.

### 2.3 The Security Dimension of Strategic Autonomy: Critical Infrastructure, Technological Sovereignty and Internal Market Resilience

In addition to its economic and normative dimensions, a third and equally critical pillar of SA concerns the sphere of security, understood in its multifaceted manifestations. This encompasses not only traditional domains such as defence[325] and military capability, but also the broader capacity to safeguard and manage critical infrastructure, technological ecosystems, and strategic resources.[326] The concept of security is increasingly invoked in relation to a wide spectrum of policy areas, reflecting the Union's struggle to navigate transformative challenges such as digitalisation and the green transition. In this evolving context, security has become a normative lens shaping initiatives in sectors ranging from digital rights and public health to energy resilience and environmentally sustainable technologies.[327] The recent shocks to the EU's energy supply chain, compounded by the COVID-19 pandemic, have brought into stark relief the structural vulnerabilities that accompany deep international interdependencies.[328] The relevance of technology as a driver of SA is also becoming more prominent, as innovation and technological capability have far-reaching consequences not only for economic competitiveness but also for geopolitical influence and normative

[325] This evolution of the Union's strategic posture is further exemplified by recent developments under the Common Foreign and Security Policy (CFSP). While the CFSP has long been criticised as an intergovernmental forum lacking operational effectiveness, constrained by the unanimity requirement in the Council, pursuant to Article 31 TEU, it has recently undergone significant transformation. The geopolitical rupture caused by Russia's full-scale invasion of Ukraine on 24 February 2022 served as a catalyst for the activation of previously underutilized political tools. In the immediate aftermath of the invasion, NATO remained the principal guarantor of continental security. However, the rapidly changing geopolitical landscape exposed the obsolescence of many of the allies' pre-existing political instruments, thereby highlighting the growing necessity for a more autonomous and agile EU security and defence posture.

[326] Bellanova, R., Carrapico, H., & Duez, D., 'Digital Sovereignty and European Security Integration: An Introduction', 31 European Security (2022) 337.

[327] See *supra* (n.168), Steinbach, at p. 981.

[328] Majcher, K., 'Open Strategic Autonomy: Towards the Geopoliticisation of EU Competition Law?', Kluwer Competition Law Blog (20 November 2020); available at http://competitionlawblog.kluwercompetitionlaw.com/2020/11/20/ open-strategic-autonomy-towards-the-geopoliticisation-of-eu-competition-law/.

power.[329] Within this discourse, the concepts of "technological autonomy" and "technological sovereignty" are now frequently deployed as essential aspirations of EU policy in the security domain.

The EU has adopted several measures to safeguard critical infrastructure and technologies, relying primarily on Article 114 TFEU as their Treaty-based legal foundation.[330]. As clarified by the ECJ, Article 114 offers a flexible legal basis, allowing the adoption of harmonisation measures aimed at improving the functioning of the internal market, particularly when viewed in light of the Court's expansive case law[331]. For instance, in Tobacco advertising, the CJEU pointed out that it can be used to adopt a measure where it is genuinely intended to improve the conditions for the establishment and the functioning of the internal market and it had that effect.[332] This orientation was criticized by several scholar as Weatherill who noted that "It [the legislature] is able to exploit the broad and fuzzy contours of Article 114 TFEU to convert compliance with the principle of conferral into little more than a drafting exercise".[333]

The measures adopted by the EU institutions[334] serve as illustrative examples of the Union's capacity to pursue diverse objectives central to the proper

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[329] Sinkkonen, E., & Sinkkonen, V. A., 'A Multi-dimensional View of US-China Great-Power Competition', in Helwig, N., 'Strategic Autonomy and the Transformation of the EU' (2021) 27, at 29; U. Friedman, U., 'The New Concept Everyone in Washington Is Talking About', The Atlantic (6.8.2019); available at www.theatlantic.com/politics/archive/2019/08/ what-genesis-great-power-competition/595405/.

[330] Article 114 TFEU.

[331] Poli, S. & Gallo, D., 'Enhancing European Technological Sovereignty: The Foreign Direct Investment Regulation and Beyond', in Armstrong KA., Scott, J., & Thies, A., (a cura di), *EU External Relations and the Power of Law*, 1st edn., Hart Publishing, 2024.

[332] Case C-376/98 *Republic of Germany v Council* ECLI: EU:C:2000:544, [2000] ECR I-8419. See also Flear, M.F., 'Regulating New Technologies: EU Internal Market Law, Risk and Socio-Technical Order' in Cremona, M., *New Technologies and EU Law*, Collected Courses of the Academy of European Law 24/2 (Ox/Ord, Oxford University Press, 2017) 93. After Tobacco advertising, the wide interpretation of the conditions that justify and consent reliance on Art 114 TFEU kept on going. See, *inter alia*, Case C-58/08 *Vodafone and Others* ECLI:EU:C:2010:321, [2010] ECR I-4999.

[333] Weatherill, S., 'The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court's Case Law has become a "Drafting Guide"' (2011) 12 *German Law Journal* 827, at p. 848.

[334] The Union has employed this provision to advance three interrelated objectives. First – together with Article 207 TFEU - to address distortions to the level playing field caused by foreign-subsidised investments across multiple sectors, including those involving strategic industries and critical technologies or assets (Regulation (EU) 2022/2560 of the European Parliament and of the Council on foreign subsidies distorting the internal market [2022] OJ L330/1). Second, to strengthen the resilience of such infrastructure and technologies, which are indispensable to the functioning of the internal market and the broader security interests of both the Union and its Member States, particularly given their vulnerability to external disruption or destruction (Directive (EU) 2022/2557 of the European Parliament and of the Council on the resilience of

functioning of the internal market, namely, the mitigation of the distortive effects of subsidised foreign investments and the safeguarding of cybersecurity for critical technologies and infrastructure. This capacity is made possible through the flexible use of Article 114 TFEU, which has increasingly become a cornerstone of EU regulatory action. The flexibility with which EU institutions have invoked this legal basis can be attributed to the evolving jurisprudence of the ECJ which has progressively reinterpreted the scope of the Union's harmonisation competence. As a result, Article 114 TFEU has effectively been transformed into a regulatory instrument that operates independently of the prior existence of national legislation.[335].

### 3. The Autonomy of the EU Legal vis-à-vis Strategic Autonomy

An insightful attempt to conceptualize SA begins with the etymology of "autonomy" derived from the Greek words *autos* (self) and *nomos* (law), signifying the ability of an entity to live by its own laws. In this context, SA is defined as the European Union's (EU) capacity "to make its own choices and shape the world around it through leadership and engagement, reflecting its strategic interests and values."[336] In general, in the EU legal discourse, autonomy means self-rule, referring to the self-governing nature of the EU's legal system, emphasizing the ECJ's exclusive jurisdiction to interpret EU law, as enshrined in Article 19 TUE and Article 344 of the Treaty on the Functioning of the European Union (TFEU)[337]. The ECJ uses the term autonomy when discussing the relationship between European law and international law[338] and it has thus become an established legal concept in the ECJ's case law.

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critical entities and repealing Council Directive 2008/114/EC (Directive 2022/2577) [2022] OJ L333/164). Third, to improve the cybersecurity of network and information systems that support essential services in key areas of economic activity (Directive (EU) 2022/2555 of the European Parliament and of the Council on measures for a high common level of cybersecurity across the Union, amending Regulation (EU) No 910/2014 and Directive (EU) 2018/1972, and repealing Directive (EU) 2016/1148 (NIS 2 Directive) [2022] OJ L333/80.

[335] Schütze, R., 'Limits to the Internal Market Competence(S): Constitutional Comparisons', in Azoulai, L. (ed), *The Question of Competence in the European Union* (Oxford, Oxford University Press, 2014) 232; see s*upra* (n. 331) Gallo *et al*.

[336] See *supra* (n.18), European Commission, Trade policy review – An open, sustainable and assertive trade policy, at p. 4.

[337] Article 19 TEU, and Article 344 TFEU: 'Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.'

[338] Opinion 2/13, *Draft international agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms –*

In fact, the notion of "autonomy" traditionally denotes self-rule, the capacity of an entity to determine its own path independently, free from external control, direction, or influence. However, autonomy is not an absolute status or intrinsic quality. Rather, it is relational in nature, reflecting the extent to which an entity can shape and manage its interactions with other actors.[339] "[T]he autonomy of EU law is not absolute but relative; it does not mean that EU law has ceased to depend, for its validity and effective application, on the national law of its member states, nor that it has ceased to belong to international law". In this discussion on autonomy, 'self-rule' does not refer to the issue of kompetenz-kompetenz whereby a court has the competence to decide upon the extent of its jurisdiction. Particularly within the European Union context, autonomy signifies the EU's distinct position in relation to other legal systems or international actors. This idea is closely tied to the foundational theory of the EU as a "new legal order,"[340] a concept which has been pivotal in the development of core constitutional doctrines such as direct effect and primacy.

From its inception, the internal dimension of autonomy, the idea that the EU legal order is not only novel but also distinct from those of its Member States, has played a critical role in establishing and legitimising the EU legal order[341]. This foundational autonomy was essential to prevent Member States from rejecting the application of EU law in favour of conflicting domestic legal provisions. As such, it provided the normative basis for the CJEU's formulation of the principles of direct effect and primacy, which serve to guarantee the internal consistency and supremacy of the EU legal order over national law.[342] As Barents argues, "[a]lthough the EC is based on a document which bears the name 'treaty',

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*Compatibility with the EU Treaties* ECLI:EU:C:2014:2454, paras. 179–214; Case C-284/ 16, *Achmea* v. *Slovak Republic*, EU:C:2018:158, paras. 31–60; Opinion 1/17, *EU-Canada Comprehensive Economic and Trade Agreement (CETA) - Investment Court System – Compatibility with the EU Treaties*, EU:C: 2019:241, paras. 106–119.

[339] de Witte, B., 'European Union Law: How Autonomous is Its Legal Order?' (2010) 65 Zeitschrift für öffentliches Recht 141, 142.

[340] Case C-26/62 *Van Gend en Loos v Administratie der Belastingen*, Judgment, EU:C:1963:1: [T]he Community constitutes a new legal order of international law; Case 6/64 *Costa v ENEL,* Judgment, EU:C:1964:66: By contrast with ordinary international treaties, the EEC Treaty has created its own legal system. See Weiler, JHH., 'The Transformation of Europe' (1991) 100 Yale Law Journal 2403; Weiler, JHH., and Haltern, UR., 'The Autonomy of the Community Legal Order: Through the Looking Glass' (1996) 37 Harvard International Law Journal 411.

[341] Odermatt, J., 'The principle of autonomy: An adolescent disease of EU external relations law?' in Cremona, M., (Ed.), *Structural Principles in EU External Relations Law* (Hart, 2018), pp. 291–316.

[342] ibid.

this has but a formal meaning. In a material sense the EC Treaty has the character of an autonomous constitution and, as a result, it constitutes the exclusive source of Community law."[343] Similarly, in its landmark decision in *Costa*, the Court characterised EU law as "an independent source of law,"[344] thereby reinforcing the conceptual linkage between autonomy and the EU's supranational legal identity. The European Union has progressively enhanced its engagement with external actors, increasingly asserting its presence on the international stage in its own capacity. In this evolving context, the EU both shapes and is shaped by its intricate relations with other global entities. As these interactions have grown in frequency and complexity, "a new threat has recently emerged to the consistent application of EU law, namely interpretation of EU law by the ever growing range of international tribunals that sit outside the domestic legal order of any particular state".[345] In other words, the potential for EU law to be undermined not solely by conflicting domestic legislation, but also by international law.[346] As the EU gradually expanded its external competences and began engaging more deeply with third states and international organisations, the concept of autonomy evolved to encompass an external dimension. In this context, the ECJ began articulating the principle of "external autonomy," which safeguards the integrity of the EU legal order from potential encroachments by international commitments made either by the Union itself or by its Member States.[347]

Although the EU Treaties do not expressly codify the principle of autonomy, it has been thoroughly developed through the jurisprudence of the CJEU. The term "autonomy" has only appeared in the Court's more recent case law, but the normative substance of the principle has much deeper roots[348]. Initially, legal discussions centred on the threat posed by Member States to the independent functioning of the Union's legal order. Over time, the concern has expanded to include the compatibility of external commitments with the autonomy of EU law, particularly in the realm of external relations.

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[343] Barents, R., 'The Autonomy of Community Law' (The Hague, Kluwer Law International, 2004) 112.
[344] See *supra* (n.340), Costa vs ENEL.
[345] Parish, M., 'International Courts and the European Legal Order' (2012) 23 European Journal of International Law141, 142.
[346] See *supra* (n. 341), Odermatt.
[347] ibid.
[348] ibid.

While it is often referred to as a "concept"[349] or an "idea,"[350] its role in the development of the EU's constitutional architecture arguably elevates it to the status of a principle.[351] As Marise Cremona observes[352], principles differ from rules in that they possess a fundamental normative character to which rules must conform. In this sense, autonomy operates at a deeper, more foundational level than other structural principles such as direct effect, primacy, the duty of sincere cooperation or transparency.[353] Over time, autonomy has thus transitioned from a conceptual foundation into a concrete legal principle, particularly in the context of the EU's external action. Its development reflects both the consolidation of the EU's legal personality and its capacity to act independently on the international stage, distinct from the legal and political systems of its Member States.[354] Having examined the foundational principle of the EU as an autonomous legal order, it is now necessary to assess whether, and to what extent, this constitutional autonomy supports the Union's aspiration to Strategic Autonomy.

### 3.1 Autonomy as a Leverage for Strategic Autonomy

In the present context, the autonomy of the EU legal order serves not only as a foundational constitutional doctrine, but also as a potential leverage for the realisation of SA in its external action and norm-setting capacity. According to this conceptualisation, as anticipated, the European Union is to be understood as a distinct legal order, autonomous both from its Member States and from the broader international legal order.[355] This autonomy entails not only the right of the Union to act independently but also the capacity to preserve the integrity of its legal order

[349] Tsagourias, N., 'Conceptualizing the Autonomy of the European Union' in Collins, R., & White, ND., *International Organizations and the Idea of Autonomy* (London, Routledge, 2011) 339: "The concept of autonomy has been embedded in the legal and political culture of the European Union and has been the harbinger of important legal and political developments".
[350] Collins, R., & White, ND., (eds), International Organizations and the Idea of Autonomy (London, Routledge, 2011).
[351] Cremona, M., (Ed.), "Structural Principles in EU External Relations Law" (Hart, 2018).
[352] ibid.
[353] van Rossem, W., 'The Autonomy of EU Law: More is Less?' in Wessel, RA., & Blockmans, S., *Between Autonomy and Dependence: The EU Legal Order under the Influence of International Organisations* (The Hague, TMC Asser Press, 2013) 13, 18: "In any event, the bottom line of this argument is that autonomy is not exactly in the same league as, say, primacy, fundamental rights protection or judicial review, but forms the premise upon which such fundamental principles of EU law are built".
[354] See *supra* (n. 341), Odermatt.
[355] See on the issue, Odermatt, J., 'When a Fence Becomes a Cage: The Principle of Autonomy in EU External Relations Law' (EUI Working Paper 07-2016); Eckes, C., 'The Autonomy of the EU Legal Order' (2020) Europe and the World: A Law Review*;*

in the long term, a prerequisite for ensuring that its SA is not undermined by external influences.[356]

In other words, the effects of the autonomy of the EU's legal order on the conduct of its external action can be understood as instrumental to the pursuit of SA, reinforcing its capacity to promote a rules-based international legal order and by defending the adoption of rules aligned with its values and interests.[357]

In this sense, the principle of autonomy operates as a "leverage for the strategic autonomy of the Union. It preserves and strengthens the position of the European Union as an international norm-setter"[358]. More broadly, "beyond the principle of autonomy, the very legal nature of the Union, that of an autonomous legal order (as opposed to a sovereign state), impacts its capacity to achieve strategic autonomy"[359]. This function is most clearly illustrated in the jurisprudence of the ECJ, which has insisted that international agreements concluded by the EU must not affect the autonomy of its legal order. This requirement, as developed by the Court, has created a juridical and legal context aligned with OSA.

As such, the autonomy principle can be seen as a "legal leverage", insofar as it strengthens the Union's norm-setting role in two keyways. First, it secures the EU's legislative prerogatives by safeguarding the existing *acquis communautaire*. Second, it ensures the Union's capacity and freedom to regulate for the future, by preserving the discretion of EU institutions to pursue the Union's strategic objectives free from external constraint.[360] This safeguarding role of the autonomous legal order of the EU is achieved through a doctrinal requirement that EU law, as it is applied within the internal legal order, may not be distorted or challenged in its substance, interpretation, or application by external courts. The autonomy of the EU legal order would be compromised if international tribunals could impose interpretations of EU law binding within the Union.

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[356] 'Rapoport C., 'Setting Norms and Promoting a Rules-based International Legal Order: Enhancing Strategic Autonomy Through the Autonomy of the EU Order', in Beaucillon, C., Poli S., (eds), *EU Strategic Autonomy and Technological Sovereignty*, *European Papers – A Journal on Law and Integration*, Insight Special Issue, 2023, pp. 447–458.
[357] ibid, at p. 448.
[358] ibid, at p. 448.
[359] ibid, at p. 448.
[360] ibid, at p.449

In other words, one of the most salient ways in which the principle of autonomy is asserted in the jurisprudence on the EU's external relations is through the ECJ insistence on preserving its exclusive jurisdiction to interpret and apply EU law. This line of case law pertains to the participation of the EU and its Member States in international agreements or dispute settlement systems not envisaged by the Treaties. While the Court has acknowledged that the EU and its Member States may, in principle, accede to international treaties employing binding dispute settlement mechanisms, it has consistently stipulated that such participation must not undermine the autonomy of the EU legal order.

In order to guarantee such autonomy, the Court's objective is to ensure that no external adjudicative body is granted the capacity to interpret EU law, even indirectly. It has been suggested that this defensive posture stems, in part, from an institutional "selfishness" of the Court.[361] De Witte has contended that the principle of autonomy is "put forward as a rhetorical shield to help to protect the Court's own exclusive jurisdiction," and is deployed in a manner "rather unfriendly towards the 'rest' of international law."[362]

However, the preservation of autonomy is not solely for the benefit of the Court; rather, it serves the integrity and coherence of the EU legal order[363]. The Court's commitment to uniformity and consistency in the interpretation of EU law constitutes a valid basis for this protection. In this sense, the safeguarding of the Court's judicial monopoly is instrumental to upholding the structural integrity of the Union's legal system, rather than merely a means of defending its institutional prerogatives[364]. In fact, diverging interpretations of EU law by external tribunals could jeopardize the uniform application and coherence of EU law across the Union. This logic has been central to a notable line of Opinions by the CJEU,

[361] de Witte, B., 'A Selfish Court? The Court of Justice and the Design of International Dispute Settlement Beyond the European Union' in Cremona, M., and Thies, A., (eds), The European Court of Justice and External Relations Law: Constitutional Challenges (Oxford, Hart Publishing, 2014) 33.
[362] See *supra* (n. 339), de Witte (2010), at p. 150.
[363] See *supra* (n. 341), Odermatt.
[364] ibid.

including Opinions 1/91[365], 1/92[366], and 1/00[367], which authorised the extension of the *acquis communautaire* to third countries on condition that appropriate safeguards were included to preserve the autonomy of EU law. In particular, the ECJ'S prominent application of the principle of autonomy is evident in Opinions 1/91 and 1/92, which addressed the compatibility of the European Economic Area (EEA) Agreement with the EU Treaties. These cases concerned international agreements that provided for alternative dispute resolution mechanisms.

The Court held that such mechanisms must not possess jurisdiction to interpret or apply EU law. For instance, the ECJ, in its Opinion 1/91[368], para. 40 established that: 'An international agreement providing for such a system of courts is in principle compatible with Community law. The Community's competence in the field of international relations and its capacity to conclude international agreements necessarily entails the power to submit to the decisions of a court which is created or designated by such an agreement as regards the interpretation and application of its provisions'. This otherwise straightforward requirement becomes complex in mixed agreements, in which both the EU and its Member States are parties. For example, in the context of the EEA Agreement, the ECJ determined that the proposed EEA Court's authority to rule on the allocation of competences between the Community and its Member States could "likely adversely affect the allocation of responsibilities defined in the Treaties and the autonomy of the Community legal order."[369]

In practical terms, different mechanisms[370] have been developed across EU international agreements to ensure this autonomy, depending on whether the agreement extends the *acquis* to thid states immediately or progressively, and whether the dispute resolution system is diplomatic or arbitral. These

[365] Opinion 1/91 Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area ECLI:EU:C:1991:490.
[366] Opinion 1/92 Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area ECLI:EU:C:1992:189.
[367] Opinion 1/00 European Common Aviation Area ECLI:EU:C:2002:231.
[368] See *supra* (n.365), Opinion 1/91, para 40.
[369] ibid.
[370] For an analysis, see Rapoport, C., 'Autonomy of the EU Legal Order and International Agreements Extending the Acquis: Opinion 1/00 (European Common Aviation Area*)'* in Butler, G., et Wessel, R.A., (eds), *EU External Relations Law: The Cases in Context* (Hart Publishing 2022) 501.

mechanisms[371] serve to ensure that no external body may interpret EU law in ways binding within the EU legal order, thereby protecting both the interpretative monopoly of the CJEU and the internal coherence of the *acquis*. In line with its earlier rulings such as MOX Plant[372], the ECJ continued to protect its judicial prerogatives, not as an end in itself, but in order to preserve the constitutional balance of powers and the allocation of responsibilities within the Union.

In Opinion 1/00[373], concerning the establishment of a European Common Aviation Area (ECAA), the Court articulated two essential requirements to preserve autonomy: "[f]irst, that the essential character of the powers of the Community and its institutions as conceived in the Treaty remain unaltered … [s]econd, it requires that the procedures for ensuring uniform interpretation of the rules of the ECAA Agreement and for resolving disputes will not have the effect of binding the Community and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of Community law referred to in that agreement."[374] These two conditions reflect a narrow reading of autonomy, primarily oriented toward safeguarding the exclusive jurisdiction of the CJEU to

[371] "Integration agreements with neighbours all organise, in one way or another, the incorporation of part of the Union acquis as such into their internal legal order, which, combined with a more or less structured alignment, tends to achieve partial integration in certain areas or policies of the Union". See Maresceau, M., 'Les accords d'intégration dans les relations de proximité de l'Union européenne' in Blumann, C., (ed.), *Les frontières de l'Union européenne* (Bruylant 2013) 151-192 at 153.

[372] Case C-459/03, *Commission of the European Communities v. Ireland* (*MOX Plant*), ECLI:EU:C:2006:345. It is a case that arose from a dispute between the United Kingdom ("UK") and Ireland regarding a nuclear facility located on a site at Sellafield in the UK. Ireland initiated arbitral proceedings against the UK at the international level, pursuant to the dispute settlement provisions in UNCLOS. The European Commission regarded Ireland's use of arbitral proceedings as a violation of EU law and brought proceedings before the CJEU against Ireland, for failing to fulfil its obligations under Article 292 of the EC Treaty (TEC) (currently Article 344 TFEU). The Commission argued that the dispute between Ireland and the UK was essentially a dispute concerning the interpretation of EU law, and that the CJEU therefore had exclusive jurisdiction to hear the dispute. The Court found that Ireland, by submitting the dispute to an arbitral tribunal, had breached its obligation under Article 292 TEC. The judgment drew a certain criticism from academics in both EU law and international law. Klabbers, for instance, argued that "the Court's attitude is worrisome: it does aspire to build a fence around EU law, thus running the risk of placing the EU outside international law" (Klabbers, J., 'Treaty Conflict and the European Union' (Cambridge, Cambridge University Press, 2009) 148). Moreover, Prost argued that the judgment "artificially "Communitarises" whole portions of the law of the sea and asserts, in absolute terms, the autonomy and superiority of the Community system over the universal regime of the UN" (Prost, M., *The Concept of Unity in Public International Law* (Oxford, Hart Publishing, 2012) 42–43). The criticism originated from the fact that the Court examined the issues solely through the lens of EU law, without acknowledging that the wider dispute concerned issues of international law and dispute settlement.

[373] See *supra* (n.367), Opinion 1/00 European Common Aviation Area.

[374] ibid, para. 12.

interpret EU law. "A narrow conception of autonomy, such as this, is appropriate as it serves the legitimate purpose of protecting the integrity of the EU law while retaining the EU's capacity as an external actor.[375] Summarising this case law, De Witte asserts that "the theme of the autonomy of the Community legal order is mentioned recurrently, and relates essentially to the preservation of the Court's own exclusive power to interpret Community law."[376] Yet, it is evident that in these decisions, the Court's concern is not simply institutional self-preservation[377]. Rather, it is fundamentally about maintaining the "essential characteristics of the European Union legal order." [378]

This broader conception was more explicitly elaborated in Opinion 1/09, concerning the proposed European and Community Patents Court (ECPC). The agreement envisaged a preliminary reference mechanism to the CJEU for questions of EU law, ostensibly to preserve the principle of autonomy. However, the Court emphasized that "an international agreement concluded with third countries may confer new judicial powers on the Court provided that in so doing it does not change the essential character of the function of the Court as conceived in the EU and FEU Treaties."[379]

Among these essential features is the capacity of national courts to submit preliminary references to the CJEU, a mechanism that is "indispensable to the preservation of the very nature of the law established by the Treaties."[380] This position was affirmed in Opinion 2/13, where the Court rejected the draft agreement for the EU's accession to the European Convention on Human Rights on the ground that it "is liable adversely to affect the specific characteristics of EU law and its autonomy"[381]. Although the ECJ's reasoning has been subject to considerable critique[382], its conclusion appears less unexpected when considered

[375] Locke, T., 'The Future of the European Union's Accession to the European Convention on Human Rights after Opinion 2/13: Is It Still Possible and is It Still Desirable?', 11 *European Constitutional Law Review*, (2015), 239, 243.
[376] See *supra* (n. 339), de Witte (2010), at p. 150.
[377] See *supra* (n. 341), Odermatt.
[378] Opinion 1/09, EU:C:2011:123, para 65.
[379] ibid, para 75.
[380] ibid, para 85.
[381] See *supra* (n.338), Opinion 2/13.
[382] The European Convention on Human Rights (ECHR) permits contracting parties to initiate interstate disputes. In this regard, the Court found that the "very existence of such a possibility" for the EU or its Member States to invoke Article 33 ECHR in relation to a dispute involving EU law would constitute a violation of Article 344 TFEU (Opinion 2/13 (n. 338), para 208). The Court emphasised that the submission of such a dispute to the European Court of Human Rights (ECtHR)

within the broader context of a consistent line of jurisprudence in which the principle of autonomy has evolved into a comprehensive and far-reaching doctrine.

The case law of the Court of Justice reveals a dual conception of autonomy: a narrow reading, focused on the **e**xclusive jurisdiction of the CJEU to interpret EU law, and a broader interpretation, which views autonomy as a constitutional principle underpinning the Union's capacity to act externally**.** The narrow conception emerged primarily in earlier opinions (e.g., Opinions 1/91, 1/92), where the Court insisted that international tribunals must not interpret or apply EU law. By contrast, more recent judgments (such as Opinions 1/17 and 2/13) reflect a broader understandin**g**: autonomy is no longer confined to judicial interpretation, but is increasingly associated with preserving legislative discretion, protecting the right to regulate, tjus supporting the Union's SA in the international legal order.

In essence, the autonomy principle, as articulated by the CJEU, has evolved beyond a mere safeguard for the Court's interpretative authority. It now functions as a foundational principle designed to uphold the structural integrity of the EU legal order[383]. In protecting its judicial monopoly, the Court simultaneously preserves the ability of national courts to participate in the coherent application of EU law, thereby reinforcing the constitutional order that underpins the Union. The Court's evolving jurisprudence thus reflects a shift from a narrow to a broader

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"goes against the very nature of EU law" (Opinion 2/13 (n.338), para 212). Unlike in *Mox Plant*, where the issue concerned the prevention of Member States from bringing proceedings against each other, the situation here involves a prohibition on entering into an agreement that even allows for such a *possibility*. This concern over interstate proceedings is particularly relevant to the principle of autonomy. Under the proposed ECHR Accession Agreement, Member States would have been able to bring cases before the ECtHR involving aspects of EU law without those issues first being considered by the CJEU.

The matter was also examined in the *View* of Advocate General Kokott, she observes that such concerns can be adequately addressed within the existing institutional framework of the EU, for instance through infringement proceedings initiated by the Commission, as exemplified in *Mox Plant* (Opinion 2/13, View of AG Kokott, EU:C:2014:2475, para 118: "In my view, the possibility of conducting infringement proceedings (Articles 258 TFEU to 260 TFEU) against Member States that bring their disputes concerning EU law before international courts other than the Court of Justice of the EU, with the added possibility that interim measures may be prescribed within those proceedings if necessary (Article 279 TFEU), is sufficient to safeguard the practical effectiveness of Article 344 TFEU". Furthermore, Kokott underlines that numerous existing international agreements, to which both the EU and its Member States are parties, already permit inter-state proceedings. She cautions that if EU law required a proposed agreement to *expressly* exclude inter-state cases in order to be deemed valid, *"*this would implicitly mean that numerous international agreements which the EU has signed in the past are vitiated by a defect, because no such clauses are included in them".

[383] See *supra* (n. 341), Odermatt.

understanding of autonomy, one that supports not only judicial authority but also the normative coherence and constitutional balance of the Union as a whole.

Through its approach, the EU has been able to extend its legal norms beyond its own territory, thereby reinforcing its position as a normative power. In some agreements, EU law applies, in substance, in up to 35 or 36 countries.[384] This extraterritorial application, combined with effective implementation and enforcement through binding dispute resolution mechanisms, gives rise to what has been referred to as the *"*Brussels effect*"*.[385] In this way, such agreements become a vehicle for the dynamic dissemination of EU substantive law and interpretative methods, as well as the policy goals they embed.[1386] This dynamic has also played a critical role in the Court's handling of threats posed by intra-EU bilateral investment treaties (BITs), most notably in the *Achmea* judgment[387], and, more recently, in its findings in Opinion 1/20 regarding the Energy Charter Treaty (ECT).[388]

These decisions underscore the Court's determination to preclude any external adjudicatory forum from interfering with the uniform application of EU law. Through such rulings, the CJEU reinforces both the integrity of EU law and its capacity to influence global legal developments, thereby aligning legal autonomy with SA. The legal framework established by these judgments ensures that EU law retains its integrity and uniformity within the Union while also enhancing the EU's ability to shape legal norms abroad.[389]

This dual objective is further evident in Opinion 1/17[390], concerning the Investment Court System under the Comprehensive Economic and Trade Agreement (CETA) where an even more explicit intention has emerged to safeguard the Union's capacity to legislate independently and to define, without external constraints, the levels of protection it deems appropriate for its legitimate

[384] Depending on the field, and apart from EU MS, EU law applies in European Free Trade Association (EFTA) states (Norway, Island, Liechtenstein, Switzerland), in the Western Balkans (Serbia, Bosnia and Herzegovina, Montenegro, Albania and Kosovo), and in Eastern associated Neighbours (Georgia, Moldova, and Ukraine).
[385] Bradford, A., 'The Brussels Effect: How the European Union Rules the World' (Oxford University Press 2020).
[386] See *supra* (n.356), Rapoport, at p. 450.
[387] See *supra* (n.338), Achmea case.
[388] Opinion 1/20 Draft modernised *Energy Charter Treaty*; case C-741/19 *République de Moldavie v Komstroy* LLC ECLI:EU:C:2021:655.
[389] See *supra* (n.356), Rapoport, at p. 450.
[390] See *supra* (n.338), Opinion 1/17.

public interests, an approach that resonates with the notion of SA. On the one hand, the Court verifies, as it has done with regard to previous agreements, the non-denaturaring of Union law, in other words, that the international court is not able to provide an interpretation of EU law[391] which is binding in the (internal) legal order of the Union.

Additionally, the CJEU reaffirmed that the autonomy of EU law must be preserved, not only in substance but also against indirect pressures, such as threat financial sanctions, that might compromise the Union's legislative freedom in determing the level of protection of their legitimate interests. It insisted on clear and precise definitions of "reprehensible conduct" to ensure that international tribunals could not reinterpret EU law too broadly[392], and mandated explicit *"*right to regulate*"* clauses to be inserted in investment agreements. When negotiating a BIT within the framework of Regulation 1219/2012 establishing transitional arrangements for bilateral investment agreements between Members States and third countries, the European Commission requires that they fall in line with the EU approach to the right to regulate and that they endorse the objective of establishing a multilateral investment court and use its services in the future[393].

Thus, the autonomy principle, as interpreted by the CJEU, protects *"*the EU's capacity and freedom to act*"*[394], and its right to regulate and thus exercise its norm setting power, both cornerstones of SA[395]. It enables the EU to participate in international law-making and dispute resolution frameworks, such as, for instance, the United Nations Commission on International Trade Law (UNCITRAOL) investment court system or the modernisation of the Energy Charter Treaty[396], without compromising its constitutional identity.[21–24] Indeed, the solution endorsed in Opinion 1/17 enables the EU institutions to continue engaging in the negotiation of international agreements whose implementation may be subject to oversight by an international jurisdiction. In this respect, it permits the Union to actively

[391] Other than the provisions of the international agreement itself.
[392] See *supra* (n.338), Opinion 1/17, para 158.
[393] See Report COM(2020) 134 final from the Commission to the European Parliament and the Council of 6 April 2020 on the application of Regulation (EU) 1219/2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, p. 7.
[394] Commission, COM(2021)750 final, "2021 Strategic Foresight Report, The EU's capacity and freedom to act".
[395] See *supra* (n.356), Rapoport, at p. 452.
[396] See EU draft proposal for a modernised Charter of Energy Treaty, ccsi.columbia.edu 7.

participate in bilateral and multilateral negotiations aimed at strengthening the effectiveness of international law, while at the same time preserving the autonomy of the EU legal order. In so doing, the Court ensures that the Union retains full legislative discretion, even when bound by external commitments. "In that sense, the autonomy principle meets the objectives of strategic autonomy"[397].

Consequently, the principle of autonomy does not merely preserve the internal legal coherence of the EU; it actively contributes to its SA by securing both the means and the space necessary for the Union to regulate in alignment with its values and interests by exercising its norm-setting power without altering its identity and its capacity and freedom to act. In this regard, legal autonomy is a key constitutional condition for the implementation of SA in EU external action.

### 4. Constitutional Constraints on Strategic Autonomy

As anticipated in Chapter I, while Strategic Autonomy is often misunderstood as a synonym for unilateralism, autarky or isolationism, it is in fact rooted in the Union's commitment to multilateralism and international cooperation. As noted by Nathalie Tocci, the concept does not preclude autonomous action, but rather implies the capacity to act independently when necessary, within a framework that prioritises rules-based engagement with international partners.[398] In this sense, SA presupposes not only the freedom to regulate[399] but also the ability to cooperate. In fact, as previously mentioned, the 2021 EU Trade Policy Review presents "OSA" as a response to the need for the EU to 'manage interdependence'[400] while 'assertively defending its interests'[401] entailing that the Union cooperates multilaterally wherever it can and act autonomously wherever it must.[402] Put this way, "OSA" does not differ from the definition of SA provided by the Council of the European Union in its Plan on Security and Defence, according to which, as noted, SA is "the ability to act and

[397] See *supra* (n.356), Rapoport, at p. 452.
[398] See *supra* (n.196), Tocci.
[399] See *supra* (n.356), Rapoport.
[400] See *supra* (n.18), European Commission, Trade Policy Review An Open, Sustainable and Assertive Trade Policy.
[401] ibid.
[402] ibid.

cooperate with international and regional partners wherever possible, while being able to operate autonomously when and where necessary".[403]

However, the Union's pursuit of SA encounters a series of constitutional constraints that shape and, at times, limit its external action. These constraints arise from multiple sources: the principle of autonomy of the EU legal order, the division and sharing of competences between the Union and its Member States, the procedural architecture governing the conclusion of international agreements, and the requirement to respect international law and fundamental rights of those who are placed outside the EU territory, but affected by its actions.

In particular, as has been argued, the legal principle of autonomy, while intended to protect the Union's legal order and guarantee the EU's norm-setting power, may also act as a constraint, potentially hindering the effective integration of international law into the Union's legal system and fostering a more inward-looking conception of SA[404]. As a result, it risks fostering an insular conception of SA, one which may replicate at the supranational level the structural shortcomings traditionally associated with the nation-state model.[405] Together, these elements highlight the tension between the Union's ambition to act as a global strategic actor and the internal and external constitutional limits that govern its capacity to do so by determining how EU-centric the union is allowed to be. The following sections explore each of these constitutional constraints in turn.

### 4.1 Legal Autonomy as Constraint: Reassessing Openness to International Law and Strategic Autonomy in EU External Action

Strategic Autonomy does not imply complete detachment from international cooperation, instead, the EU, while capable of acting alone when necessary, remains structurally inclined toward multilateral engagement.[406] This

[403] See *supra* (n.35), Council of the European Union, Implementation Plan on Security and Defence.
[404] See *supra* (n.7), Editorial Comments.
[405] ibid.
[406] See *supra* (293). Kübek *et al.* See also *supra* (n.196 Tocci; Grevi (n.206); Editorial Comments, 'Keeping Europeanism at Bay? Strategic Autonomy as a Constitutional Problem', 59 CMLR (2022); Schmidtz, L. and Seidl, T., 'As Open as Possible, as Autonomous as Necessary: Understanding the Rise of Open Strategic Autonomy in EU Trade Policy', 61(3) *Journal of Common Market Studies* (2023) p. 834; See *supra* (n.169) Cagnin C. *et al*.

inclination is consistent with the Union's internal governance model and with its longstanding commitment to a rules-based international order. It also reflects the EU's practice of maintaining partnerships with international organisations such as the United Nations, NATO, the OSCE, ASEAN, and MERCOSUR, and its strategic posture of selective engagement even with systemic rivals such as Russia and China. Thus, SA, as outlined by both political scientists and legal scholars such as Hoffmeister, is best understood as the Union's capacity to "striv[e] for multilateral solutions, while being able to take lawful action alone to safeguard the Union's values, fundamental interests, security, independence and integrity."[407]

It is against this background that the role of constitutional constraints must be examined. These constraints derive not only from the Union's internal architecture and institutional balance but also, and perhaps most importantly, from the doctrine of legal autonomy as developed by ECJ. While legal autonomy has served as a foundational principle for safeguarding the Union's legal order, it has also, paradoxically, functioned as a structural limit on the EU's capacity to fully engage in multilateral frameworks[408]. This tension lies at the heart of what might be termed the "constitutional dilemma" of SA: the urge and need to protect the internal legal order while projecting influence externally through binding legal instruments and participation in global dispute settlement mechanisms.

This paradox is particularly visible in the Court's jurisprudence. From Opinion 1/91[409] to Opinion 2/13[410] and Opinion 1/17[411], the CJEU has consistently upheld the autonomy of the EU legal order by establishing strict boundaries on the extent to which external legal bodies may exercise interpretative authority over EU law. In Opinion 2/13, as not noted, the Court rejected the draft agreement for the EU's accession to the European Convention on Human Rights (ECHR), holding that it "is liable adversely to affect the specific characteristics of EU law and its autonomy."[412] While the decision has been widely criticised in academic literature[413], its underlying rationale reflects a broader line of jurisprudence in

[407] See *supra* (n.4), Hoffmeister, at 673.
[408] See *supra* (n.7), Editorial Comments.
[409] See *supra* (n.365), Opinion 1/91.
[410] See *supra* (n.338), Opinion 2/13.
[411] See *supra* (n.338), Opinion 1/17.
[412] See *supra* (n.338), Opinion 2/13.
[413] See *supra* (n.341), Odermatt and (n.382), Opinion 2/13, View of AG Kokott.

which autonomy is conceptualised as a mechanism to ensure the primacy, coherence, and uniform application of EU law within the Union[414].

As has been argued recently by Phelan,[415] - giving rise to Horsley's criticism[416] - the emergence of the doctrines of direct effect and supremacy in the Court's early case law, particularly through the influence of figures such as Robert Lecourt, may be interpreted as an effort to construct "a mechanism that allowed the member states to give up the use of inter-state retaliation and reciprocity mechanisms to enforce European treaty obligations."[417] This foundational rationale, paradoxical as it may seem, simultaneously shaped the principle of autonomy of EU law and its potential openness to international law. While autonomy was instrumental in ensuring the effectiveness of EU law as a pacifying force among Member States, it may now hinder international law from playing an integrative and stabilising role in the EU's external relations. In particular, the excessive insulation of the EU legal order from external norms can obstruct the full integration of international law into the EU legal system.

This ambivalence becomes more pronounced as the EU asserts itself more prominently as a global actor. As noted, "the more the EU seeks to present itself as an actor in its own right at the international level, to participate in the development of international law, the more the Court seeks to stress the autonomy of the EU legal order."[418] While this may appear contradictory, it reflects a structural reality: the Union, as a unique entity situated between a state and an international organisation, may require a more robust assertion of autonomy to safeguard its legal order[419]. In line with this view, Eckes argues that the "Court of Justice did not have an alternative. It took the perspective of European law. This is the only possible option. After all, the European legal order, despite its ongoing constitutionalisation, remains an international organization that needs to defend its

[414] See *supra* (n.341), Odermatt.
[415] Phelan, W., 'Great Judgments of the European Court of Justice: Rethinking the Landmark Decisions of the Foundational Period' (Cambridge University Press, 2019).
[416] Horsley, T., 'Rethinking judicial narratives: The Court of Justice and the Treaty of Rome', 17 *EuConst* (2021), 553.
[417] See *supra* (n.415), Phelan at p. 53.
[418] See *supra* (n.341), Odermatt, at p. 315.
[419] ibid, at p. 315.

autonomy more firmly than a well-established state, both towards the inside and towards the outside."[420]

Accordingly, the CJEU, as its guardian, may reasonably adopt a more assertive stance toward both internal and external threats to that autonomy[421]. In this perspective, the Court's insistence on autonomy, may be interpreted as a functional response to increasing interaction with other legal systems and actors[422], a manifestation of the Union's constitutional maturity.[423] Nevertheless, the very necessity of including specific clauses in international agreements to preserve this autonomy can equally be seen as evidence of constitutional immaturity.[424]

The principle of autonomy has not only defined the Union's internal judicial structure but has also been deployed by the Court to shape its broader relationship with international law, however, in the absence of clearly delineated boundaries, autonomy may justify an increasingly restrictive approach to international legal engagement. In fact, as noted by Ziegler, "The shift to an abstract "principle" of autonomy is a dangerous precedent likely to be used to justify whatever restrictive approach to international law is considered appropriate".[425] While there are indeed valid reasons for shielding the EU legal order from potential fragmentation or inconsistency with international law, autonomy should not be the sole guiding principle in determining how the EU engages with the international legal system.[426] Ever since the Kadi case law[427], a longstanding scholarly debate has persisted regarding whether the ECJ has truly embraced the transformative potential of international law as, in Koskenniemi's

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[420] Eckes, C., 'Protecting Supremacy from External Influences: A Precondition for a European Constitutional Legal Order?' (2012) 18 European Law Journal 230, 250.
[421] See *supra* (n.341), Odermatt, at p. 315.
[422] See *supra* (n.349), Tsagourias, at p. 345: "[A]utonomy is relational. Autonomous orders interact with other orders and this inevitably leads to the normative and legal interpenetration. The question then is how a particular order can preserve its autonomy under conditions of intense interaction with other orders. It is submitted that the autonomy of otherwise juxtaposed orders is preserved only if such normative or legal penetration occurs according to the rules of the receiving order."
[423] See *supra* (n.353), van Rossem, at p. 28: '[*O]ne could argue, the more constitutionally mature the EU becomes, the more protective the shield of the concept of autonomy in the face of the international legal order'.*
[424] See *supra* (n.341), Odermatt, at p. 315.
[425] Ziegler, K. Autonomy: 'From Myth to Reality—or Hubris on a Tightrope?' *EU Law, Human Rights and International Law*, University of Leicester School of Law Research Paper 15–25 (2015) 43
[426] See *supra* (n.341), Odermatt, at p. 216.
[427] Joined Cases C-402 & 415/05 P, *Kadi* v. *Council and Commission*, EU:C:2008:461; Joined Cases C-584/, 593 & 595/10 P, *Commission and Others* v. *Kadi*, EU:C:2013:518.

words, a "gentle civilizer of nations"[428], including, crucially, the European Union itself.[429] Scholars have noted that the Court's interpretation of the principle of autonomy has led to a selective permeability of the EU's internal legal order toward international norms[430], with the ECJ acting as a "gatekeeper" for determining the extent and manner of such integration.[431] Klabbers sustains that "the EU has always been highly ambivalent towards international law, and has carved out an ethos to justify this: what matters, and has always mattered, is the protection of the integrity of the EU legal order and the autonomy of EU law."[432]

Having regard to the above, the EU's constitutional commitment to rules-based multilateralism, coherently to the interpretation of SA given in the present thesis, is potentially undermined when the very notion of autonomy is used to reject participation in international legal frameworks. In this regard, as one scholar has put it, "on the one hand, the EU's autonomy is a product of international law; on the other, it must distance itself from the international legal order to cement and strengthen its autonomy."[433] The result is a structural tension that may restrict the Union's ability to act as an effective and credible global actor, particularly where participation in international courts or dispute resolution mechanisms is essential for advancing shared norms and values[434]. Cannizzaro, Palchetti, and Wessel have articulated this tension in stark terms, noting that the EU "claims to be an open society, which aims to play an increasingly active role in the global legal order,

[428] Koskenniemi, M., 'The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870–1960' (Cambridge University Press, 2001).
[429] See, on this debate, de Búrca, 'The European Court of Justice and the international legal order', 51 *Harvard International Law Journal* (2010), 1; Eeckhout, 'The integration of public international law in EU Law: Analytical and normative questions', in Eeckhout & López-Escudero (Eds.), *The European Union's External Action in Times of Crisis* (Hart, 2016), p. 189; Lenaerts, Guttiérrez-Fons & Adam, 'Exploring the autonomy of the European legal order', 81 *ZaöRV* (2021), 47.
[430] See *supra* (n.7), Editorial Comments.
[431] Cremona, M., 'Extending the reach of EU law: The EU as an international legal actor', in Cremona and Scott (Eds.), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (OUP, 2019), 64, at 67–8; See also *supra* (n.341), Odermatt at p. 314.
[432] Klabbers, "Straddling the fence: The EU and international law", in Arnull and Chalmers (Eds.), *The Oxford Handbook of European Union Law* (OUP, 2015), p. 52, at 55.
[433] Collins, R. & White, ND., 'Introduction and Overview' in Collins, R., & White, ND., (eds), *International Organizations and the Idea of Autonomy* (London, Routledge, 2011), at p. 14.
[434] See *supra* (n.341), Odermatt.

while simultaneously presenting itself as an isolated monad, safeguarding the autonomy of its domestic system of values."[435]

In fact, despite de Búrca's expectation that "If the EU perceives of itself as a uniquely internationally engaged entity, and as a political system founded on the idea of transnational legal and political cooperation, we would be inclined to expect that its Court of Justice would reflect something of this internationalist orientation too"[436], the CJEU adopts the opposite approach, indeed, as noted by Locke: "While this would suggest that in contrast to some states, which robustly defend the idea of their own sovereignty, the Union would be more open to integration into an international human rights mechanism, the Court has used this argument to achieve the exact opposite".[437]

The foregoing literature highlights the constitutional limits of SA. Although the Union's openness to international law, an element that supports the pursuit of its OSA, occupies a prominent place within the EU's constitutional framework, it is significantly constrained by the imperative to safeguard the autonomy of the EU legal order. The openness to international law, as emphasized in section III, is explicitly affirmed in Article 3(5) TEU[438], which proclaims that "[The Union] shall contribute . . . to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.*"* A similar commitment is reiterated in Article 21(1) TEU[439], and has been consistently acknowledged in the jurisprudence of the Court of Justice. As the Court has affirmed: "Under Article 3(5) TEU, the European Union is to contribute to the strict observance and the development of international law. Consequently, when it adopts an act, it is bound to observe international law in its entirety, including customary international law, which is binding upon the

[435] Cannizzaro, E., Palchetti, P., & Wessel, RA., 'Introduction: International Law as Law of the European Union' in E., Palchetti, P., & R.A., (eds), *International Law as Law of the European Union* (Leiden, Martinus Nijhoff, 2012) 1.
[436] de Búrca, G., 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' (2013) 20 *Maastricht Journal of European and Comparative Law* 168, 183.
[437] See *supra* (n.375), Locke, at p. 244.
[438] Art. 3(5) TEU.
[439] Article 21(1) TEU: "The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law."

institutions of the European Union."[440] This obligation, much like that imposed on States or other international legal subjects, sets the outer boundary of how far the EU may pursue its interests in a purely EU-centric manner to the potential detriment of other international actors[441].

As Odermatt warns, the EU exists within "a larger world of other states and international organisations and benefits from participation and interaction in the international legal order; international law is in turn also strengthened by the participation of the Union in international agreements and dispute settlement mechanisms." [442] Yet, autonomy is currently framed "primarily in terms of exclusion, even isolation, and not in terms of engagement and integration."[443] This restrictive vision "can diminish the EU's ability to participate in this system, and undermines many of the principles it seeks to protect."[444]

Despite this, it cannot be affirmed that the autonomy of the EU legal orderly is entirely and inherently incompatible with Strategic Autonomy. Rather, it also establishes the legal and political conditions under which Strategic Autonomy must be pursued. On the one hand, the principle of autonomy, as developed by the CJEU, serves a critical function: it protects the Union's legal identity, ensures the uniform interpretation of EU law, and prevents fragmentation of the internal legal order. On the other hand, if interpreted too rigidly, it may reduce the Union's capacity to engage in the kind of binding legal commitments that multilateral cooperation requires. Accordingly, As Tocci[445] and Hoffmeister[446] have shown, Strategic Autonomy does not imply complete independence from international law or institutions. It implies the ability to choose independently, including the choice to act multilaterally where aligned with the Union's interests and values. This understanding is compatible with the protection of the EU's legal autonomy, so long as that protection does not become a rationale for disengagement. In this sense, the autonomy of the EU legal order and SA can be mutually reinforcing, but only when both are exercised with a view to enabling, rather than limiting, meaningful participation in the international legal order.

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[440] See s*upra* (n.281) Case C-366/10, *Association of America,* para 101.
[441] See *supra* (n.7), Editorial Comments.
[442] See *supra* (n.341), Odermatt, at p.316.
[443] ibid.
[444] ibid.
[445] See *supra* (n.196), Tocci.
[446] See *supra* (n.4), Hoffmeister.

### 4.2 Procedural Constraints and the Role of Mixed Agreements in Shaping EU External Action

The constitutional constraints on Strategic Autonomy do not emanate solely from the CJEU's doctrine of autonomy of the EU legal order. This sub-section examines the limitations inherent in the institutional structure and procedural mechanisms governing the Union's decision-making process. More precisely, the pursuit of Strategic Autonomy by the European Union is intrinsically constrained by the constitutional allocation of competences between the Union and its Member States, as well as by the procedural mechanisms enshrined in the Treaties. In this regard, Strategic Autonomy cannot be conceptualised as an objective to be pursued unilaterally by the Commission or the European External Action Service alone. Rather, it must be a shared enterprise, collectively embraced by all EU institutions and the MS[447].

A particularly revealing context in which this dynamic unfolds is the negotiation and conclusion of international agreements. Indeed, one of the key expressions of SA, the Union's ability to act independently on the global stage, implies both the competence to conclude and, where necessary, to withdraw from international agreements.[448]

Nevertheless, the EU's constitutional architecture does not fully regulate the legal effects of joint participation by the Union and its Member States in international agreements: commonly referred to as "mixed agreements"[449]. This regulatory gap has given rise to institutional practices that may impact the realisation of Strategic Autonomy. The European Union and its Member States resort to mixity in situations where neither possesses, nor wishes to exercise, the exclusive authority to conclude an international agreement independently. Indeed, while the EU-only agreements remain within the competence of the Commission, Council, and Parliament, mixed agreements require the additional ratification by

[447] See *supra* (n.356), Rapoport, at p. 453.
[448] See *supra* (n.356), Rapoport, at p. 454.
[449] On mixed agreements see e.g. Heliskoski, J., 'Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States' (Brill, 2002); O'Keeffe, D., & Schermers, H.G., (Eds.), 'Mixed Agreements' (Kluwer, 1983); Koutrakos, P., & Hillion, c., (Eds.), 'Mixed Agreements Revisited, The EU and its Member States in the World' (Hart, 2010); Chamon, M., & Govaere, I., (Eds.), 'EU External Relations Law Post-Lisbon: The Law and Practice of Facultative Mixity' (Brill, 2020).

all Member States through their domestic procedures, sometimes including regional parliaments.

Two principal categories of mixed agreements are generally identified in the literature: *facultative* and *mandatory* mixed agreements.[450] Facultative mixed agreements pertain to areas of shared competence. As clarified by the ECJ within such domains, recourse to mixity is legally permissible but not obligatory. In these circumstances, the decision to conclude a mixed agreement falls within the political discretion of the Council.[451] Should the Council choose to exercise the Union's shared competence, the agreement may be concluded solely by the EU, resulting in an "EU-only" agreement. Conversely, if the Council opts not to exercise (part of) the shared competence, this competence reverts to the Member States, thereby necessitating their participation in the conclusion of the (mixed) agreement.[452] Mandatory mixed agreements, by contrast, involve subject matter falling partly within the EU's exclusive competence and partly within the exclusive competence of the Member States. In such instances, mixity is legally required, as the Union lacks the competence to act alone[453]. Any attempt by the EU to conclude a mandatory mixed agreement unilaterally would contravene the principle of conferral and the principle of sincere cooperation, and would risk overstepping its powers under international law (*ultra vires*).[454] Regardless of their classification, mixed agreements are typically concluded jointly by the EU and all of its Member States. Only in rare cases have they been concluded by the EU and a subset of Member States, leading to the formation of so-called incomplete mixed agreements. The notion of incomplete mixity has been discussed in academic literature as a potential solution to the deadlock that arises when one or more Member States fail to ratify a mixed agreement.[455]

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[450] See further Heliskoski, J., & Kübek, G., 'Typology of mixed agreements revisited' in Levrat, N., Kaspiarovich, Y., Kaddous, C., & Wessel, R.A., (Eds.), *The EU and its Member States' Joint Participation in International Agreements* (Hart, 2022).

[451] Kübek, G., 'Facing and embracing the consequences of mixity: Opinion 1/19, Istanbul Convention'. Common Market Law Review, 59(5), (2022), 1465–1500.

[452] Case C-600/14, COTIF I, EU:C:2017:935, paras. 66-68; see also Kübe, G., and Van Damme, 'Facultative mixity and the European Union's trade and investment agreements' in Chamon, M., & Govaere, I., (Eds.), *EU External Relations Law Post-Lisbon: The Law and Practice of Facultative Mixity* (Brill, 2020), at p. 137.

[453] See *supra* (n.451), Kübek.

[454] See, on this aspect, *supra* (n.450), Heliskoski *et al*.

[455] See Van der Loo, G., & Wessel, R.A., 'The non-ratification of mixed agreements, legal consequences and solutions', 54 CML Rev. (2017), 735; see also Kübek, G., The non-ratification scenario: Legal and practical responses to mixed treaty rejection by Member States", 23 EFA Rev.

The Council of Europe's Convention on Preventing and Combating Violence against Women and Domestic Violence, ("the Istanbul Convention")[456], is a rare example of a mandatory mixed agreement.[457] Opinion 1/19[458] deals with the EU's accession to the Instanbul Convention. More precisely, it represents the most recent development in a line of case law[459] from the ECJ addressing international agreements concluded jointly by the EU and its MS with third countries or international organisations, As noted, it "provide[d] ample evidence that the relationship between the Member States and the Union in respect of [mixed agreements] is apt to present some of the most difficult and complex questions of European Union law".[460] The request for the Opinion raised fundamental issues concerning the rationale and function of mixity as a procedural mechanism facilitating the Union's external action.[461]

One of the core issues addressed in Opinion 1/19 concerned the legitimacy of the common accord techinque[462] as a procedural practice for concluding mixed agreements. This practice permits the Council to delay the conclusion of a mixed

(2018), 21. For a view criticizing on incomplete mixity see also Rosas, A., 'Mixity past, present and future: Some observations' Chamon, M., & Govaere, I., (Eds.), *EU External Relations Law Post-Lisbon: The Law and Practice of Facultative Mixity* (Brill, 2020). p. 17.

[456] Council of Europe, Convention on Preventing and Combating Violence against Women and Domestic Violence, Istanbul, 11 May 2011, Council of Europe Treaty Series, No. 210**.**

[457] See *supra* (n.451), Kübek. In the course of the Opinion 1/19 proceedings, it remained largely uncontested - as stated in in the Proposal for a Council Decision on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence, 2016/063 (NLE) (COM(2016)0111final) - that "the Member States remain competent for substantial parts of the Convention, and particularly for most of the provisions on substantive criminal law and other provisions in Chapter V"; for a more detailed competence analysis, see Prechal, S., 'The European Union's accession to the Istanbul Convention' in Lenaerts, K., Bonichot, J.C., Kanninen, H., Naômé, C., & Pohjankoski, P., (Eds.), *An Ever-Changing Union? Perspectives on the Future of EU Law in Honour of Alan Rosas* (Hart Publishing, 2019), p. 279.

[458] Opinion 1/19, Convention on preventing and combating violence against women and domestic violence (Istanbul Convention*)*, Opinion of the Court (Grand Chamber) of 6 October 2021, EU:C:2021:832.

[459] See e.g. *supra* (n.319) UK v. Council; *supra* (n.322) Opinion 2/15; Opinion 3/15, Marrakesh Treaty, EU:C:2017:114; Case C-389/15, Commission v. Council *(*Revised Lisbon Agreement*)*, EU:C:2017:798; see *supra* (n.452), Case C-600/14, COTIF I; Case C-620/16, *COTIF II*, EU:C:2019:256; Joined Cases C-626/15 & 659/16, Commission v. Council (Antartica MPAs), EU:C:2018:925. Although some of the agreements at stake here ended up being concluded by the EU alone, the question of mixity played an important role in all these cases.

[460] Opinion of A.G. Hogan in Opinion 1/19, *Istanbul Convention,* EU:C:2021:198, para 1.

[461] See *supra* (n.449), Heliskoski.

[462] The practice originated under the former Art. 133(6) EC, which stipulated that the negotiations of certain trade agreements required the common accord of Member States, and that they were to be concluded jointly by the (then) Community and the Member States. The practice was subsequently expanded to all types of mixed agreements and carried on even after the Lisbon Treaty reform.

agreement until all Member States have ratified it, ostensibly to ensure the unity of external representation. The European and Parliament and the Commission observed that this practice, requiring the common accord of the MS, although the Istanbul Convention could *de jure* be concluded by a qualified majority in the Council (Art. 218(8) TFEU, first subparagraph[463]), would *de facto* establish a unanimous voting requirement[464], thus undermining. the EU's ability to act as an autonomous legal order[465].

This practice was validated by the Court. In fact, it initially highlighted that the practice of common accord, if perceived as a *legal prerequisite*, establishes a "hybrid decision-making process" that is incompatible with the Treaties.[466] Furthermore, the Court noted that the notion of "hybridity" as set out in *Hybrid acts*[467] is not limited to the formal nature of a Union act, but also encompasses the entire decision-making procedure. In this regard, the procedural framework established by the Treaties, including both the process and the resulting legal acts, must be adhered to strictly and cannot be modified or supplemented by intergovernmental practices. This interpretation is consistent with the Court's settled case law[468], which has reaffirmed that the procedural norms enshrined in the Treaties, and particularly Article 218 TFEU, may not be circumvented by institutional custom or political practice.[469]

Despite these determinations, the Court validated the use of this practice. Indeed, the Court noted that, even where qualified majority voting would be

[463] Art 218(8) first sub-paragraph TFEU: "The Council shall act by a qualified majority throughout the procedure".
[464] Opinion 1/19, paras. 155 *et seq.* To *be p*recise, there is a (marginal) difference: unanimity voting allows Member States to abstain without blocking an action, whereas common accord requires agreement between all Member States. See Boelaert, S., 'Mixity versus unity: A view from the other side of the Rue de la Loi' in Chamon, M., & Govaere, I., (Eds.), *EU External Relations Law Post-Lisbon: The Law and Practice of Facultative Mixity* (Brill, 2020) and Written Observations lodged by the Council of the European Union pursuant to Article 196(3) of the Rules of Procedure of the Court of Justice, 18 Dec. 2019, para 185.
[465] See *supra* (n.451), Kübek.
[466] Opinion 1/19, para 246.
[467] In Case C-28/12, *Commission* v. *Council* (*Hybrid acts)*, EU:C:2015:282, the decisive element of hybridity was the fact that EU and national acts were adopted under a single procedure (see e.g. para 52).
[468] See, in addition to Case C-28/12, *Hybrid acts*, e.g. Case C-658/11, *Parliament* v. *Council*, EU:C:2014:2025; Case C-263/14, *Parliament* v. *Council*, EU:C:2016:435; Case C-687/15, *Commission* v. *Council*, EU:C:2017:803; or Case C-244/17, *Commission* v. *Council*, EU:C:2018:662.
[469] Koutrakos, P., and Soneca, V., 'The future of the Istanbul Convention before the CJEU' in Levrat, N., Kaspiarovich, Y., Kaddous, C., & Wessel, R.A., (Eds.), *The EU and its Member States' Joint Participation in International Agreements* (Hart, 2022).

sufficient, under article 218(8) first sub-paragraph TFEU , the Council retains full discretion to determine the timing of the conclusion of the agreement, since "both the decision whether or not to act on the proposal to conclude an international agreement […] fall within the Council's political discretion".[470] It held that nothing precludes the Council from seeking the greatest possible majority in favour of concluding a mixed agreement, "which may involve waiting for a common accord".[471] "The Court thus significantly relativized its previous findings: the search for a common accord is only contrary to EU law if the Council understands it as a legal requirement for taking a signature or conclusion decision".[472] In this case, the principle of loyal cooperation offered no remedy, as clarified in Opinion 1/19, neither the Member States are obliged to ratify the Convention, nor is the Council compelled to conclude the agreement upon reaching a qualified majority.[473]

The Court emphasised that the Istanbul Convention could be ratified by the European Union together with only some of its Member States, thereby constituting an instance of incomplete mixity.[474] With this, the Court, for the first time[475], explicitly recognised the legal permissibility of the practice of incomplete mixity. When entering into a mixed agreement, both the Union and its Member States are required to act strictly within the bounds of their respective competences and must refrain from encroaching upon each other's legal domains.[476] The Court's principled recognition of incomplete mixity thus constitutes a significant development in addressing the challenges posed by scenarios in which unanimous ratification cannot be secured. Importantly, it opens the possibility for the EU to proceed with the conclusion of a mixed agreement even in the absence of ratification by all Member States, thereby preventing a small minority of Member

[470] Opinion 1/19 cit. para. 252.
[471] Opinion 1/19, para 253.
[472] See *supra* (n.451), Kübek at p. 1480.
[473] Opinion 1/19, paras 251-255.
[474] Opinion 1/19, para 260.
[475] In the pre-Lisbon era, the Court facilitated incomplete mixity in specific circumstances, but it did not acknowledge the general conformity of the practice with (then) Community law outside these specific circumstances. See e.g. Opinion 1/76, *Draft Agreement establishing a European laying-up fund for inland waterway vessels*, EU:C:1977:63, para 7. See, on this aspect, *supra* (n.450), Heliskoski *et al,* at p. 37.
[476] Opinion 1/19, para 259.

States from paralysing external action otherwise supported by a qualified majority within the Council.

Despite this apparent solution, the classification of the Istanbul Convention as a mandatory mixed agreement raises substantial concerns regarding the potential international liability of the European Union. Significant portions of Chapter V of the Convention, concerning substantive criminal law, fall entirely outside the scope of the EU's competences. Consequently, the Union lacks the authority to act in these areas when acceding to the Convention. Nonetheless, under international law, the EU is presumed to assume responsibility for the Convention in its entirety upon accession. This means the EU could be held internationally liable for the non-implementation of provisions by a non-ratifying Member State in domains where exclusive national competence prevails[477]. In such instances, the Union would lack the internal competence to remedy the breach under international law, given that it cannot legislate in areas outside its competences[478]. Moreover, the Union cannot adopt a legislative act that allocates liability between itself and the Member States in fields falling under exclusive national competence, as such an act would be *ultra vires* and infringe the principle of conferral under Article 5(2) TEU[479]. The same limitations apply to the invocation of the principle of sincere cooperation.[480] While it is true that this principle operates irrespective of the allocation of competences, it cannot be employed as an internal mechanism to remedy an external *ultra vires* act by the Union[481]. As Koutrakos has observed, extending the application of the duty of sincere cooperation to compel ratification in domains of exclusive national competence would encroach upon the Member States' sovereign rights as subjects of international law.[482] The ECJ ultimately rejected concerns regarding potential international liability, basing its reasoning on procedural grounds. It held that the

[477] See *supra* (n.451), Kübek, at pp. 1482-1483.
[478] ibid.
[479] ibid.
[480] Article 4(3) TEU: "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives".
[481] See *supra* (n.451), Kübek, at p. 1483.
[482] see also Koutrakos, P., 'Confronting the complexities of mixed agreements' – Opinion 1/19 on the Istanbul Convention", 47 EL Rev. (2022), at p. 263

Opinion procedure under Article 218(11) TFEU[483] cannot be invoked to address questions relating to the "potential liability which the European Union might incur at the international level"[484]. According to the Court, the purpose of Article 218(11) TFEU is confined to assessing the compatibility of an international agreement with EU law, rather than the reverse[485]. However, as Chamon has observed, this finding raises several difficulties[486]. Firstly, the Court appears to treat the Union's compliance with international law as a matter entirely "external" to the EU legal order, thereby failing to acknowledge that Article 3(5) TEU expressly obliges the Union to respect international law "whenever it decides to exercise its powers"[487]. Secondly, the judgment seems to contradict earlier case law: notably, in the *Antarctic MPAs* case[488], the Court held that international law may, in certain circumstances, prevent the Union from exercising its competences independently from the MS in the framework of a mixed agreement.

The situation would be fundamentally different if the Istanbul Convention were to qualify as a facultative mixed agreement. In such a case, the MS in the Council could agree to exercise shared competence collectively at the EU level, allowing the Convention to be concluded as an EU-only agreement[489]. Should the Council nonetheless opt for mixity, it could retroactively harmonise EU law in the relevant fields, thereby indirectly binding non-ratifying Member States through the resulting common EU rules.[490] The Court, however, did not distinguish between mandatory and facultative mixity in its reasoning. It did not acknowledge that the legal and political ramifications of incomplete mixity are significantly

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[483] Article 218(11) TFEU: "Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised."

[484] Opinion 1/19, para 272.

[485] See *supra* (n.451), Kübek, at p. 1484.

[486] See also Chamon, M., 'Op-Ed: The Court's Opinion in Avis 1/19 regarding the Istanbul Convention', *EU Law Live* (2021), available at: <eulawlive.com/op-ed-the-courts-opinion- in-avis-1-19-regarding-the-istanbul-convention-by-merijn-chamon/>.

[487] See *supra* (n.427), *Kadi*, para 291.

[488] Joined Cases C-626/15 & 659/16, *Antarctic MPAs*.

[489] See *supra* (n.451), Kübek, at p. 1483.

[490] ibid. As for facultative mixed agreements, drawing on the case law concerning the duty to remain silent one could argue that the Member States have a duty to refrain from exercising their retained shared competence in ways that would jeopardise the Union's objectives, including the obligation to ensure strict observance of international law under Article 3(5) TEU. See, on the issue, Delgado Castelleiro A., & Larik, J., 'The duty to remain silent: Limitless loyalty in EU external relations?', 36 EL Rev. (2011), at p. 524.

more serious when the agreement is mandatory in nature[491]. Instead, the Court approached the Istanbul Convention as though it were a facultative mixed agreement, endorsing incomplete mixity as a practical solution to the challenge of non-ratification.[492] The implications for Strategic Autonomy are clear: although the ECJ recognises and upholds institutional mechanisms that safeguard Member State sovereignty and participatory governance, these very tools may hinder the rapid, cohesive external action that Strategic Autonomy requires, while also risking the Union's exposure to international liability.

Another important instrument for promoting Strategic Autonomy, association agreements, exemplifies constraints to the pursue of SA. Although Article 217 TFEU[493] assigns a special status to such agreements, requiring the Council's unanimity for their conclusion adoption[494], they are nearly always concluded as mixed agreements[495], despite the fact that, post-Lisbon, mixity is no longer a legal necessity[496]. This voluntary choice perpetuates the political reality whereby the ratification of major strategic partnerships remains dependent on national ratification procedures[497]. The protracted ratification of the EU-Ukraine Association Agreement, which faced a referendum challenge in the Netherlands, provides a poignant example.[498] Moreover, mixity is not the only way in which Member States can impede strategic partnerships. The Hungarian veto on the signing of the EU-ACP Partnership Agreement (Post-Cotonou Agreement)[499]

[491] See *supra* (n.451), Kübek, at p. 1483.
[492] ibid.
[493] Article 217 TFEU: "The Union may conclude with one or more third countries or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure".
[494] Article 218(8) TFEU: "The Council shall act by a qualified majority throughout the procedure. However, it shall act unanimously when the agreement covers a field for which unanimity is required for the adoption of a Union act as well as for association agreements and the agreements referred to in Article 212 with the States which are candidates for accession."
[495] With the exception of the EU-UK Trade and Cooperation Agreement and the EU-Kosovo Stabilisation and Association Agreement.
[496] See Van Elsuwege, P., & M Chamon, m., 'The Meaning of "Association" under EU Law: A Study on Law and Practice of EU Association Agreements' *Study for the European Parliament's Committee on Constitutional Affairs* (AFCO), (2019).
[497] See *supra* (n.356), Rapoport, at p. 456.
[498] Van der Loo, G., 'The Dutch Referendum on the EU-Ukraine Association Agreement: Legal Options for Navigating a Tricky and Awkward Situation', *CEPS Centre for European Policy Studies*, (2016).
[499] The text of the EU-ACP Partnership Agreement is annexed to the Proposal for a Council Decision COM(2021) 312 final from the Commission of 11 June 2021 on the signing on behalf of the European Union, and provisional application of the Partnership Agreement between the European Union, on one side, and the members of the Organisation of African, Caribbean and Pacific States (OACPS), on the other part.

illustrates how Member States can leverage their procedural power to block strategic initiatives, often for unrelated domestic political reasons, here, possibly to resist EU financial sanctions for Rule of Law violations.[500] This example is particularly relevant as the building of strategic alliances is one of the new features of the envisaged future EU-Asian, Caribbean, and Pacific (ACP) agreement.[501]

In sum, the analysis of mixed agreements (and the institutional practice surrounding their negotiation and ratification) and of the EU's ability to forge strategic alliances reveals a set of structural constraints that significantly affect the Union's capacity to act autonomously in the international arena. The discretionary nature of mixity, the persistence of unanimity-based practices such as the common accord technique, and the unresolved tensions between exclusive and shared competences expose SA to procedural fragility. In other words, Europe's Strategic Autonomy is a project that must work within, and is continually shaped by, the constitutional confines of the EU legal order itself. While the Court's recognition of incomplete mixity provides a partial solution to deadlocks caused by national ratification failures, the absence of a clear distinction between facultative and mandatory mixity continues to generate legal uncertainty and institutional inertia. These factors collectively undermine the Union's ability to act swiftly and coherently, limiting the operationalisation of Strategic Autonomy in its external dimension. As far as accession agreements are concerned, the EU-ACP Partnership Agreement underscores the inherent difficulty in achieving SA, particularly in its external dimension, which is directed at safeguarding interests and advancing values, when the internal effectiveness of those very values is called into question[502]. This is extremely relevant as a significant component of the EU's legitimacy and credibility as a global actor stems from its identity as a rules-based and value-oriented organisation.[503]

[500] See *supra* (n.356), Rapoport, at p. 457.
[501] See *supra* (n. 499), COM(2021)312 final, Part III "Global alliances and international cooperation" of the EU-ACP "Post-Cotonou" agreement.
[502] See *supra* (n.356), Rapoport, at p. 457.
[503] ibid.

### 4.3 Institutional Complexity and Competence Allocation as Structural Constraints on Strategic Autonomy

As one commentary observes, the very "mosaic of the division of competences and the complex institutional and procedural arrangements" built into the EU system can be seen as an inherent obstacle to the effective pursuit of Strategic Autonomy.[504] There is no single competence nor uniform institutional process capable of accommodating all dimensions of the Strategic Autonomy the EU aspires to. Rather, Strategic Autonomy traverses the full spectrum of EU competences, ranging from the Common Foreign and Security Policy (CFSP) and the Common Commercial Policy, to internal market regulation, environmental and energy policy, and the Area of Freedom, Security and Justice (AFSJ). The nature of the competence involved, whether exclusive (as the CCP), shared (e.g. internal market), or merely supporting (e.g. public health), determines the degree to which the Union can unilaterally formulate and implement external strategies[505]. Measures with extraterritorial reach, regardless of whether they are coordinated bilaterally or multilaterally, are thus invariably subject to the complexities introduced by the division of competences and the institutional arrangements that follow from it. "In particular, EU measures, whether (bilaterally or multilaterally) coordinated with other countries or institutions or just unilateral, that explicitly or implicitly reach beyond the Union's borders are characterized by the faultlines created by the division of competences and the diverging institutional and procedural arrangements that follow from them"[506].

When examined in the broader context of all relevant policy areas and instruments, trade, foreign policy, internal regulation, competition, and public health, a deeply fragmented institutional and procedural structure emerges. These divergences are the product of the Union's complex competence architecture, which lacks a coherent and centralised design.[507] At one end of this institutional spectrum, the Union operates with substantial centralised authority, as seen in

[504] See *supra* (n.7), Editorial Comments.
[505] ibid.
[506] ibid.
[507] ibid. The authors define it as a "dizzying array of diverging institutional setups and procedures".

trade policy under Article 207(2) TFEU[508]. This provision allows the Commission to act without Council involvement in the implementation of trade policy[509] due to the integration of the CCP in the comitology system[510]. Comitology itself is a distinctive feature of EU decision-making, having originated in the 1960s without an explicit Treaty basis. It was later formally anchored in primary law by the Single European Act (Article 145 EEC) and was gradually structured through horizontal instruments, namely, the first and second comitology decisions (1987[511] and 1999[512]), and the Comitology Regulation of 2011[513], currently in force. Fundamentally, comitology refers to a system in which the Commission is entrusted with the implementation of EU legislation, while being assisted, and potentially constrained, by committees composed of national experts.[514] Prior to 2011, these committees could refer files to the Council, thereby displacing the Commission's executive authority.[515]

Although the integration of the CCP into the comitology system may have been inspired by the Lisbon Treaty, this development was far from automatic upon the Treaty's adoption. Notably, the revised wording of Article 207(2) TFEU merely provides for the adoption of "measures defining the framework for implementing the CCP, in contrast to the broader provisions of Article 133(2) TEC and Article III-317(2) of the draft Constitutional Treaty, which referred to

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[508] Article 207(2) TTFEU: "The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the measures defining the framework for implementing the common commercial policy".

[509] Bourgeois, J., & Chamon, M., 'The integration of EU trade defence in the horizontal comitology regime', in Hahn, M., & Van der Loo, G., *Law and Practice of the Common Commercial Policy; The first 10 years after the Treaty of Lisbon* (Brill, 2020), 512, at 515–6; Hahn, "Art. 207 AEUV", in Calliess, C., and Ruffert, M., (Eds.), *EUV/AEUV,* 6th ed. (Beck, 2022) Art. 207 AEUV paras. 95–8.

[510] Arguing that the Lisbon Treaty introduced the Community Method to the CCP and comitology respectively, see Y. Devuyst, 'European Union trade policy after the Lisbon Treaty: the Community method at work', in Witzleb, N., Martinez Arranz, A., Winand, P., (eds.), *The Euro pean Union and Global Engagement: Institutions, Policies and Challenges* (Edward Elgar, 2015), p. 138– 158; Chamon, M., 'Institutional balance and Community method in the implementation of EU legislation following the Lisbon Treaty', Common Market Law Review 53 (2016), p. 1507.

[511] Council Decision 87/373/EEC of 13 July 1987, OJ L 197/33.

[512] Council Decision 1999/468/EC of 28 June 1999, OJ L 184/23.

[513] Regulation (EU) 182/ 2011, laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, OJ 2011, L 55/ 13).

[514] See *supra* (n.509), Bourgeois *et al*.

[515] See Recital 12 to the second Comitology decision of the Council 1999/ 468 (oj 1999, L 184/ 23). Prior to the entry into force of the Lisbon Treaty, the Commission was (already) required to cooperate with committees of national experts and the Council when adopting or proposing certain trade defence instruments, such as anti-dumping measures. However, these procedures were not formally embedded within the horizontal comitology framework.

"measures implementing the CCP." Consequently, the Council may no longer adopt implementing measures directly based on Article 207 TFEU.[516] As a result of these developments, there are currently no CCP implementing measures adopted directly by the Council[517]. Despite this, Bourgeois and Chamon note that, this carve-out in secondary legislation is, however, potentially problematic, if not legally impermissible, as Article 207 TFEU refers only to measures that define the framework for implementation of the CCP[518]. Accordingly, the direct use of Article 207 TFEU as a legal basis for implementing acts would appear inconsistent with its text and scope, thus rendering such use an anomaly[519].

Although the comitology framework has attracted the above institutional and academic criticism, the CCP still constitutes a domain of robust EU-level authority. The Commission's competence is illustrated by the unilateral imposition of COVID-19 vaccine export controls[520], demonstrating the Union's capacity for a swift and autonomous action[521]. Similarly, under the Merger Control Regulation[522] based on Articles 103 and 352 TFEU, the Commission may block mergers with significant effects on the internal market, including those involving non-EU companies.[523] These powers mirror those of a centralised executive and reflect the EU's ability to act strategically in certain domains. Conversely, other domains essential to Strategic Autonomy, particularly foreign policy and defence under the CFSP, remain subject to intergovernmental decision-making. Here, despite institutional support from the HR/VP, EEAS, and Commission, the Member States, acting by consensus in the Council, maintain decisive control in

[516] Such measures must now rely on a framework instrument, such as the basic Anti-Dumping or Anti-Subsidy Regulation, as their legal basis. See Streinz, R., Ohler, C., Herrmann, C., Der Vertrag von Lissabon zur Reform der EU (Beck, 2010), p. 152. Gosalbo Bono on the other hand found it was "not clear what the terms 'framework for implementation' mean." See Gosalbo Bono, R., 'The organization of the external relations of the European Union in the Treaty of Lisbon', in P. Koutrakos (ed.), *The European Union's External Relations a Year after Lisbon* (CLEER Working Paper 2011), p. 18.

[517] A notable exception appears in the context of retaliation measures, for which Article 14(2) of Regulation 2015/1843 stipulates reliance on Article 207 TFEU as the legal basis. See Regulation (EU) 2015/ 1843, OJ 2015, L 272/ 1.

[518] See *supra* (n.509), Bourgeois *et al*.

[519] ibid.

[520] Implementing Regulations (EU) 2021/111, 2021/442, 2021/521, 2021/1071, 2021/1728 and 2021/2071 on the basis of Regulation (EU) 2015/479.

[521] See *supra* (n.7), Editorial Comments.

[522] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.1.2004, p. 1–22.

[523] A notable example is still Commission decision of 30 July 1997, Case No. IV/M.877 – Boeing/McDonnell Douglas.

direction of foreign policy. This institutional dualism, sometimes referred to as a "compound executive order," typifies the Union's hybrid nature.[524]

It is therefore unsurprising that the existing division of competences and associated procedural diversity are frequently perceived as impediments to the realisation of Strategic Autonomy. However, these very constraints may also function as a structural counterweight to unbridled Europeanism.[525] Although actors and interests outside the Union lack direct representation in EU decision-making, the internal diversity of voices within the Union can serve as a moderating force, ensuring that EU action does not excessively prioritise its own interests at the expense of others.[526] The complexity and plurality inherent in the Union's institutional arrangements can, paradoxically, produce an external benefit: that of tempering hegemonic impulses. In this way, even if imperfect, a decision-making structure that reflects intra-EU diversity is arguably better suited to accommodate global pluralism than a streamlined process driven by a singular, effectiveness-oriented logic. In the words of the authors: "It does not seem unreasonable to believe that the diversity of interests among its citizens represented by the Union and its Member States that leads to the often cumbersome decision-making in the EU is a countervailing force against nationalistic exuberance not only in the relationship between the Member States, but also in external relations (in particular regarding rivalries between neighbouring EU and non-EU countries such as Greece and Turkey, or France and the UK). Moreover, a process that, however messy, takes account of infra-EU diversity is surely a better, albeit far from perfect, reflection of the global diversity of interests affected by the Union's actions than a streamlined process that prioritizes effectiveness over the representation of diversity".[527]

### 4.4 Fundamental Rights as Constraints: Legal Boundaries to the EU's Strategic Autonomy

Last but not least, EU law offers individuals a crucial tool to limit the exercise of the Union's powers by conferring upon them fundamental rights, as

[524] See *supra* (n.7), Editorial Comments.
[525] ibid.
[526] ibid.
[527] ibid.

guaranteed by the Charter of Fundamental Rights of the European Union[528] and the general principles of Union law derived from the European Convention on Human Rights (ECHR) and the constitutional traditions common to the Member States (Art. 6 TEU).[529] Indeed, as noted, as noted, the protection of human rights constitutes one of the Union's guiding principles "in its relations with the wider world" (Art. 3(5) TEU), and features prominently in the legal framework governing the Union's external action (Art. 21(1) and (2) TEU).

More precisely, the EU is profoundly committed to law and to the legality of its actions, both internally (constitutional legality) and externally (with respect to international law).[530] Two notable statements of the Court of Justice highlight these two dimensions: "[T]he obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty"[531]; and "Under Article 3(5) TEU, the European Union is to contribute to the strict observance and the development of international law. Consequently, when it adopts an act, it is bound to observe international law in its entirety, including customary international law, which is binding upon the institutions of the European Union".[532]

Compliance with fundamental rights constitutes a prerequisite for the legality of all acts of the European Union.[533] Since the landmark *Kadi I*[534] ruling, this principle has been consistently reaffirmed in subsequent post-Lisbon case law concerning the Union's external action, including in the context of concluding

[528] Charter of Fundamental Rights of the European Union, OJ C 202, 7.6.2016, p. 389–405.
[529] Article 6 TEU(1) and (3): 1. "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties". [...] 3. "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."
[530] See (n.438
[531] See *supra* (n.427), *Kadi,* para. 285.
[532] See *supra* (n.281), Case C-366/10, *Air Transport Association of America* para. 101; see also Case C-266/16, *Western Sahara Campaign* (ECLI:EU:C:2018:118), para. 47.
[533] See *supra* (n.431), Cremona, at pp. 74-82.
[534] See *supra* (n.427), *Kadi I.*

international agreements.[535] A key development in this regard is *Opinion 1/15*, which addressed a proposed agreement with Canada on the transfer of Passenger Name Record (PNR) data from airlines to national security authorities. In that Opinion, the Court confirmed that its jurisdiction to review the compatibility of international agreements with the EU Treaties also encompasses an assessment of their conformity with fundamental rights, which form part of the Union's primary law. In the words of the ECJ: "A judgment on the compatibility of an agreement with the Treaties may…depend, inter alia, [on] the compatibility of an international agreement with the rst subparagraph of Article 6(1) TEU and, consequently, with the guarantees enshrined in the Charter, since the Charter has the same legal status as the Treaties."[536]

As regards the acts of the Union itself, the scope of application of the fundamental rights enshrined in Article 6 TEU is, in principle, relatively clear. *Ratione personae*, fundamental rights under EU law are not restricted solely to EU citizens. Exceptions to this general inclusivity are limited to the citizens' rights found in Chapter V of the Charter, the right to political expression through political parties (Art. 12(2) CFR), and the right to seek employment, work, and provide services throughout the Union (Art. 15(2) CFR). However, Art. 15(3) CFR provides that "[n]ationals of third countries who are authorized to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union". Notably, the General Court has extended the personal scope of protection even to "legal persons which are emanations of non-Member countries,"[537] thereby granting state-owned companies from third countries legal standing in proceedings concerning more assertive EU trade measures adopted in pursuit of Strategic Autonomy.

*Ratione materiae*, all acts adopted by the Union, whether internal or external, unilateral or concluded jointly with foreign States or international organisations, must comply with the constraints imposed by fundamental rights as an integral part of EU law[538].

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[535] Case C-130/10, *European Parliament v. Council* ECLI:EU:C:2012:472), paras 83–84; Case C-263/14, *European Parliament v. Council* ECLI:EU:C:2016:435, para. 47.
[536] Opinion 1/15, *EU-Canada PNR Agreement*, EU:C:2017:592, para 70.
[537] Case T-494/10, *Bank Saderat Iran* v. *Council*, EU:T:2013:59, para. 39.
[538] See *supra* (n.7), Editorial Comments.

Beyond this internal application, EU fundamental rights may also extend extraterritorially, including in instances where the Union fails to uphold human rights in third countries. This may occur if the EU breaches a duty to assess the human rights impact of international agreements concluded with those countries, whether under the Charter or under international human rights law. In the *Front Polisario case*, the applicant challenged the legality of the Council decision concluding an agreement with Morocco on trade in agricultural and fisheries products on grounds, inter alia, of breach of the EU's values (including fundamental rights) and breach of the principles governing the EU's external action[539]. It was argued that the agreement would *de facto* be applied by Morocco to the territory of Western Sahara, sovereignty over which is disputed.

The General Court dismissed arguments based on the EU's international legal obligations,but held that assessing the human rights impact of a trade agreement is not only a matter of good administration but also a procedural requirement enforceable via judicial review, derived from the obligation on the EU institutions to base their decisions on an examination of all relevant facts[540]. "Where an EU institution enjoys a wide discretion, in order to verify whether it has committed a manifest error of assessment, the Courts of the European Union must verify whether it has examined carefully and impartially all the relevant facts of the individual case, facts which support the conclusions reached"[541].

The General Court recognised that, despite the Union's wide discretion, such an obligation exists and used the standards enshrined in the Charter as the benchmark.[542] Furtheremore, it held that the impact of the agreement on the fundamental rights of the population of Western Sahara was a factor that ought to have been considered. Specifically, the Council should have assessed the production of goods for export to the EU under the agreement in light of the specific rights enshrined in the EU Charter of Fundamental Rights, such as human dignity, and the prohibitions against slavery, forced labour, and child labour. The

[539] The agreement, concluded by Council Decision 2012/497/EU, amended the existing association agreement between the EU and Morocco, thereby extending liberalization of trade in agricultural and fisheries products.
[540] Case T-512/12, *Front Polisario v. Council* (ECLI:EU:T:2015:953).
[541] ibid, para 225.
[542] ibid, para 228.

Council's failure to conduct such an assessment led the Court to annul the decision to the extent that it approved the agreement's application to Western Sahara.

Although the ECJ overturned this ruling on other grounds[543], Advocate General Wathelet supported the existence of a Union duty to consider human rights, albeit not under the Charter (which he deemed territorially inapplicable), but rather in accordance with international human rights standards.[544] The Advocate General based his reasoning on two principles. First, that "compliance with the principles of the rule of law and human rights, as well as respect for human dignity, is required of all actions of the European Union."[545] Second, that it is settled-case law that the EU must observe international law when exercising its powers[546]. On this basis, he concluded that "the question of the conformity of the agreement at issue with international law must be considered in the institutions' prior examination of all relevant facts before concluding an international agreement."[547] Because international law mandates compliance with *ius cogens* norms and *erga omnes* obligations, international human rights norms necessarily come into play[548]. Accordingly, "it is clear that international law imposes a clear obligation on the European Union and its Member States not to recognise an illegal situation resulting from the infringement of principles and rules concerning fundamental rights and not to render aid or assistance in maintaining the situation created by that infringement. To that end, the EU's institutions and its Member States must examine the impact which the international agreement at issue could have on human rights."[549] Therefore, EU

[543] Case C-104/16 P, *Council* v. *Front Polisario*, EU:C:2016:973. The judgment of the General Court was reversed on appeal by the Court of Justice on the ground that there was no legal basis for interpreting the EU-Morocco agreement as applicable to the territory of the Western Sahara. The decision concluding it could therefore not be of direct and individual concern to the applicant, who as a result lacked standing to bring the action.
[544] Case C-104/16 P, Opinion of A.G. Wathelet, EU:C:2016:677, paras. 269–76.
[545] Citing Case C-263/14, *European Parliament v. Council* ECLI:EU:C:2016:435, para. 47.
[546] The A.G. cites the following cases: Case C-162/96, *Racke* ECLI:EU:C:1998:293, para. 45; Case C-402/05 P and C-415/05 P, Ka*di and Al Barakaat International Foundation v. Council and Commission* ECLI:EU:C:2008:461, para. 291
[547] See *supra* (n. 544), Opinion of A.G. Wathelet, para. 256.
[548] ibid, para. 259. "Consequently, before concluding international agreements, the EU institutions must ensure compliance with the very short list of peremptory norms of international law (*jus cogens*) and *erga omnes* obligations, which include 'the outlawing of acts of aggression, and of genocide, [and] the *principles and rules concerning the basic rights of the human person*, including protection from slavery and racial discrimination' and the right to self-determination".
[549] ibid, para. 269

institutions and Member States are required to assess the potential human rights impact of any international agreement.[550]

Taken together, these strands suggest that, when embedded within the framework of EU law, fundamental rights may constitute an effective constraint on attempts to pursue Strategic Autonomy to the detriment of individuals, particularly those beyond the EU's borders. In trade-related contexts, where predominantly economic interests are at stake, a sweeping obligation for the Union to respect the economic rights of third-country nationals, including private and state-owned enterprise, would risk unduly burdening the EU with responsibility for the global welfare consequences of its regulatory choices[551]. Conversely, in matters involving global public goods, such as climate change, the absence of domestic legal constraints grounded in fundamental rights may render it nearly impossible for international actors to overcome the first-mover disadvantage.

In sum, the EU's constitutional structure, including the careful division of competences between the Union and the States, the autonomy of the EU legal order, the procedural checks embedded in the Treaties, the respect of fundamental rights and the judicial oversight of the Court, is a double-edged sword for Strategic Autonomy. It provides the legal foundations and instruments for the Union to develop a distinct international actorness, yet it also imposes checks and balances that channel, slow, or sometimes block the realization of a fully autonomous EU will[552].

[550] See *supra* (n.431), Cremona, at pp. 74-82. Cremona also notes that "It is important that both the General Court and the Advocate General cast the obligation in procedural terms: the duty is to take account of the human rights implications of EU external action, as part of the procedural duty of care, the duty to ensure that a policy decision is based on all relevant facts". See *supra* (n.543) *Front Polisario v. Council*, para 224; See *supra* (n. 544), Opinion of A.G. Wathelet, para. 278. See further Vianello, I., 'EU External Action and the Administrative Rule of Law A Long-Overdue Encounter' (2016).
[551] See *supra* (n.7), Editorial Comments.
[552] ibid.

# CHAPTER III
# STRATEGIC AUTONOMY THROUGH ECONOMIC SECURITY: THE FDI SCREENING REGULATION AND THE ANTI-COERCION INSTRUMENT IN EU LAW

## 1. Strategic Autonomy and the Rise of Economic Security

Over the past decade, the European Union has increasingly linked the pursuit of Strategic Autonomy with a broader agenda of economic security, both of which have become foundational elements of the EU's evolving economic Statecraft. This emphasis is evident in high-level political discourse. With regard to Strategic Autonomy, emblematic references include President von der Leyen's 2019 call for a "Geopolitical Commission," President Michel's 2020 endorsement of European strategic autonomy, and the introduction of the notion of "Open Strategic Autonomy" in the 2021 Trade Policy Review. As for economic security, recent official acts of the European Commission, such as the 2023 European Economic Security Strategy, the 2024 Communication *Advancing Economic Security*, and the 2025 *Competitiveness Compass*, signal the growing importance of this concept within the Union's external and internal policy frameworks.

As noted, despite its conceptual vagueness, Strategic Autonomy is increasingly understood as the capacity for Europeans to act according to their own laws and interests without undue foreign interference. Yet, given the EU's cooperative legal and institutional DNA, this autonomy is intended to be pursued multilaterally where possible. In other words, the EU needs to promote and defend its interests with partners when it can and act alone only if it is strictly necessary, in keeping with the principle: "Multilateral if you can, unilateral if you must".[553]

The academic debate around these concepts is rich and evolving. Yet, Steinberg and Wolff note that economic security has until recently remained less explored, both politically and academically. In fact, historically, the link between economics and security has received limited attention in political science and international relations scholarship.[554] The term is often used to describe the ability of economies to weather risks and shocks, withstand economic pressure and

[553] Steinberg, F., & Wolff G., 'Dealing with Europe's economic (in-)security', Global Policy 15(1), (2023), at pp. 183-192.
[554] Mastanduno, M., 'Economics and security in statecraft and scholarship'. *International Organization*, 52(4), (1998), at pp. 825–854.

coercion, manage strategic dependencies, protect critical infrastructure, deter cyber-attacks and disinformation and maintain and strengthen economic leverage and/or technological edge.[555]

While the US and China have undertaken significant initiatives over the past decade to integrate economic considerations into their national security strategies, the European Union has, until recently, devoted comparatively limited attention to this dimension.[556] Nevertheless, the concept has gained traction as a result of concrete geopolitical developments: the COVID-19 pandemic revealed the fragility of global supply chains, and Russia's invasion of Ukraine demonstrated the strategic risks inherent in energy dependence. These events, alongside rising trade tensions and the increasing use of economic coercion, have compelled the EU to reassess its exposure to global shocks, reconsider its dependencies on third countries, and prepare for a potential breakdown in multilateralism.[557]

Despite growing recognition of its importance, the relationship between economic security and Strategic Autonomy remains the subject of ongoing debate. Although the two concepts are sometimes used interchangeably, they are distinct yet deeply interconnected.[558] Three main approaches can be identified in the emerging literature and policy discourse:

*i)* the first frames economic security as a precondition for achieving Open Strategic Autonomy, on the premise that the capacity to make independent decisions and defend Union interests presupposes a stable and resilient economic foundation.[559] According to this view, Strategic Autonomy cannot be realised without first securing critical supply chains, reducing strategic dependencies, and safeguarding the Union's economic sovereignty;[560]

*ii)* the second approach adopts a reverse logic, treating Open Strategic Autonomy as a driver of economic security.[561] Here, the pursuit of Strategic Autonomy through policies such as diversification, increased domestic

[555] See *supra* (n.553), Steinberg *et al*.
[556] Xiaotong, Z. (2023) 'New economic statecraft. China, the United States and the European Union', (2023), London: Routledge.
[557]See *supra* (n.553), Steinberg *et al*.
[558] Alcidi, C., 'EU Economic Security: Confronting the Dual Challenge of China and the US', CEPS In-Depth Analysis, (2025).
[559] ibid.
[560] ibid.
[561] ibid.

capabilities, and international partnerships is seen as instrumental to enhancing the Union's overall economic security.[562]

*iii*) The third perspective posits that economic security and Strategic Autonomy are partially overlapping but conceptually distinct.[563] While there is a clear intersection, particularly in areas such as trade and industrial policy, this view maintains that certain instruments that some associate with economic security, such as export controls on dual-use technologies or sanctions enforcement, may fall outside the scope of traditional EU debates on Strategic Autonomy[564]. Moreover, some authors support the idea of a limited overlap by emphasising the original scope of Strategic Autonomy, which included military and broader security dimensions, thereby making room for economic security within it[565].

Nevertheless, there is general agreement that enhancing economic security will strengthen Europe's SA. This recognition has motivated the EU to adopt new policy instruments. Most notably, the 2023 European Economic Security Strategy of the European Commission.[566]

In order to unpack the multifaceted relationship between SA and economic security, the following sections offer a structured analysis of the Union's evolving regulatory and policy framework. Section II examines the definitional contours of economic security, distinguishing between narrow and expansive approaches and assessing the implications of each for EU governance. Section III provides a detailed account of the 2023 European Economic Security Strategy, highlighting its hybrid structure and the taxonomy of risks and instruments it sets out. Section IV analyses the Commission's January 2024 Communication and the subsequent implementation of key initiatives, focusing on five technical dossiers: the proposal for a revised FDI screening regulation; the White Papers on export controls, outbound investment, and dual-use R&D; and the Recommendation on research security. Section V turns to the strategic outlook articulated in the Draghi Report and the Competitiveness Compass, illustrating the Union's efforts to reconfigure its economic model around resilience, productivity, and autonomy. Finally, Sections 6.1 and 6.2 focus on two emblematic legal instruments, the FDI

[562] ibid.
[563] See *supra* (n.553), Steinberg *et al*.
[564] ibid.
[565] ibid.
[566] See *supra* (n. 50), European Commission: 'European Economic Security Strategy'.

Screening Regulation and the Anti-Coercion Instrument, as concrete expressions of the Union's evolving approach to economic security and SA in external economic relations.

### 2. The European Commission's 2023 Economic Security Strategy

Despite growing political momentum for strengthening the EU's defence capabilities, the European Commission continues to wield significant authority in economic governance, a role it does not hold in matters of security or defence.[567] Consequently, the EU's approach to economic security has predominantly emerged from within the framework of trade and internal market policy, rather than from a traditional national security perspective.[568] The institutional structure also complicates the implementation of economic security measures. Even where legislation is adopted at the EU level, the practical enforcement of many economic security instruments, such as the FDI Screening Regulation[569], remains primarily within the purview of Member States. Similarly, the Commission and the Council enjoy a broader and more developed set of instruments to protect the integrity of the single market from external pressures or coercive practices (e.g., through the ACI[570]) than they do in the field of industrial policy, where Union competences are more limited.

Moreover, the EU is composed of 27 Member States, each with its own strategic orientation regarding geoeconomics and external affairs. Several Member States have already adopted national security strategies that explicitly incorporate economic threats, such as the 2023 German National Security Strategy, reflecting diverging national priorities.[571] This fragmentation of preferences increases the complexity of collective decision-making within the EU, in contrast to more centralised nation-state models. Although these divergences have not yet led to significant institutional deadlock in the field of economic security, as has sometimes occurred in common foreign and security policy, this

[567] European Economic Security: Current practices and further development', *Policy Department of the Directorate-General for External Policies of the European Parliament*, (2024) study requested by the European Parliament's Committee on International Trade (INTA).
[568] ibid.
[569] See *infra,* Chapter III, section 6.1.
[570] See *infra,* Chapter III, section 6.2.
[571] See for instance the German strategy https://www.nationalesicherheitsstrategie.de/National-Security-Strategy-EN.pdf.

risk may become more pronounced as the EU begins to operationalise the instruments outlined in its economic security toolkit.[572] Taken together, the limited competences of the Union in security matters, combined with the heterogeneity of Member State preferences, imply that the EU's role in economic security policy is, to a significant extent, focused on facilitating cooperation and coordination among its Member States.[573]

The above conceptual and institutional background clarifies why the European Commission has embraced a hybrid approach to economic security. Indeed, the EU's recent policy initiatives in this field represent an attempt to strike a balance between two divergent conceptions of economic security: one narrowly focused on shielding the Union from economic coercion by third countries, and the other more expansive, encompassing national security concerns such as critical infrastructure protection and technological sovereignty (see below sections 5.1 and 5.2).[574] Indeed, the European Commission's 2023 Economic Security Strategy[575] embraces this hybrid model, incorporating both narrowly defined tools, such as those responding to targeted coercion, and broader initiatives that influence national security through economic means. This approach reflects the structural convergence between economic and strategic imperatives in a context marked by the erosion of the multilateral trade order, the weaponization of interdependence, and the technological race with authoritarian powers.

In the Commission's European Economic Security Strategy a definition of economic security is still missing. The EU's approach is built around four general risks to European economic security:

*i)* "Risks to the resilience of supply chains including energy security: to be assessed by the Commission, by deepening the EU's strategic dependencies analysis, with a particular focus on dependencies that are more likely to be weaponised for geopolitical purposes";[576]

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[572] See *supra* (n.567), 'European Economic Security: Current practices and further development'.
[573] ibid.
[574] Nevertheless, Steinberg and Wolff (see *supra* n. 553), note that the choices being made along the axes of "protectionism versus openness" and "centralisation versus decentralization" of funding remain ambiguous and, in some cases, appear to lack a clearly articulated justification.
[575] See *supra* (n. 50), European Commission: 'European Economic Security Strategy'.
[576] See *supra* (n. 50), European Commission: 'European Economic Security Strategy', pp. 4-5. These risks include risks of price surges, the unavailability or scarcity of critical products, or inputs in the EU, including but not limited to those linked to the Green Transition, those needed for a stable and diversified energy supply and pharmaceuticals.

*ii*) "Risks to the physical and cyber security of critical infrastructure, to continue to be assessed in line with the Council Recommendation of 8 December 2022";[577]

*iii*) "Risks related to technology security and technology leakage, to be assessed on the basis of a list of strategic technologies critical for economic security. With regard to the most sensitive risks, the Commission will propose a list of dual-use technologies for risk assessment that could be adopted by the Council by September 2023. The list will be based on narrowly defined and forward-looking criteria such as the enabling and transformative nature of a technology, the risk of civil military fusion, and the risk of their misuse for human rights violations. The priority technologies should be assessed collectively with Member States by the end of 2023, with a view to identifying the relevant protection and promotion measures";[578]

*iv*) "Risks of weaponisation of economic dependencies or economic coercion, to be assessed including in the context of the recently agreed upon EU anti-coercion instrument".[579]

As noted by the Commission, "it is important to bear in mind that certain risks listed above could also go so far as to threaten national security in certain circumstances. This could be the case, most notably, withdual use technology leakage, foreign direct investment threatening security and public order; dual use exports or outbound investment in a narrow set of advanced technologies that could enhance military and intelligence capacities of actors who may use these capabilities to threaten international peace and security; and the secure treatment of sensitive information."[580]

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[577] ibid. These risks include risk of disruptions or sabotage of critical infrastructures, such as pipelines, undersea cables, power generation, transportation, electronic communication networks, that undermine the secure and reliable provision of goods and services or data security in the EU.
[578] ibid. Including Risk to the EU's technological advancements, technological competitiveness, and access to leading-edge technology, including through malicious practices in the digital sphere such as espionage or illicit knowledge leakage In some cases, technology leakage risks strengthening the military/intelligence capabilities of those that could use them to undermine peace and security, especially for dual-use technologies such as Quantum, Advanced Semiconductors or Artificial Intelligence, and therefore require specific risk mitigation measures.
[579] See *supra* (n. 50), European Commission: 'European Economic Security Strategy', pp. 5-6. Among those risks, risk of third countries targeting the EU, its Member States and EU businesses through measures affecting trade or investment to bring about a change of policy falling within legitimate policymaking space.
[580] ibid.

To mitigate these risks, the EU Economic Security Strategy is based on three pillars[581]:

*i*) Promoting the EU's competitiveness and growth, strengthening the Single Market, supporting a strong and resilient economy, and fostering the EU's research, technological and industrial base;

*ii*) Protecting economic security through a range of policies and tools, including targeted new instruments where needed. The EU has already put in place specific de-risking tools and measures to protect against economic security risks. As the risks keep evolving, the Commission desires to assess the effectiveness of these tools in addressing them and consider upgrades or whether new tools tat may be needed;

*iii*) Partnering and further strengthening cooperation with countries worldwide: "The EU cannot achieve economic security on its own. Neither can its policy response be unilateral. The global economy will remain integrated and interconnected, and effective EU action depends on cooperation and coordination with others. Transparency and cooperation are essential to ensuring that economic security policies do not have unwanted consequences on third countries, particularly on the most vulnerable ones".

Each pillar is accompanied by a range of legislative and policy instruments that reflect the multifaceted nature of economic security in a globalised and geopolitically unstable context.

As outlined in the 2023 Joint Communication on the European Economic Security Strategy, the first objective,[582] promoting the EU's economic base, competitiveness, and growth, centres on leveraging the full potential of the Single Market to strengthen resilience, support innovation, and reduce dependencies. The Commission notes that it has undertaken substantial efforts to advance industrial capacity, facilitate supply chain security, and reinforce technological leadership. Instruments such as the European Chips Act[583], the Critical Raw Materials Act[584],

[581] See *supra* (n. 50), European Commission: 'European Economic Security Strategy', pp. 5-6.
[582] ibid, at pp. 6-7.
[583] See *supra* (n.74), European Chips Act.
[584] Regulation (EU) 2024/1252 of the European Parliament and of the Council of 11 April 2024 establishing a framework for ensuring a secure and sustainable supply of critical raw materials and amending Regulations (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1724 and (EU) 2019/1020, OJ L, 2024/1252, 3.5.2024.

and the Net-Zero Industry Act[585] are proposed, in the Strategy[586], to secure key technologies and strategic inputs. The EU Industrial Strategy outlines additional measures, including industrial alliances in areas like clean tech and semiconductors, Important Projects of Common European Interest (IPCEIs), and initiatives promoting the circular economy and green and digital skills. Financial tools such as the implementation of NextGenerationEU and the Cohesion Funds have also contributed to reform and investment in strategic sectors. Furthermore, proposals like the Strategic Technologies for Europe Platform (STEP)[587] and ongoing development of the Capital Markets Union aim to crowd-in private investment for the development of critical technologies, including dual-use applications. The Single Market Emergency Instrument[588] has been proposed to ensure the free movement and availability of critical products during future crises. Collectively, these initiatives aim to boost economic resilience, support the green and digital transitions, and reduce the Union's strategic vulnerabilities.

The second pillar[589], protecting against economic security risks, is grounded in a risk-based approach to addressing threats such as economic coercion, unfair competition, technology leakage, and vulnerabilities in critical infrastructure. To address the weaponisation of economic dependencies by third countries, the Commission states that it will deploy Trade Defence Instruments and enforce the Foreign Subsidies Regulation[590]. The Anti-Coercion Instrument[591] aims to deter

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[585] Regulation (EU) 2024/1735 of the European Parliament and of the Council of 13 June 2024 on establishing a framework of measures for strengthening Europe's net-zero technology manufacturing ecosystem and amending Regulation (EU) 2018/1724 (Text with EEA relevance), OJ L, 2024/1735, 28.6.2024.

[586] At the time of the publication of the Economic Security Strategy in June 2023, several key initiatives, including the European Chips Act, the Single Market Emergency Instrument (now, the Internal Market Emergency and Resilience Act), the Critical Raw Materials Act, the Net-Zero Industry Act, and STEP, were still at the proposal stage. Since then, all have been formally adopted and now constitute central pillars of the Union's legislative and strategic framework for ensuring economic resilience and technological sovereignty.

[587] Regulation (EU) 2024/795 of the European Parliament and of the Council of 29 February 2024 establishing the Strategic Technologies for Europe Platform (STEP), and amending Directive 2003/87/EC and Regulations (EU) 2021/1058, (EU) 2021/1056, (EU) 2021/1057, (EU) No 1303/2013, (EU) No 223/2014, (EU) 2021/1060, (EU) 2021/523, (EU) 2021/695, (EU) 2021/697 and (EU) 2021/241, OJ L, 2024/795, 29.2.2024.

[588] It has been adopted as the Internal Market Emergency and Resilience Act. Regulation (EU) 2024/2747 of the European Parliament and of the Council of 9 October 2024 establishing a framework of measures related to an internal market emergency and to the resilience of the internal market and amending Council Regulation (EC) No 2679/98 (Internal Market Emergency and Resilience Act) (Text with EEA relevance), OJ L, 2024/2747, 8.11.2024.

[589] See *supra* (n. 50), European Commission: 'European Economic Security Strategy', pp. 7-11.

[590] See *supra* (n.334), Foreign Subsidies Regulation.

[591] See *supra* (n. 76), Anti-Coercion Instrument.

and respond to acts of economic coercion by third countries targeting EU policy choices. Inbound investment risks are addressed through the FDI Screening Regulation[592], which enables coordinated scrutiny of foreign investments affecting public order and security. Research security is further reinforced through the Toolkit on Tackling Foreign R&I Interference and proposals for enhanced measures concerning critical technologies. The digital domain is protected through the 2020 Cybersecurity Strategy and proposed legislation such as the Cyber Resilience Act[593] and Cyber Solidarity Act[594], which strengthen both public and private sector defences. In parallel, infrastructure protection is supported by the Directive on the Resilience of Critical Entities[595], the Revised NIS2 Directive on network and information system security[596], and the 5G Toolbox. Export controls on dual-use items, which remain largely the competence of Member States, are governed by the revised Dual-Use Regulation of 2021.[597] However, in response to heightened geopolitical risks and the proliferation of national measures, the Commission affirms it will propose an upgrade of the export control framework to enhance EU-level coordination. Finally, the Commission observes it is exploring the need for controls on outbound investments to address the risk of sensitive technologies and know-how being transferred to actors with military or intelligence aims. A structured expert group, the Commission asserts, will assist in assessing these risks, with a legislative proposal expected by the end of 2023.[598]

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[592] See *supra* (n. 75), FDI Screening Regulation.

[593] Regulation (EU) 2024/2847 of the European Parliament and of the Council of 23 October 2024 on horizontal cybersecurity requirements for products with digital elements and amending Regulations (EU) No 168/2013 and (EU) No 2019/1020 and Directive (EU) 2020/1828 (Cyber Resilience Act), OJ L 2024/2847, 20.11.2024.

[594] Regulation (EU) 2025/38 of the European Parliament and of the Council of 19 December 2024 laying down measures to strengthen solidarity and capacities in the Union to detect, prepare for and respond to cyber threats and incidents and amending Regulation (EU) 2021/694 (Cyber Solidarity Act), OJ L, 2025/38, 15.1.2025.

[595] Directive (EU) 2022/2557 of the European Parliament and of the Council of 14 December 2022 on the resilience of critical entities and repealing Council Directive 2008/114/EC), OJ L 333, 27.12.2022, p. 164–198.

[596] Directive (EU) 2022/2555 of the European Parliament and of the Council of 14 December 2022 on measures for a high common level of cybersecurity across the Union, amending Regulation (EU) No 910/2014 and Directive (EU) 2018/1972, and repealing Directive (EU) 2016/1148 (NIS 2 Directive), OJ L 333, 27.12.2022, p. 80–152.

[597] Regulation (EU) 2021/821 of the European Parliament and of the Council of 20 May 2021 setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items (recast), OJ L 206, 11.6.2021, p. 1–46.

[598] In early 2025, building on the work of the Commission's Expert Group on Outbound Investments, the Commission adopted a Recommendation providing guidance to Member States on how to identify and assess potential risks posed by these transactions. Commission

The third pillar[599], partnering on economic security, acknowledges that the EU cannot achieve economic security in isolation. Given the interconnectedness of the global economy, the strategy emphasises cooperation with a wide range of partners to mitigate dependencies, diversify supply chains, and counter shared vulnerabilities. The Commission observes that the EU is deepening bilateral and plurilateral cooperation through frameworks such as the Trade and Technology Councils (TTC) with the United States and India, and a dedicated economic security workstream with Japan. The G7 remains a central forum for coordinating responses to non-market policies, economic coercion, and technology leakage. Complementary to this, the Commission affirms that the EU is expanding its geo-economic toolbox, which includes Free Trade Agreements, Digital Partnerships, Green Alliances, Raw Materials Partnerships, and the proposed Critical Raw Materials Club. In its external action, the EU is also reinforcing engagement with developing countries, offering technical and financial assistance to facilitate industrialisation, digital development, and green transition. Initiatives such as the Global Gateway and the Partnership for Global Infrastructure Investments aim not only to bolster economic resilience in partner countries but also to strengthen the EU's own strategic positioning by promoting trusted value chains and alternative financing routes. At the multilateral level, the EU remains committed to a rules-based international order. It will continue to engage actively with institutions such as the WTO, G20, UN, and Multilateral Development Banks. In particular, WTO reform and the restoration of the dispute settlement mechanism are deemed critical to ensure legal certainty and reduce the scope for arbitrary trade restrictions.

Across all three pillars, the EU strategy reflects an integrated approach that combines internal market instruments, regulatory coordination, and global engagement to safeguard economic security in an increasingly complex international environment.

Several of the instruments identified within the European Economic Security Strategy are clearly aligned with, and specifically intended to enhance, economic security. For example, the Internal Market Emergency and Resilience Act[600] aims

Recommendation (EU) 2025/63 of 15 January 2025 on reviewing outbound investments in technology areas critical for the economic security of the Union, OJ L, 2025/63, 15.1.2025.

[599] See *supra* (n. 50), European Commission: 'European Economic Security Strategy', pp. 11-13.

[600] See *supra* (n.588), Internal Market Emergency and Resilience Act.

to ensure the proper functioning of the EU internal market during crises by identifying risks to supply chains, assessing potential impacts, and securing strategic stockpiles. Likewise, the Anti-Coercion Instrument[601] provides Member States with a mechanism to shield themselves from economic or political coercion imposed by third countries. The FDI Screening Regulation[602] also figures prominently within the Strategy. While it is primarily designed to protect public order and security by scrutinising foreign investments in sensitive sectors, its relevance to economic security stems from its preventive function: it seeks to forestall strategic dependencies and the potential acquisition of critical infrastructure or technologies by foreign actors that may undermine the Union's autonomy or pose geopolitical risks. However, as noted, some scholas note that[603], these measures are generally hard to justify on economic grounds alone and would therefore not fall under a strict definition of economic security, which would not encompass national security. The lines are, however, sometimes blurred, given that some of the security outcomes, such as the protection of critical infrastructure, may also have substantial economic implications.[604] In this sense, the FDI framework lies at the intersection between economic and national security and reflects the hybrid approach adopted by the Commission. However, other instruments referenced in the strategy appear to have a more tenuous connection to economic security. This is the case with the Cohesion Funds, which primarily aim to "correct imbalances between countries and regions,[605]" and the EU Standardisation Strategy, whose principal goal is to "ensure European leadership in global standards".[606]

[601] See *supra* (n.76), Anti-Coercion Instrument.
[602] See *supra* (n.75), FDI Screening Regulation.
[603] See *supra* (n.567), 'European Economic Security: Current practices and further development'.
[604] ibid.
[605]Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy, OJ L 231, 30.6.2021, p. 159–706*;* Regulation (EU) 2021/1058 of the European Parliament and of the Council of 24 June 2021 on the European Regional Development Fund and on the Cohesion Fund, OJ L 231, 30.6.2021, p. 60–93.
[606]European Commission, 'An EU Strategy on Standardisation – Setting global standards in support of a resilient, green and digital EU single market*',* COM(2022) 31 final, Brussels, 2 February 2022.

## *Policy Measures included in the EU Economic Security Strategy*

| Priorities | Policies | Intended outcome |
|---|---|---|
| **Promoting EU's growth and competitiveness** | NextGenerationEU | Investments contributing to long-term growth |
| | Cohesion Funds | Improve regional convergence |
| | EU Industrial Strategy | Support innovation in EU industry |
| | Green Deal | Fight climate change: lower economic costs and keep productivity levels |
| | RepowerEU | Guarantee EU energy supply |
| | Critical Raw Materials Act | Guarantee market functioning and green technologies deployment |
| | European Chips Act | Promote market for critical technological area |
| | Net-Zero Industry Act | Support innovation and greening EU industry |
| | Internal Market Emergency and Resilience Act | Guarantee single market functioning even under exceptional circumstances |
| | Capital Market Union | Improve EU financial market |
| | Strategic Technologies for Europe Platform (STEP) | Guarantee EU critical supply chain |
| **Protecting the economy** | Trade Defence Instruments | Protect EU imports and exports |
| | Foreign Subsidies Regulation | Defend MS against foreign dumping |
| | EU Anti-coercion Instrument | Defend MS against third parties coercions |
| | Foreign Direct Investment (FDI) Screening regulation | Protect critical infrastructure and technology leakage |
| | Horizon Europe | R&D investment in related areas |
| | Toolkit on Tackling Foreign R&I Interference | Protect critical technology leakage |
| | EU standardisation strategy | Set international standards |
| | Cyber Resilience Act | Protect cyber critical infrastructure |
| | EU Hybrid and Cyber Diplomacy Toolboxes | Protect cyber critical infrastructure |
| | Directive on the Resilience of Critical Entities | Protect critical infrastructure |
| | Revised Directive on the security of network and information system (NIS2 Directive) | Protect cyber critical infrastructure |
| | 5G Toolbox | Protect critical technology leakage |
| | Cyber Resilience Act | Protect cyber critical infrastructure |

| | | |
|---|---|---|
| | Cyber Solidarity Act | Protect cyber critical infrastructure |
| | EU's Regulation on dual-use export controls | Protect critical technology leakage |
| **Partnering** | Trade and Technology Councils (TTC) | International cooperation on critical technology areas |
| | Foster bilateral and plurilateral cooperation | International cooperation on critical technology areas |
| | Free Trade Agreements | Guarantee MS to international markets in fair conditions |
| | Partnerships with developing countries | Set long-term relationships and open new markets |
| | Global Gateway | Address global issues through financial assistance for development projects |
| | Partnership for Global Infrastructure investments | International cooperation on critical infrastructure |
| | Critical Raw Materials Club | International cooperation on critical materials |
| | Reform World Trade Organization | Guarantee MS to international markets in fair conditions |

**Source:** European Economic Security: Current practices and further development', *Policy Department of the Directorate-General for External Policies of the European Parliament*, (2024) study requested by the European Parliament's Committee on International Trade (INTA).
**Note**: Some of the policies included in the Table had already been implemented, others are proposals (later implemented).

### 3. The 2024 Communication and Beyond: Advancing Economic Security Following the 2023 Economic Security Strategy

Following the publication of the June 2023 Communication, two significant developments have occurred. A number of the instruments originally proposed in the Strategy, such as the European Chips Act[607], the Critical Raw Materials Act[608], the Net-Zero Industry Act[609], and the Single Market Emergency Instrument[610], have since been formally adopted. Similarly, the regulatory framework addressing digital resilience has been significantly strengthened through the adoption of both the Cyber Resilience Act[611] and the Cyber Solidarity Act[612], which reinforce the Union's capacity to prevent, detect, and respond to cyber threats.

Furthermore, in October 2023, the Commission adopted a Recommendation identifying ten technology areas deemed critical for the Union's

[607]See *supra* (n.74), European Chips Act.
[608] See *supra* (n. 584), Critical Raw Materials Act.
[609] See *supra* (n. 585), Net-Zero Industry Act.
[610] See *supra* (n. 588), Single Market Emergency Instrument.
[611] See *supra* (n. 593), Cyber Resilience Act.
[612] See *supra* (n. 594), Cyber Solidarity Act.

economic security, which are to be evaluated jointly by the Member States and the Commission.[613]

Finally, in January 2024, the Commission issued a follow-up Communication "Advancing Economic Security"[614], aimed at building upon the strategic foundations set in the previous document. This new Communication introduced five additional initiatives. These initiatives span two broad domains: investment and trade, where the EU enjoys clear competences and is able to act in accordance with the principle of subsidiarity (initiatives *i*, *ii* and *iii*); and research and innovation (initiatives *iv* and *v*) where the Commission's direct influence is more limited, as responsibility primarily lies with the Member States, in cooperation with private sector actors and research institutions.

The five initiatives set out in the January 2024 Communication are:

*i*) Proposal for a new regulation on the screening of foreign investment[615]: The proposed regulation intends improve the effectiveness of the FDI Screening Regulation by addressing the shortcomings of the current mechanism. It aims to ensure that all Member States have a screening system in place so as to avoid loopholes in the screening of risky transactions, to focus on the cases which present the highest risks and ensure there is greater accountability within the system in respect of the security or public order concerns expressed by Member States and/or the Commission.

*ii*) White Paper on Export Controls[616]: it outlines the European Commission's intention to strengthen EU-level coordination in response to mounting geopolitical tensions and persistent deadlock in multilateral export control regimes. It highlights the risks associated with an uncoordinated proliferation of national controls, which could undermine the effectiveness of the EU's dual-use framework and the integrity of the Single Market. Among the short-term measures, the Commission proposed introducing uniform EU controls for items stalled at the multilateral level and establishing a high-level political coordination forum with MS. It also announced its intention to adopt a

[613] European Commission, 'Commission Recommendation of 3 October 2023 on critical technology areas for the EU's economic security for further risk assessment with Member States', C(2023) 6689 final, Strasbourg, 3 October 2023.
[614] See *supra* (n.51), 'Advancing European economic security: an introduction to five new initiatives', at p. 4.
[615] ibid, at pp. 2-3.
[616] ibid, at p. 3.

Recommendation to improve coordination on new national control lists**,** allowing for prior consultation at the EU level to assess cross-border impacts, a Recommendation that was subsequently adopted in April 2025.[617] In the medium term, the Commission has brought forward the evaluation of the Dual-Use Regulation to early 2025, supported by a comprehensive study;

*iii*) White Paper on Outbound Investment[618]: the 2023 European Economic Security Strategy acknowledged the critical role of open global markets in securing the Union's economic interests. At the same time, it highlighted growing concerns about outbound investments in advanced technologies, specifically those that could enhance the military and intelligence capabilities of foreign actors who might threaten international peace and security. Unlike existing mechanisms that screen inbound FDI and control the export of dual-use technologies, the EU lacked a framework to monitor outbound investments from EU companies to third countries. In response, the Commission created an Expert Group with Member States and proposed a White Paper to assess potential risks in strategic sectors over a 12-month period. This led to Recommendation (EU) 2025/63 of 15 January 2025[619], calling on Member States to review outbound investments in semiconductors, AI, and quantum tech to safeguard EU economic security.

*iv*) Proposal for a Council Recommendation on Research Security[620]: it seeks to enhance Member States' and research institutions' capacity to identify and mitigate research security risks, ensuring that research and innovation are not misused in ways that threaten EU security or ethical standards.[621]

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[617] European Commission, Commission Recommendation (EU) 2025/683 of 8 April 2025 on coordination of national control lists, OJ L, 2025/683, 16.4.2025.

[618] See *supra* (n.51), 'Advancing European economic security: an introduction to five new initiatives', at p. 4.

[619] European Commission**,** Commission Recommendation (EU) 2025/63 of 15 January 2025 on reviewing outbound investments in technology areas critical for the economic security of the Union, OJ L, 2025/63, 15.1.2025.

[620] See *supra* (n.51), 'Advancing European economic security: an introduction to five new initiatives', at pp. 4-5.

[621]While respecting academic freedom, it encourages national frameworks based on whole-of-government approaches, the appointment of research security advisers, and the introduction of due diligence and risk management procedures. These measures should be proportionate, non-discriminatory, and grounded in self-governance. At the EU level, the Commission proposes to facilitate coordination through the European Research Area, including the creation of a European Centre of Expertise on Research Security. Progress will be monitored biennially, with the potential for further action depending on geopolitical developments. The Council formally adopted this Recommendation on 23 May 2024: Council Recommendation of 23 May 2024 on enhancing research security*,* OJ C, C/2024/3510, 30.5.2024.

*v*) White Paper for enhancing support for research and development involving technologies with dual-use potential.[622]

### 4. The Draghi Report and the Competitiveness Compass

In his 2024 report "The Future of European Competitiveness"[623], Mario Draghi outlines a comprehensive vision for revitalising the European Union's competitiveness and sustainable growth. Although the report is primarily centred on competitiveness, its implications for economic security and SA are substantive, particularly in a geopolitical context increasingly shaped by systemic rivalry, supply chain disruptions, and the weaponisation of interdependence.

At the heart of the report lies the proposition that the EU must develop a new industrial strategy grounded in three core transformations: innovation, decarbonization, and security[624]. The third transformation, "increase security and reduce dependencies[625]", is of central relevance to economic security. As Draghi stresses, "Given its high trade openness and dependence on imports ranging from raw materials to advanced technology, the EU will need to develop a genuine 'foreign economic policy' that coordinates preferential trade agreements and direct investment with resource-rich nations, the building up of stockpiles in selected critical areas, and the creation of industrial partnerships to secure the supply chain of key technologies".[626]

This assertion connects economic security to external dependencies and elevates industrial policy to the realm of strategic governance. Draghi's call for a "foreign economic policy" appears to mark a shift in EU economic thinking, from liberal market integration to strategic market shaping, mirroring recent

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[622] See *supra* (n.51), 'Advancing European economic security: an introduction to five new initiatives', at p. 5. It highlights the growing importance of supporting research and development (R&D) in technologies that serve both civilian and defence purposes, given their strategic relevance to the EU's economic security. It reviews the support currently provided through EU funding instruments, such as the EU Defence Innovation Scheme (EUDIS) under the European Defence Fund (EDF), which promotes the integration of promising civilian technologies into the defence sector. The Commission, with the White Paper, launches a comprehensive consultation process with stakeholders, including public authorities, academia, industry, and civil society, to inform its future policy direction.

[623] Draghi, M., 'The Future of European Competitiveness – Part A', Report for the President of the European *Commission*, European Commission, 2024.

[624] ibid.

[625] ibid.

[626] ibid.

Commission initiatives such as the 2023 European Economic Security Strategy[627] and instruments like the Critical Raw Materials Act[628] and Anti-Coercion Instrument[629].

Furthermore, the report devotes attention to FDI screening[630]. Draghi notes that the current system, under Regulation 2019/452, is still largely national in nature, with Member States "only required to exchange notifications and information".[631] This "fragmentation prevents the EU from leveraging its collective power in FDI negotiations" and complicates the establishment of a unified EU position on key strategic investments.[632] The report thus implicitly endorses the European Commission's subsequent proposal to revise the FDI Screening Regulation as part of the 2024 Economic Security Package.

Another essential contribution of the report is its diagnosis of Europe's institutional fragmentation**,** which poses a serious obstacle to the effective deployment of economic security policies. Draghi acknowledges that "Europe's decision-making rules have not substantially evolved as the EU has enlarged and as the global environment facing Europe has become more hostile and complex".[633] He critiques the EU's disaggregated governance structure, where decisions are taken issue-by-issue, with little coordination between subcommittees, leading to inefficiencies in policy coherence. This is problematic in domains such as FDI screening, supply chain resilience, and industrial policy, where coordinated action is necessary to mitigate security threats.

Draghi argues that while strengthening the EU may ultimately require Treaty reform, substantial progress can be achieved through targeted institutional and policy adjustments in the interim.[634] He outlines three main avenues for reform: refocusing, accelerating, and simplifying the Union's functioning.

First, Draghi proposes the creation of a "Competitiveness Coordination Framework" to rationalise and integrate existing fragmented policy coordination mechanisms across the EU.[635] This new structure would focus solely on "EU

[627] See *supra* (n. 50), European Commission: 'European Economic Security Strategy'.
[628] See *supra* (n. 584), Critical Raw Materials Act.
[629] See *supra* (n.76), Anti-Coercion Instrument.
[630] See *supra* (n.75), FDI Screening Regulation.
[631] See *supra* (n.623), Draghi.
[632] ibid.
[633] ibid.
[634] ibid.
[635] ibid.

Competitiveness Priorities" determined by the European Council, supported by targeted "Competitiveness Action Plans" with streamlined governance, financing through pre-allocated MFF envelopes, and stronger public-private cooperation.[636]

Second, Draghi advocates for accelerating EU decision-making by extending qualified majority voting (QMV) through use of the *passerelle clauses*, and, where needed, enabling enhanced cooperation[637] among like-minded Member States as foreseen by Articles 20 TEU[638] and 329 TFEU.[639] As a last resort, intergovernmental agreements could be used, although Draghi notes these should remain exceptional due to their lack of judicial oversight and democratic legitimacy.[640]

Third, the report urges the EU to simplify its regulatory framework, pointing to the excessive and often inconsistent legislative burden on companies, particularly SMEs. He recommends the appointment of a Vice President for Simplification, the development of a unified methodology to assess regulatory costs, and stricter application of the subsidiarity principle. Draghi further suggests cutting reporting obligations by 25% and by up to 50% for SMEs, while strengthening the Single Market Enforcement Taskforce (SMET).[641]

In January 2025, the European Commission, building directly on the findings and recommendations of the Draghi Report, adopted its Competitiveness Compass[642], a strategic non-binding document that situates competitiveness at the heart of the EU's policy agenda for the next political cycle. Framing competitiveness, innovation and growth as a conditions for safeguarding Europe's freedom, security, and autonomy, the Communication explicitly ties future economic performance to broader geopolitical objectives, noting that the "EU

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[636] ibid.
[637] Enhanced cooperation offers two important safeguards: the consent of the European Parliament and judicial oversight of the Court of Justice of the EU.
[638] Article 20, TEU. 'Member States which wish to establish enhanced cooperation between themselves within the framework of the Union's non-exclusive competences may make use of its institutions and exercise those competences by applying the relevant provisions of the Treaties, subject to the limits and in accordance with the detailed arrangements laid down in this Article and in Articles 326 to 334 of the Treaty on the Functioning of the European Union. Enhanced cooperation shall aim to further the objectives of the Union, protect its interests and reinforce its integration process. Such cooperation shall be open at any time to all Member States, in accordance with Article 328 of the Treaty on the Functioning of the European Union'.
[639] Article 329, TFEU.
[640] See *supra* (n.623), Draghi.
[641] ibid.
[642] European Commission, Commission Communication 'Competitiveness Compass for the EU', COM(2025) 30 final, Brussels, 29.1.2025.

must integrate more tightly security and open strategic autonomy considerations in its economic policies"[643] as "the security environment is a precondition for EU firms' economic success and competitiveness"[644]. As acknowledged in the Communication itself, the Draghi Report provides a "clear diagnosis"[645] of Europe's structural challenges, particularly its productivity gap, innovation stagnation, excessive regulatory burden, and strategic dependencies, and identifies the three aforementioned "transformational imperatives" (closing the innovation gap, decarbonising in a competitiveness-friendly way, and reducing strategic dependencies while enhancing economic security). Drawing from this analysis, the Commission's Compass sets out a comprehensive framework structured around these pillars, coupled with horizontal "enablers" such as simplification of regulation, Single Market integration, coordinated investment, targeted labour and skills strategies, and a Competitiveness Coordination Tool (thus implementing Draghi's recommendation of proposing a tool, designed to align industrial and research policies and investments across the EU and Member States on common competitiveness priorities).[646]

Importantly, the document does not merely replicate the Draghi Report's insights, but it translates them into concrete flagship initiatives and legislative plans, many of which relate to SA and economic security. These include the establishment of a TechEU investment programme for critical technologies, a Quantum Act, a Circular Economy Act, a Critical Medicines Act, and a Joint Purchasing Platform for Critical Raw Materials, among others.

The Competitiveness Compass thus constitutes a political and policy response to the Draghi Report's warnings, signalling a shift from passive market integration to a more strategic and coordinated economic model, one that aims to sustain the EU's technological edge, reduce vulnerabilities, and align industrial and security interests in a geopolitically uncertain environment.

[643] ibid.
[644] ibid.
[645] ibid.
[646] ibid.

## 5. Defining Economic Security

As noted, more recently, the notion of economic security has gained relevance within the European Union's external action and internal regulatory framework, emerging at the intersection of Open Strategic Autonomy, competitiveness, and geopolitical resilience. While widely used to justify a growing range of initiatives, spanning from trade defence instruments to investment screening and industrial policy, economic security remains conceptually underdefined, still in a formative stage, and continues to be interpreted in markedly different ways by scholars and policymakers.[647] In defining economic security for policy-making purposes, it is essential to distinguish between two fundamental dimensions. The first concerns the intended objective of the policy, while the second deals with the breadth of the definition.[648]

### 5.1 Policy Aims of Economic Security

With regards to policy aim, certain instruments are designed to influence economic outcomes directly, while others involve the use of economic policy tools to pursue objectives that are not primarily economic in nature. In the former category fall measures such as trade defence instruments aimed at mitigating economic harm caused by economic coercion, or at shielding the economy from broader disruptions in global trade. From this perspective, economic security strategies encompass those policies that are explicitly directed at protecting economic outcomes from specific categories of risk or shock. This understanding would include industrial and trade policies intended to diversify sources of key inputs, trade defence mechanisms designed to deter economic coercion as the Anti-Coercion Instrument, and reactive policies aimed at cushioning the impact of external shocks when they arise.[649]

An alternative definition of economic security focuses on measures that pursue national security objectives through the use of economic policy instruments[650]. In this view, policies designed to maintain a technological edge in

[647] See *supra* (n.567), 'European Economic Security: Current practices and further development'.
[648] ibid.
[649] ibid.
[650] ibid.

areas with military applications, restrict adversarial access to critical cyber infrastructure, or limit foreign control over the digital information space, pursue economic security although they do not serve primarily economic purposes. Likewise, ensuring access to essential goods for non-economic reasons, such as safeguarding public health through the uninterrupted supply of medicines, is a vital policy objective, but its rationale lies outside the prevention of economic harm. Under this conceptualisation, policies such as FDI screening to prevent sensitive technology transfers and export restrictions on high-tech goods would fall within a broader scope of economic security. A number of scholars have criticised this definition, arguing that it tends to be applied in a vague or overly broad manner, serving as a catch-all to justify a wide array of measures ranging from responses to economic shocks to actions taken on the basis of national or physical security imperatives.[651] This conflation, in their opinion, while politically convenient, risks undermining policy coherence and may lead to poorly targeted government interventions.[652] To address this ambiguity, they adopt the narrower analytical framework focused explicitly on economic de-risking from politically motivated shocks, namely, economic coercion.[653] Under this interpretation, economic security pertains primarily to hostile interference in supply chains and interdependencies, such as trade embargoes, sanctions, or the weaponisation of energy markets, as observed in recent instances involving Russia or China.

The authors advocating this view concentrate on targeted economic measures designed to protect vulnerable sectors from coercive pressure, noting that these threats differ substantially from accidental disruptions such as natural disasters.[654] Their emphasis is therefore on resilience to external, politically driven trade shocks, rather than domestic vulnerabilities.

This analysis intentionally excludes certain policies that are often presented under the label of "economic security", such as those included in the European Commission's Economic Security Strategy[655], but which, in substance, do not possess a genuinely economic character or objective. Except in rare

[651] McCaffrey, C., & Poitiers, N.F., 'Instruments of economic security' in Pisani-Ferry, J., Weder di Mauro, B. and Zettelmeyer, J. (eds.) (2024), *Europe's Economic Security,* Paris Report 2, CEPR and Bruegel.
[652] ibid.
[653] ibid.
[654] ibid.
[655] See *supra* (n. 50), European Commission: 'European Economic Security Strategy'.

instances where the complexity of a given technology creates monopolistic conditions that could potentially be exploited for economic coercion[656], restrictions on technology transfers, in some authors view, are difficult to justify solely on economic security grounds.[657] Although safeguarding Europe's leadership in advanced technological sectors is an important strategic goal, it does not, in itself, in their opinion, satisfy the criteria for economic security as they define it.[658] Therefore, alternative justifications, particularly those related to defence policy, such as the preservation of superiority in dual-use technologies, are typically required to substantiate such restrictive measures.

This distinction between economic and national security is more than a theoretical matter; it carries legal and political significance.[659] Policies framed around national security goals are often easier to justify and may be exempt from the scrutiny and constraints typically applied to economic measures. Cost-benefit analysis and efficiency assessments, which are central to economic policymaking, become less relevant in the context of hard, physical security.[660] Moreover, if a direct link to defence or national security is established, trading partners may be more inclined to view such measures as legitimate and not merely disguised protectionism. The World Trade Organization (WTO) provides for national security exceptions that permit states to implement measures that would otherwise violate trade rules.[661] However, the scope and application of this exception remain highly contested. The US has adopted an expansive interpretation of the national security clause, relying on it to justify actions such as the imposition of Section 232 tariffs on steel and aluminium, including against its own military allies, such as the European Union.[662] This approach, however, has not been accepted by other WTO members, and a WTO panel has subsequently rejected the U.S.

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[656] Given the potential for technological advantages to confer monopolistic powers on semiconductor firms, coupled with the immense capacity for economic coercion in this sector, the authors note that the 2023 export controls introduced by the Netherlands on advanced semiconductor manufacturing equipment are one of the very few instances in which technological defence measures can be justified by economic security arguments.
[657] See *supra* (n.651), McCaffrey *et al*.
[658] ibid.
[659] See *supra* (n.567), 'European Economic Security: Current practices and further development'.
[660] ibid.
[661] Article XXI, GATT.
[662] Kleimann, D., 'Section 232 reloaded: the false promise of the transatlantic 'climate club' for steel and aluminium', *Working Paper 11/2023*, (2023), Bruegel.

justification.[663] These developments underscore that invoking "security" in trade disputes is not a semantic exercise; the way in which economic security is defined and applied has direct implications for international legal regimes.[664]

McCaffrey[665] notes that the broader context of this definitional tension is reflected in the transatlantic divergence in practice: the US securitised approach to economic policy, exemplified by initiatives like the CHIPS and Science Act[666] and outbound investment controls[667] announced by the National Security Advisor, diverges from the EU's economic approach, constrained by its more limited mandate in defence and national security matters. However, the European Commission's evolving strategy under President von der Leyen, reveals a growing ambition to project economic power in foreign policy, increasingly mirroring elements of U.S. policy despite the lack of a corresponding security mandate.[668] In fact, As Steinberg and Wolff stress[669], the EU remains institutionally ill-equipped for a world dominated by great power rivalry. While economic, trade, and competition policies fall under EU competences, foreign policy and security matters remain largely in the hands of Member States. This division hinders the EU's ability to define geopolitical priorities and align them with economic policy. Unlike the United States or China, where economic statecraft is coordinated within a unified political framework, the EU faces legal and institutional constraints that limit its ability to act strategically[670]. Provisions of the Treaties such as Article 63 TFEU, which guarantees the free movement of capital with third countries, reflect a legal framework built for a rules-based global order, not one marked by

[663] Maruyama, W. & Wolff, A., 'Saving the WTO from the national security exception', *PIIE Working Paper 23-2*, Peterson Institute for International Economics, (2023).
[664] See *supra* (n.567), 'European Economic Security: Current practices and further development'.
[665] See *supra* (n.651), McCaffrey *et al*.
[666] CHIPS and Science Act Will Lower Costs, Create Jobs, Strengthen Supply Chains, and Counter China", White House Fact Sheet, 9 August 2022 (https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/09/fact-sheet- chips-and-science-act-will-lower-costs-create-jobs-strengthen-supply-chains-and-counter-china/).
[667] "It's important to recognize this is a national security action, not an economic one... This order protects our national security interests [...] Again, I want to be clear: This is a national security action, not an economic one" (Background Press Call by Senior Administration Officials Previewing Executive Order on Addressing U.S. Investments in Certain National Security Technologies and Products in Countries of Concern, 10 August 2023; https://www.whitehouse.gov/briefing-room/press-briefings/2023/08/10/background-press-call-by-senior-administration-officials-previewing- executive-order-on-addressing-u-s-investments-in-certain-national-security-technologies-and-products-in-countries-of- concern/)
[668] See *supra* (n.651), McCaffrey *et al*.
[669] See *supra* (n.553), Steinberg *et al*.
[670] ibid.

fragmentation or decoupling. At the same time, the EU's highly open and export-oriented economic model makes it particularly vulnerable to a retreat from globalization.[671]

### 5.2 The scope of Economic Security and its operationalization

The second axis of the definitional debate concerns the breadth of the concept of economic security. Economic outcomes are influenced by a wide range of variables, including domestic shocks such as financial crises, that can be just as damaging as those arising from global trade dynamics.

If the overarching objective of economic security is to reduce vulnerability to significant economic disruptions, then it raises the question of whether the source of the risk, foreign or domestic, should matter to policymakers. From this broader perspective, economic security would encompass all policy measures aimed at reducing the economy's exposure to risk, irrespective of origin. There is, indeed, considerable overlap between policies designed to enhance resilience to foreign trade shocks and those intended to strengthen overall economic stability. However, the counter-argument is that expanding the definition too broadly risks rendering the concept analytically meaningless: under such an approach, nearly every policy aimed at economic resilience could be categorised as a form of economic security.

Reflecting these tensions, scholars have adopted divergent definitions of the term. Acknowledging the evolving nature of the concept, Bown suggests that at its most basic, economic security is described as a "state's ability to secure access to essential goods and services when needed and at affordable prices, acknowledging the inherent openness and interdependence of modern economies".[672] This definition, in Bown's view, aligns economic security with national security, as both aim to protect the welfare of the population from substantial threats; Murphy and Topel, for instance, define national security as "the set of public policies that protect the safety or welfare of a nation's citizens

[671] ibid.
[672] Bown, C.P., 'Trade policy, industrial policy, and the economic security of the European Union' in Pisani-Ferry, J., Weder di Mauro, B. and Zettelmeyer, J. (eds.) (2024), *Europe's Economic Security,* Paris Report 2, CEPR and Bruegel.

from substantial threats".[673] However, Bown notest that emerging debate increasingly recognises that economic security cannot be divorced from geopolitical realities, including the intentional disruption of a country's strategic objectives by foreign policymakers. This concept of economic security broadens the analytical scope of the emerging literature on supply chain resilience, which has traditionally focused on major disruptions, such as climate change, health crises, or natural disasters, that may propagate across countries through globally interconnected production networks.[674] By also accounting for resilience against the deliberate actions of hostile foreign policymakers, Bown's notion of economic security acknowledges that international economic relations may not always operate within cooperative frameworks. Instead, it recognises the potential for foreign governments to adopt adversarial or self-interested policies, thereby situating economic security within a strategic context where geopolitical considerations play a central role. In other words, economic security builds upon the notion of supply chain resilience but integrates the additional dimension of hostile foreign actors, while retaining a relatively narrow scope in terms of both objectives and applicable policy domains. Conversely, McCaffrey and Poitiers, as noted in section 2.1, advocate for a more precise definition, centred on the protection of economic outcomes against deliberate, targeted foreign interventions, and explicitly excluding measures driven by broader national security concerns[675].

Beyond the definitional divergences discussed above, competing views also exist regarding how the EU should operationalise economic security. Economic security's vagueness and ambiguity allows different institutional actors to project distinct strategic visions upon it.[676] As Lavery[677] has observed, two broad and opposing approaches can be identified. The first, commonly associated with Commissioner Vestager and the policy stance of smaller, liberal, export-

[673] Murphy, K.M. & R.H. Topel, 'Some Basic Economics of National Security', *American Economic Review* 103(3), (2013), at pp. 508–11. On national security (NS), Murphy and Topel (2013, p. 508) write, "[w]hile NS policies are typically thought of in terms of military assets, our definition includes the development and deployment of any public good that would mitigate catastrophic outcomes for a large segment of the population".
[674] See *supra* (n.672), Bown.
[675] See *supra* (n.651), McCaffrey *et al*.
[676] ibid.
[677] Lavery, S., 'Rebuilding the fortress? Europe in a changing world economy'. *Review of International Political Economy*, (2023), pp. 1–24.

driven economies in Northern Europe, maintains that potential geopolitical shocks can be addressed *if* and *when* they materialise. This view places a strong emphasis on maintaining economic openness and adherence to multilateral frameworks. The second approach, aligned with Commissioner Breton and reflecting a more traditional "French" or "Fortress Europe" perspective, advocates for a fundamental strategic shift. It calls for the EU to reorient itself in response to the realities of intensifying great power competition by prioritising domestic investment, strengthening industrial policy, and reducing trade with non-like-minded countries. Some scholars criticize both of these approaches[678], noting that they suffer from significant limitations. The former tends to underestimate the economic and political repercussions of a major geopolitical conflict and the risks associated with entering such a confrontation unprepared[679]. The latter, by contrast, appears to be overly optimistic regarding the practical feasibility and financial sustainability of relocating global supply chains. Subsidies are unlikely to overturn entrenched comparative advantages and may ultimately impose unsustainable fiscal burdens[680].

### 6. FDI Screening and the ACI as Emblematic Instruments of the EU's Hybrid Economic Security Strategy: Operationalising Strategic Autonomy at the Intersection of Trade, Security, and Sovereignty

It shall now be evident that over the past decade, the European Union's legal and policy responses to evolving geopolitical pressures have increasingly coalesced around the concept of Strategic Autonomy and Economic Security. The following section examines this dynamic by analysing two emblematic regulatory instruments, the FDI Screening Regulation and the Anti-Coercion Instrument, both of which illustrate how the EU is translating SA and economic security into operational legal frameworks. These instruments have been selected not only for their significance in addressing concrete vulnerabilities, but also for their illustrative value in demonstrating how SA is pursued through divergent legal

[678] Steinberg, F., & Wolff G., 'Dealing with Europe's economic (in-)security', Global Policy 15(1), (2023), at pp. 183-192.
[679] ibid.
[680] ibid.

modalities: one preventive (or *ex ante*) and structurally embedded in the internal market (FDI screening)[681], the other reactive (or *ex post*) and anchored in the intersection between trade defence and external action (ACI). Each of them reflects a distinct dimension of the Union's evolving economic security agenda, FDI screening emphasises the *ex ante* safeguarding of strategic assets, while the ACI embodies a deterrent framework designed to respond to coercive economic conduct. Their combined analysis, thus, enables a deeper understanding of the hybrid nature of SA, situated at the confluence of external trade relations and national security considerations.

The choice to begin with FDI screening stems from the recognition that foreign investment control lies at the heart of the EU's effort to reduce strategic dependencies and preserve critical assets underpinning its technological and industrial base. The FDI Screening Regulation (EU) 2019/452 marked a pivotal shift from an open, market-liberal approach to a more guarded regulatory stance rooted in concerns over sovereignty, competitiveness, and geopolitical resilience. Its relevance to SA derives not only from the enhanced scrutiny of foreign acquisitions in sensitive sectors, such as critical technologies (i.e., semiconductors) and critical infrastructure, but also from its explicit connection to the Union's broader goal of achieving European Technological Sovereignty (ETS)**.** As recognised in the 2023 Economic Security Strategy, FDI can pose a risk to public order and security in circumstances where it threatens to compromise key enabling technologies, infrastructures, or supply chains deemed essential to the functioning of the EU economy. The Strategy explicitly identifies "foreign direct investment threatening security and public order" as one of the four key risks to economic security, alongside technology leakage, economic coercion, and critical infrastructure vulnerability. Accordingly, the Commission has proposed in January 2024 a new Regulation to reform the current FDI screening mechanism,

[681] While the legal basis of the FDI Screening Regulation is rooted in external trade policy (Article 207 TFEU)**,** its institutional design and operational logic are structurally embedded in the internal market architecture**.** This is due to its preventive function: safeguarding the Union's public order and security by controlling foreign access to critical assets essential to the functioning of the internal market. In this sense, the Regulation exemplifies the interdependence between external and internal policy spheres**,** whereby an instrument formally belonging to the Common Commercial Policy pursues objectives characteristic of internal market governance**,** namely, cohesion, security, and systemic resilience**.**

aiming to close regulatory loopholes, mandate screening in high-risk sectors, and ensure that all Member States adopt and enforce robust screening systems.

In addition to safeguarding critical infrastructure and technological assets, the FDI Screening Regulation also serves as a mechanism for mitigating distortions in the internal market caused by foreign investors. In particular, the Regulation has been viewed as a complement to internal market rules, designed to prevent third-country undertakings, especially those benefiting from state support, from acquiring a competitive advantage over EU-based operators.

For several Member States, the screening of FDI is not solely a matter of national security, but also of economic fairness. A central concern in both institutional and academic discussions surrounding FDI screening is the potential for foreign investors to distort competitive conditions within the internal market.[682] The apprehension stems from the fact that foreign investors may not be subject to an equivalent set of competition obligations as those imposed on EU undertakings.

For instance, as Velten notes, whereas EU firms must comply with the competition rules governing public undertakings under Article 106 TFEU[683] and the general prohibition of competition-distorting state aid under Article 107 TFEU[684], third-country investors may benefit from public subsidies or other forms of strategic state support, thus distorting the level playing field.[685] This asymmetry may manifest both at the pre-acquisition and post-acquisition stages.[686] This perspective reinforces the view that the FDI Screening Regulation does not merely protect security interests, but also functions as a structural safeguard for the internal market.

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[682] Velten, J., 'Screening Foreign Direct Investment in the EU', European Yearbook of International Economic Law 26, at p.13 (Springer Cham, 2022).
[683] Article 106 TFEU.
[684] Article 107 TFEU.
[685] See *supra* (n.682), Velten. See also Commission, 'White Paper on Levelling the Playing Field as regards Foreign Subsidies' COM (2020) 253 final, p. 7, 17 June 2020.
[686] In the former case, investors supported by foreign public funding may be able to offer higher prices for strategic assets, thereby disrupting the efficient allocation of resources. In the latter, once the acquisition has occurred, these investors may continue to operate under conditions that provide an economic advantage not available to their EU competitors. In response, Velten (see *supra* n.682) considers two types of intervention for the EU and its Member States. One option is to focus screening mechanisms on investors who have received state support potentially in violation of EU competition standards. The second is to conduct a comparative assessment of the legal frameworks governing competition in the investor's home jurisdiction and impose restrictions on those originating from states that offer inadequate competitive safeguards..

While the FDI framework exemplifies the preventive pillar of SA, ACI represents its reactive dimension, designed to confront the growing use of economic pressure as a means of strategic interference. Economic coercion, defined as the application or threat of trade or investment measures by third countries in order to induce or prevent specific policy choices by the Union or its Member States, has become a salient feature of the global geopolitical landscape. The ACI, equips the EU with a dedicated legal framework to deter and respond to such coercive acts through proportionate countermeasures, denominated Union Response Measures (URMs), thereby reinforcing the Union's capacity to defend its security and autonomy.

Notably, both the FDI Screening Regulation and the ACI emerge within the broader context of a shift towards unilateralism in EU trade policy, where the emphasis on multilateral cooperation is increasingly tempered by the need for autonomous legal tools capable of defending Union interests in an adversarial environment. Since 2021, the EU has adopted or planned at least five instruments aimed at preserving EU security through trade, on the basis of Article 207(2) TFEU: (1) the Revised Trade Enforcement Regulation[687], enabling the imposition of countermeasures when WTO or FTA dispute settlement is obstructed[688]; (2) the FDI Screening Regulation[689], which coordinates Member State assessments of investment-related risks to public security and order;[690] (3) the revised Export Control Regulation[691], governing the trade of dual-use goods, software and technologies; (4) the ACI[692], designed to deter and counter economic coercion;

[687] Regulation (EU) 2021/167 of the European Parliament and of the Council of 10 February 2021 amending Regulation (EU) No 654/2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules, OJ L 49, 12.2.2021, p. 1–5.
[688] It is labelled as a security instrument because it is essentially about defending the EU's interests vis-à-vis third states, most notably the United States, by means of stricter enforcement rules. The 'security dimension' of the regulation can also be observed in the wording of Commissioner Valdis Dombrovskis: 'The European Union must be able to defend itself against unfair trading practices. These new rules will help protect us from those trying to take advantage of our openness' (emphasis added). See https://ec.europa.eu/commission/presscorner/detail/en/IP_ 21_601.
[689] See *supra* (n.75), FDI Screening Regulation.
[690] Although this mechanism became operational before the adoption of the 2021 Trade Policy Review, it has been expressly framed as an instrument in pursuit of open strategic autonomy. Commission, Press Release, 'EU Foreign Investment Screening Mechanism becomes Fully Operational', 9 October 2020.
[691] See *supra* (n.597), Export Control Regulation.
[692] See *supra* (n.76), Anti-Coercion Instrument.

and (5) the proposed revision of the EU Blocking Statute[693], aimed at resisting extraterritorial application of foreign sanctions.[694] Although varying in scope and function, these instruments share an underlying strategic logic: they are designed to safeguard the EU's autonomy in a context where traditional multilateral safeguards have eroded, while still nominally preserving the aspiration of international cooperation in their recitals.[695] An aspiration that is "scarcely reflected in substance".[696]

Yet, as observed, these instruments tend to rely on "best-effort" clauses regarding international engagement, rather than creating binding duties to exhaust multilateral remedies, marking "a directional change in EU trade policy away from 'the common thread' of multilateralism"[697]. For instance, while the ACI stipulates that the Commission "shall provide adequate opportunity for consultations" with the concerned third state, "shall engage in such consultations expeditiously" and "explore options" with the third state, provided that the latter "enters into consultations with the Union in good faith" to "explore consultations with the third country"[698], it does not compel the Union to first exhaust available international remedies before adopting unilateral trade sanctions against the targeted country.

This design reflects a structural shift in the EU's external posture, whereby autonomous instruments are increasingly preferred to ensure policy effectiveness and rapid response in cases where adversarial conduct, such as foreign state subsidies or coercion, cannot be adequately addressed under existing multilateral frameworks. Despite the Commission's rhetorical commitment to "open strategic autonomy", the practice of adopting unilateral measures, even those with security implications, suggests a functional rebalancing between

[693] Communication from the Commission to the European Parliament, the Council, the European Central Bank, European Economic and Social Committee and the Committee of the Regions, 'The European economic and financial system: fostering openness, strength and resilience', 19.1.2021, COM(2021) 32 final, p. 19; see also Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extraterritorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, OJ EU 1996 No. L 309, Consolidated text, 7 August 2018.
[694] It may be viewed as the flipside of the Anti-Coercion Instrument as it aims to counter 'the effects of the unlawful extra-territorial application of third-country unilateral sanctions to EU individuals and entities'.
[695] See *inter alia,* Recitals 1-4 of the Anti-Coercion Instrument and recital 2 of the FDI Screening Regulation.
[696] See *supra* (n.293), Kübek *et al.*
[697] ibid; see also (n.300), de Búrca.
[698] Anti-Coercion Instrument, Article 6(1) and (2).

openness and autonomy, wherein strategic imperatives prevail in cases of conflict. Such rebalancing, besides being striking, particularly when considering the EU's constitutional preference for multilateralism and international cooperation (that, in theory, has also inspired the policy makers design and pursuit of an "open" strategic autonomy), does not determine a violation of the Treaties in light of the broad room that primary law leaves to balance the objectives of multilateralism and international cooperation against other constitutional objectives, in particular sustainability.[699]

Furthermore, both FDI screening and the ACI lie at the intersection of trade and security, revealing the limits of EU competence allocation and the ambiguities of legal categorisation. While the FDI Regulation is grounded in the CCP under Article 207 TFEU, its operational rationale centres on the protection of national and European security, a domain traditionally reserved to the Member States. Conversely, the ACI, though based on the CCP, substantively addresses issues closely aligned with the Common Foreign and Security Policy (CFSP), namely, protecting sovereign decision-making and defending against external interference. As such, these instruments illustrate the growing tension between the Union's exclusive competence in trade and the intergovernmental nature of security governance, a tension that remains unresolved in the Treaties but is increasingly managed through legal and institutional innovation.

The selection of these two instruments as case studies reflects not only their individual importance, but also their explanatory value in analysing the evolving structure of EU economic Statecraft. The FDI Screening Regulation embodies the Union's effort to pre-empt strategic dependencies through preventive control of critical assets, while the ACI operationalises a deterrent model aimed at dissuading third-country coercion. Together, they map out the contours of an emerging legal architecture of SA, rooted in the ambition to secure the Union's technological edge, safeguard the integrity of its internal market, and assert its sovereign capacity to respond to a world marked by increasing geopolitical contestation.

[699] See *supra* (n.293), Kübek *et al.*

### 6.1 FDI Investment Screening: An Ex-Ante Approach

Traditionally, FDIs have been regarded as a driver of innovation, a source of capital, and a catalyst for cross-border cooperation. However, recent geopolitical and economic developments have revealed how such investments may also pose risks to national security, the integrity of critical infrastructure, and the Union's long-term competitiveness. This dual character of FDIs, representing both opportunity and vulnerability, calls for a regulatory framework that strikes a balance between openness and strategic caution. As highlighted by Gallo and Poli[700], four primary areas of concern have recently attracted the attention of EU institutions with regard to the use and control of key enabling technologies. First, the Union has experienced a growing technological gap, resulting in a loss of competitiveness in the global market.[701] Second, FDI may pose risks to the public security and public order of Member States, particularly in situations where foreign operators gain control over critical infrastructure[702] and technologies[703]. Third, there is an increasing risk that foreign undertakings benefiting from subsidies may acquire EU-based companies of strategic relevance. Finally, the EU remains significantly dependent on third countries for access to critical raw materials, which are indispensable to technology-intensive industries and the development of digital infrastructure. This section focuses on the second of the four primary concerns: the regulation of FDI within the Union.

As for SA, a precise and consistent definition of European Technological Sovereignty is notably absent from EU official documentation. The notion of ETS has gained increasing attention in both academic and policy circles. Some scholars

[700] See *supra* (n.331), Gallo *et al* at p. 216.
[701] Ramahandry, T., *et al*, 'Key Enabling Technologies for Europe's Technological Sovereignty' (European Parliamentary Research Service, 16 December 2021), available at: www.europarl.europa.eu/thinktank/en/document/EPRS_STU(2021)697184.
[702] Examples of these infrastructures are ports, roads, telecommunication networks and energy networks. There are different definitions of this notion. Regulation 2019/452, Article 4(1)(a) offers the following one: "(a) critical infrastructure, whether physical or virtual, including energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure, and sensitive facilities, as well as land and real estate crucial for the use of such infrastructure". Zwartkruis, W., & de Jong B., 'The EU Regulation on Screening of Foreign Direct Investment: A Game Changer?' (2020) 31 *European Business Law Review* 447, 451.
[703] Art 4(1)(b) Regulation 2019/452 states: "Critical technology and dual use items are defined in point 1 of Article 2 of Council Regulation (EC) No 428/2009 (15), including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies as well as nanotechnologies and biotechnologies".

define it as the ability of a country (or a group of countries) "to generate autonomously technological and scientific knowledge or to use technological capabilities developed outside through the activation of reliable partnerships".[704] Furthermore, distinct scholars note that coupling the term "sovereignty" with "European", may signal an underlying aspiration to strengthen the EU's own capacity to act as a sovereign entity, thereby aligning with a more federalist vision of integration.[705] In this regard, the Horizon Europe 2023–2024 work programme on "digital, industry and technology"[706] offers useful interpretive guidance, indicating that strengthening ETS entails both the consolidation of the EU's capacity to exploit existing technologies and the development of new ones, with a view to securing the integrity and safety of both the Union and its Member States. These definitions highlight both the strategic and operational dimensions of technological sovereignty, underscoring its relevance not only in terms of innovation and competitiveness, but also as a condition for preserving autonomy in geopolitical and economic decision-making. The convergence of perspectives from academia, policy[707], and industry reveals a growing consensus on the need for the EU to reduce technological dependencies and build resilient, secure value chains in key sectors. More precisely, on the basis of the above argumentations, a clear link between efforts to minimise technological dependency and broader objectives of CFSP can be established. ETS encompasses the Member States' capacity for self-reliance in critical technology sectors that underpin the

[704] Crespi, F., Caravella, S., Menghini, M., and Salvadori, C., 'European Technological Sovereignty: An Emerging Framework for Policy Strategy' (2021) 56 *Intereconomics* 348, 349. Alongside academic discourse, think tanks have also begun to reflect on the concept, framing it as "the ability for Europe to develop, provide, protect, and retain critical technologies required for the welfare of European citizens and prosperity of businesses, and the ability to act and decide independently in a globalised environment" (see *supra* (n. 701), Ramahandry *et al*). In yet another context, technological sovereignty has been described as "an ability of states, or a community of states, to provide the technologies it deems critical for its existence and operation, as well as for maintaining its 'capabilities', and to be able to develop these technologies or source them from other economic areas without one-sided structural dependency". Edler J., et al, 'Technological Sovereignty from Demand to Concept', Fraunhofer Institute for Systems and Innnovations Research ISI 2.

[705] See *supra* (n.331), Gallo *et al*, at p. 219.

[706] European Commission, Commission Implementing Decision on the Adoption of the Work Programme for 2023–2024 within the Framework of the Specific Programme implementing Horizon Europe – the Framework Programme for Research and Innovation and on its Financing: Annex VII Horizon Europe Work Programme 2023–2024 "7. Digital, Industry and Space"' (2022) C(2022) 7550 final.

[707] The Strategic Compass, see *supra* (n.129), recognises that "[r]educing strategic dependencies and enhancing our technological sovereignty is critical if we are to meet the challenges of a more dangerous world".

functioning of essential services in a modern economy. Thus, reducing external dependency is crucial not only for ensuring the Union's and the Member States' security but also for preserving the functioning of the internal market.[708] It is thus clear that the ambition to enhance ETS coincides with broader efforts to reinforce EU Strategic Autonomy and economic security (in its broader understanding), not merely to shield the Union from external vulnerabilities, but also to enhance its global competitiveness.

Successive financial crises have weakened the European industrial base, while China developed its "go out" strategy, manifested notably through the "One Belt, One Road" initiative. Launched in 2013, China's One Belt One Road (OBOR) initiative, now more commonly referred to as the Belt and Road Initiative (BRI), represents a comprehensive strategy to enhance regional connectivity through large-scale infrastructure investments. Structured around the overland Silk Road Economic Belt and the 21st Century Maritime Silk Road, the BRI seeks to build new trade corridors linking China to Europe, Africa, and the broader Global South. Officially promoted as a mutually beneficial development framework, the initiative is also widely regarded as a vehicle for expanding China's geopolitical and economic influence.[709] A prominent example often cited in the context of China's BRI is the acquisition of a majority stake in the Port of Piraeus by the Chinese state-owned company China Ocean Shipping Company Shipping (COSCO). Initially entering through a concession agreement in 2009, COSCO formally acquired 51% of the Piraeus Port Authority in 2016 and later expanded its stake to 67%. While the investment significantly modernized the port and increased its commercial throughput, it has also sparked geopolitical concerns within the Union. The strategic location of Piraeus as a key maritime gateway into Europe has rendered it a critical node in the BRI's maritime route, raising alarms

[708] See *supra* (n.331), Gallo *et al*, at p. 219.

[709] See, Hurley, J., Morris, S., and Portelance, G., 'Examining the Debt Implications of the Belt and Road Initiative from a Policy Perspective*, Center for Global Development,* (2018). Some observers[709] have noted that China's evolving rhetoric increasingly casts the BRI as a development platform rather than purely an economic or geopolitical initiative. This shift may be a reactive response to external criticism, including concerns over transparency, corruption, and environmental degradation in recipient states, issues closely linked to debates around debt dependency and China's long-term strategic influence. Alves, A. C. & Lee, S., 'China's BRI developmental agency in its own words: a content analysis of key policy documents'. World Development, (2022).

about foreign influence over essential European infrastructure. This case illustrates the broader tension between short-term economic gains and the long-term implications for ETS and ESA. These global events have revealed how the processes of globalisation and liberalisation have produced economic interdependencies across strategic sectors, which can, under certain conditions, be weaponised against the Union's SA and its economic security.[710]

In light of this succession of events, the adoption of EU Regulation 2019/452 became more necessary than ever.[711] Despite its longstanding position as a global leader in FDI, with an inward stock exceeding EUR 5.7 trillion in 2015 and over EUR 6.9 trillion held abroad by Union investors[712], the EU has began to recognise the strategic implications of foreign acquisitions. In 2017 alone, the EU attracted US$ 334 billion in FDI inflows, surpassing North America and second only to Asia.[713] Yet the growing role of foreign, particularly state-owned[714], enterprises from countries such as China and Russia[715] has raised alarms over the potential political motivations behind such investments. As emphasized by Bungenberg and Blandfort[716], the Commission recognised a risk that (state influenced) "foreign investors may seek to acquire control or influence in European undertakings whose activities have repercussions on critical technologies, infrastructure, inputs, or sensitive information."[717]

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[710] Farrell, H., and Newman, AL., 'Weaponized Interdependence: How Global Economic Networks Shape State Coercion' (2019) International Security, 42, 45.

[711] As noted, FDI instrument has not been developed in isolation. In fact, The Commission, in, is increasingly deploying the EU's normative power to recalibrate its external posture in line with emerging strategic realities and "to clearly break with its traditional "naivety" with respect to liberalization and globalization". Robert, S., 'Foreign Investment Control Procedures as a Tool for Enforcing EU Strategic Autonomy' (2023) 8 *European Papers – A Journal on Law and Integration*, No 2, pp. 513-523, Special Focus *EU Strategic Autonomy and Technological Sovereignty.*

[712] The EU was "the world's leading source and destination of foreign direct investment". Source: European Commission, 'Welcoming Foreign Direct Investment while Protecting Essential Interests', COM(2017) 494 final, 13 September 2017, at p. 3.

[713] United Nations Conference on Trade and Development (UNCTAD), World Investment Report 2018, Investment and New Industrial Policies, at p. 15.

[714] European Commission, 'Reflection Paper on Harnessing Globalisation', COM(2017) 240, 10 May 2017, p. 15.

[715] Sunesen, E., & Hansen, M., 'Screening of FDI towards the EU', Danish Business Authority, Copenhagen Economics January 2018, at p. 18.

[716] M. Bungenberg & F. Blandfort, *'Investment Screening – a New Era of European Protectionism?'* in M. Bungenberg, A. Reinisch and C. Tietje (eds), *European Yearbook of International Economic Law 2019* (Springer, Cham 2019) 145–172.

[717] See *supra* (n.712), European Commission, 'Welcoming Foreign Direct Investment while Protecting Essential Interests', at p. 5.

In response to these mounting concerns, President Jean-Claude Juncker proposed the adoption of an EU-level screening framework during his State of the Union Address on 13 September 2017, asserting that "Europe must always defend its strategic interests"[718]. This followed the publication of the Commission's Reflection Paper on Harnessing Globalisation earlier that year, which had already warned that: "Openness to foreign investment remains a key principle for the EU and a major source of growth. However, concerns have recently been voiced about foreign investors, notably state-owned enterprises, taking over European companies with key technologies for strategic reason. […] These concerns need careful analysis and appropriate action."[719] Concurrently, a joint initiative by Germany, France, and Italy in 2017 urged the creation of a coordinated EU approach to FDI screening, criticising acquisitions driven by "other countries' strategic industrial policies".[720] These political and institutional signals converged to give rise to Regulation (EU) 2019/452, a measure intended to safeguard Union interests without undermining its traditionally open investment environment. Commissioner Cecilia Malmström summarised the aim of the initiative as follows: "[t]he aim of what we are proposing is to keep the EU open to foreign investment, with a non-discriminatory, transparent and predictable framework,"[721] while nonetheless equipping the EU with some instruments to react to foreign threats if necessary. More precisely, the Explanatory Memorandum accompanying the Commission's proposal for the Regulation[722], while reaffirming the Union's

[718] European Commission, Jean- Claude Juncker – State of the Union Address, 13 September 2017; available at: https:// europa.eu/ rapid/ press- release_ SPEECH- 17- 3165_ en.htm.
[719] See *supra* (n.714), Reflection Paper on Harnessing Globalisation.
[720] The first MS' initiative 'Proposals for ensuring an improved level playing field in trade and investment' was published in February 2017. The second initiative 'European investment policy: A common approach to investment control' followed on 28 July 2017.
[721] Malmström, C., 'State of the Union 2017 - Trade Package: European Commission proposes framework for screening of foreign direct investments', 13 September 2017, Press Corner: https://ec.europa.eu/commission/presscorner/detail/en/ip_17_3183.
[722] European Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investments into the European Union' (2017) COM(2017) 487 final, para 3. See also European Commission, 'Report From The Commission to The European Parliament and the Council: First Annual Report on the Screening of Foreign Direct Investments into the Union' (2021) COM(2021) 714 final; European Commission, 'Report from the Commission to the European Parliament and the Council: Second Annual Report on the Screening of Foreign Direct Investments into the Union' (2022) COM(2022) 433 final; European Commission, 'Commission Staff Working Document: Screening of FDI into the Union and its Member States accompanying the document "Report from the Commission to the European Parliament and the Council Second Annual Report on the Screening of Foreign Direct Investments into the Union"' (2021) SWD(2021) 334 final.

commitment to openness towards foreign investment as a fundamental source of economic growth, nevertheless recognises the existence of significant risks attached to such investments, thus emphasizing the intrinsic connection between foreign investment and technological assets. Specifically, the Commission highlights concerns related to foreign investors[723] acquiring European companies possessing strategic technological capabilities, not for commercial purposes but for geopolitical advantage.[724] Furthermore, the Memorandum positions the Regulation as complementary to several existing Union policies, including those in the fields of electronic communications, cybersecurity, the protection of critical infrastructure, and industrial competitiveness, particularly within the cybersecurity sector.[725]

In other words, although the Regulation itself does not explicitly reference the notions of Strategic Autonomy or ETS it is evident that the imperative to safeguard critical infrastructure and critical technologies underlies its adoption.[726]

### 6.1.1 The concepts of National and European Security

The adoption of Regulation (EU) 2019/452 brings to the fore a complex and evolving understanding of "national [and European] security" within the EU

[723] See *supra* (n.331), Gallo *et al.* As to the character of foreign investors, the Regulation allows consideration of whether the investor is a state-owned enterprise or sovereign fund from a third country, especially where such investors may operate under differing rule of law standards. While Article 345 TFEU guarantees neutrality of ownership, the Court of Justice has clarified that such neutrality must be interpreted in light of internal market freedoms (see, *ex multis*, Joined Cases C-105/12 to C-107/12 Essent and Others ECLI:EU:C:2013:677, para 36). As such, sovereign investments are subject to greater scrutiny, potentially triggering a rebuttable presumption of risk: if the non-EU investor is controlled by a third country's government, the principle of legal neutrality does not come into play, with the consequence that the investment will be treated *prima facie* as potentially harmful and, thus, unwelcomed in the European territory. On sovereign investors in international and/or EU law, see Backer, LC., 'The Private Law of Public Law: Public Authorities as Shareholders, Golden Shares, Sovereign Wealth Funds, and the Public Law Element in Private Choice of Law' (2008) 82 *Tulane Law Review* 1801; Carbone, SM., '"Golden Share" e fondi sovrani: lo Stato nelle imprese tra libertà comunitarie e diritto statale' (2009) 23 *Diritto del commercio internazionale* 503; the contributions in Bassan, F., Research Handbook on Sovereign Wealth Funds and International Investment Law (Cheltenham, Edward Elgar, 2015), including Gallo, D., 'The Rise of Sovereign Wealth Funds (SWFs) and the Protection of Public Interest(s): The Need for a Greater External and Internal Action of the European Union' (2016) 27 European Business Law Review 459; Gigante, A., & Ligustro, A., 'Il diritto internazionale degli investimenti di fronte alla sfida dei fondi sovrani' (2010) Diritto pubblico comparato ed europeo 1179.
[724] See *supra* (n.722), European Commission, 'FDI Proposal', para 1.
[725] ibid.
[726] See *supra* (n.331), Gallo *et al,* at p. 217.

legal order, along with the question of how competences between the Union and its Member States are allocated in the field of FDI.

Traditionally, the notion of national security referred to protection against military threats to the territorial integrity of the state.[727] However, both in international and domestic legal frameworks, this concept has gradually expanded to include a range of threats, including economic vulnerability, critical infrastructure exposure, and the well-being of the population.[728] As seen in Chapter I, the COVID-19 pandemic further revealed that a state's security depends not only on its military capacity but also on its ability to meet essential needs, whether related to medical supplies like surgical masks or to more strategic areas such as pharmaceutical research. This has led to the growing inclusion of strategic sectors like telecommunications, security services, water supply, cryptology, financial services and infrastructure, media, health, transport, energy, media, and finance in national investment screening regimes.[729] These sectors are essential to the economy, social welfare, national security and the fulfilment of essential government functions.[730] The pandemic, in fact, has demonstrated that economic interdependence among States can translate into significant vulnerabilities. As a result, distinguishing between measures driven by purely economic considerations and those aimed at safeguarding national security has become increasingly complex.[731] Yet, the concept of national security remains self-judging, meaning each Member State retains its sovereign authority to determine what constitutes a threat.[732] This national prerogative is expressly preserved in EU primary law,

[727] Baldwin, DA., 'The Concept of Security' (1997) *Review of International Studies* 5.
[728]Ma, J.,'International Investment and National Security Review' (2019) *Vanderbilt Journal of Transnational Law 8*99.
[729] On "critical infrastructures", see Gordon, K., and Dion, M., 'Protection of 'Critical Infrastructure' and the Role of Investment Policies Relating to National Security' (May 2008) www.oecd.org 3 ff.
[730] UNCTAD, 'National Security-Related Screening Mechanisms for Foreign Investment. An Analysis of Recent Policy Developments' cit. 8.
[731] See *supra,* Chapter III, sections 5.1 and 5.2 on the debate regarding the notion of economic security.
[732] See *supra* (n.331), Gallo *et al.* See also Snell, J., 'EU Foreign Direct Investment Screening: Europe qui protege?' (2019) 44 EL Rev 137; Napolitano, G., 'Il regolamento sul controllo degli investimenti esteri diretti: alla ricerca di una sovranità europea nell'arena economica globale', *Rivista della Regolazione dei mercati* 2 (2019).

notably under Article 65(1)(b) TFEU[733], Article 4(2) TEU[734], and Article 346 TFEU[735]. Under Article 4(2) TEU[736] the Union "shall respect […] essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State." In other words, the responsibility for safeguarding national security and public order remains primarily within the remit of Member State sovereignty, thus, it is pertinent to examine whether Regulation 2019/452 signals a deepening of the European integration process in the domain of economic and security governance. Accordingly with primary law, the FDI Regulation affirms that "the Regulation is without prejudice to each Member State having sole responsibility for its national security as provided for in Article 4(2) TEU, and to the right of each Member State to protect its essential security interests in accordance with Article 346 TFEU,"[737] while also recognising their right to derogate from capital movement rules for public security reasons, as provided for in point (b) of Article 65(1)TFEU"[738].

At the same time, the Lisbon Treaty conferred to the EU exclusive competence over FDI[739] under Article 207(1) TFEU[740], thus allowing it to regulate market access from third countries under the CCP[741], over which, under article 3(1)(e) TFEU[742], the Union has exclusive competence.[743] The Court of Justice of

[733] Article 65 TFEU: The provisions of Article 63 shall be without prejudice to the right of Member States: […] (b) to take all requisite measures to prevent infringements of national law and regulations, […], or to take measures which are justified on grounds of public policy or public security.
[734] Article 4(2) TEU: Shared competence between the Union and the Member States applies in the following principal areas [national security is not listed, being sole responsibility of the member states]:(a) internal market; (b) social policy, for the aspects defined in this Treaty […].
[735] Article 346 TFEU.
[736] Article 4(2) TEU.
[737] Regulation (EU) 2019/ 452, Article 1(2),
[738] ibid, Preamble, Recital 4.
[739] On the peculiar story of FDI's accidental inclusion in Art. 207 TFEU against the preferences of the Member States, see Meunier, S., 'Integration by Stealth: How the European Union Gained Competence Over Foreign Direct Investment', 55 JCMS: *J, Common Makt. Stud*. 593 (2017).
[740] Article 207 TFEU.
[741] Bungenberg, M. 'The Division of Competences Between the EU and Its Member States in the Area of Investment Politics', in M. Bungenberg, J. Griebel, S. Hindelang (eds.) *European Yearbook of International Economic Law Special Issue: International Investment Law and EU Law* (Springer 2011), p. 29; Reinisch, A., 'The EU on the Investment Path – Quo Vadis Europe? The Future of eu bit s and other Investment Agreements', *Santa Clara Journal of International Law* 12 (2013), p. 115.
[742] Article 3(1)(e) TFEU.
[743] Bungenberg, M., 'Going Global? The EUCommon Commercial Policy After Lisbon', in C. Herrmann, J. Terhechte (eds.), *European Yearbook of International Economic Law* (Springer, 2010), p. 143.

the EU confirmed this interpretation in Opinion 2/15 (Singapore FTA)[744], which held that the use of the term "foreign direct investment" in Article 207(1) TFEU constitutes an unambiguous expression of the Union's intent to include FDIs within its exclusive competence. This competence does not extend to portfolio investments, which remain outside the scope of Article 207 TFEU, as it is unequivocable that article 207 TFEU does not include any foreign investment, other than direct investments, in the Union's CCP[745]. Therefore, portfolio investments do not fall the within the exclusive Union competence according to Article 3(1)(e) TFEU.

Although some have argued that discrepancies between the Regulation's definition of FDI in article 2(1)[746] and that found in the Singapore Opinion, in paragraph 80[747], could undermine the Regulation's legal basis, the Regulation itself clarifies that it applies exclusively to direct investments[748], not portfolio investments. Furthermore, in its Proposal the Commission limited the Regulation to FDIs not intending to cover portfolio investments.[749]

Several decisions of the CJEU affirmed that the Regulation can be interpreted consistently with primary law[750], without changing its meaning. On the other hand, as Bungenberg observes[751], prior to the adoption of the Regulation,

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[744] See *supra* (n.322), Opinion 2/15, para. 83.
[745] ibid, para. 83.
[746] Pursuant to Article 2(1) of Regulation (EU) 2019/ 452, a foreign direct investment is defined as *"*an investment of any kind by a foreign investor aimed to establish or to mantain lasting and direct links between the foreign investor and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity in a Member State, including investments which enable effective participation in the management or control of a company carrying out an economic activity".
[747] See *supra* (n.322), opinion 2/ 15, para. 80. "It is settled case-law that direct investment consists in investments of any kind made by natural or legal persons which serve to establish or maintain lasting and direct links between the persons providing the capital and the undertakings to which that capital is made available in order to carry out an economic activity. Acquisition of a holding in an undertaking constituted as a company limited by shares is a direct investment where the shares held by the shareholder enable him to participate effectively in the management of that company or in its control".
[748] Pursuant to Article 1(1) of Regulation (EU) 2019/ 452, the purpose of the instrument is to *"establish a framework for the screening of foreign direct investments into the Union on the grounds of security or public order a*nd for a mechanism for cooperation between Member States, and between Member States and the Commission, with regard to foreign direct investments likely to affect security or public order. It includes the possibility for the Commission to issue opinions on such investments".
[749] See *supra* (n.722), at p. 12.
[750] See, e.g., ECJ joint cases C- 201/ 85 and C- 202/ 85, Klensch/Secrétaire d'État, ecli:eu:c:1986:439, para. 21; case C- 314/ 89, Rau/hza Nürnberg- Fürth, ecli:eu:c:1991:143, para. 17; case C- 98/ 91, Herbrink/Ministervan Landbouw, ecli:eu:c:1994:24, para. 9.
[751] See *supra* (n.716), Bungenberg *et al* at p. 168.

Member States that had introduced national screening mechanisms were acting in potential breach of Article 2(1) TFEU[752], since, absent an express empowerment by the Union, they lacked the competence to regulate in a field, such as FDI, that falls within the Union's exclusive competence.

With regard to the rights of Member States under Article 65(1)(b) TFEU, a fundamental question arises as to whether the Union is precluded from adopting a comprehensive framework for the regulation of market access in the field of FDI. Some scholars have argued that the unequivocal wording of Articles 64 and 65 TFEU supports the view that the competence to restrict capital movements on grounds of public security remains exclusively with the Member States, as explicitly recognised by Article 65(1)(b) TFEU.[753] From this perspective, the CCP could be interpreted as being limited to the adoption of liberalising measures, consequently, any secondary legislation adopted under Article 207(2) TFEU would be subordinate to Article 65(1)(b) TFEU as a provision of primary law[754] and could not restrict market access if it limits the free movement of capital. This reasoning could, in theory, render a regulation invalid if it were to encroach upon the Member States' right to impose restrictions on FDI based on national security considerations.[755]

However, the assessment of whether Article 65(1)(b) TFEU invalidates the Regulation necessarily depends on a proper delimitation of competences between the Union under Article 207(1) and (2) TFEU, and the Member States under Article 65(1)(b) TFEU.[756] As previously noted, the CCP in its post-Lisbon formulation undoubtedly encompasses FDI. Accordingly, Article 207(1) TFEU must take precedence when it comes to the adoption of autonomous measures regulating the access of third-country investors to the Union market.[757] Article 65(1)(b) is meant to preserve the ability of Member States to limit capital

[752] Article 2(1) TFEU: When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.
[753] Brauneck, J., 'Ausländische Direktinvestitionen nur mit Einverständnis der EU-Kommission?', EuZW 2018, p. 195.
[754] On the Union's obligation to obey the fundamental freedoms of the internal market see: ECJ, case C- 15/ 83, Denkavit Nederland, ecli:eu:c:1984:183, para. 15; case C- 51/ 91, Meyhui, ecli:eu:c:1994:312, para. 11; case C- 114/ 96, Kieffer und Thill, ecli:eu:c:1997:316, para 27; case C- 284/ 95, Safety Hi- Tech/ S. u. T., ecli:eu:c:1998:352, para. 63
[755] See *supra* (n.716), Bungenberg at p. 169.
[756] ibid.
[757] ibid.

movements within the internal market, and not to limit the Union's external competence.[758]

Therefore, as regards the external dimension of FDI regulation, particularly market access from third countries, Articles 207(1) and (2) TFEU are to be considered the more specific and appropriate legal bases. These confer on the Union comprehensive competence to legislate in this domain. As a result, as anticipated, it follows that, in the absence of a Union-level framework, the existence of unilateral screening mechanisms adopted by Member States prior to the Regulation were likely inconsistent with EU law. Only with the entry into force of Regulation (EU) 2019/452, and in particular Article 3(1)[759], were Member States explicitly authorised, pursuant to Article 2(1) TFEU, to adopt national screening mechanisms in conformity with the Union's exclusive competence.

As regards the legal justification for restrictions on FDI under Articles 63–66 TFEU, another crucial issue emerges. It concerns the permissibility of invoking economic considerations to justify restrictions on capital movements. Although the CJEU's doctrine of non-economic considerations excludes "economic aims" from serving as legitimate grounds for restricting the fundamental freedoms[760], a nuanced interpretation has developed. The prohibition applies solely to "aims of a purely economic nature".[761] As established in *Essent*[762], grounds of a purely economic nature cannot constitute overriding reasons in the public interest justifying a restriction of a fundamental freedom guaranteed by the Treaties unless

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[758] ibid.

[759] Article 3(1) of Regulation (EU) 2019/ 452 establishes that: "in accordance with this Regulation, Member States may maintain, amend or adopt mechanisms to screen foreign direct investments in their territory on the grounds of security or public order".

[760] See, *ex multis*, Case 7/61 Commission v Italia ECLI:EU:C:1961:31, [1961] ECR 317, para D; Case 95/81 Commission v Italy ECLI:EU:C:1982:216, [1982] ECR 2187, para 27; Case 238/82 Duphar ECLI:EU:C:1984:45, [1984] ECR 523, para 23; Case C-55/94 Gebhard v consiglio dell'Ordine degli Avvocati e Procuratori di Milano ECLI:EU:C:1995:411, [1995] ECR I-4165, para 37; Case C-224/97 Ciola ECLI:EU:C:1999:212, [1999] ECR I-2517, para 17; Case C-388/01 Commission v Italy ECLI:EU:C:2003:30, [2003] ECR I-721, para 22; Case C-137/04 Rockler ECLI:EU:C:2006:107, [2006] ECR I-1441, para 24; Case C-444/05 Stamatelaki ECLI:EU:C:2007:231, [2007] ECR I-3185, para 31;; Case C-563/17 Associação Peço a Palavra and Others ECLI:EU:C:2019:144, para 70. See also, Snell J., 'Economic Aims as Justification for Restrictions on Free Movement' in AAM Schrauwen (ed), *Rule of Reason: Rethinking Another Classic of European Legal Doctrine*, Hogendorp Papers 4 (Groningen, Europa Law Publishing, 2005); or Barnard, C., 'The Substantive Law of the EU: The Four Freedoms*"*, 7th edn (Oxford, Oxford University Press, 2022) 145–196, 472–512.

[761] Amongst others see Case 95/81 Commission v Italy ECLI:EU:C:1982:216, [1982] ECR 2187, para 22; Case C-35/98 Verkooijen ECLI:EU:C:2000:294, [2000] ECR I-4071, paras 47–48

[762] Joined Cases C-105/12 to C-107/12 Essent and Others ECLI:EU:C:2013:677, paras 51–52.

those grounds pursue an objective in the public interest. On this basis, the objective of "safeguarding EU technological security"[763] has been identified as capable of falling within the category of public interest grounds, thus allowing Member States to invoke it to justify restrictive screening measures.

Although the division of competences could have allowed for a fully centralised regulatory framework at Union level, such a solution was ultimately not realised. Instead, the Regulation reflects a compromise between maintaining Member State discretion in matters of national security and establishing a minimum level of coordination under EU law. This evolving legal architecture also reflects a deeper transformation in the EU's normative stance. As noted in the Commission's 2020 Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452[764] in March 2020, the EU now frames national security as an interest shared across the Union.

Accordingly, the Commission urges Member States that already possess a screening mechanism to "[m]ake full use already now of [their] FDI screening mechanisms to take fully into account the risks to critical health infrastructures, supply of critical inputs, and other critical sectors as envisaged in the EU legal framework."[765] For those that have not yet established such a mechanism, or whose existing frameworks do not cover all relevant transactions, it recommends the creation of a comprehensive screening system and, in the *interim*, the use of all available tools to address situations in which the acquisition or control of specific businesses, infrastructure, or technologies could pose a threat to security or public order within in the EU, including risks to critical health infrastructure and essential supplies. In this context, national security becomes the overarching rationale for shaping investment policies oriented toward ensuring the Strategic

[763] The CJEU has recognised that the security of energy supply is a public interest which justifies a derogation from the free movement of goods. Case 72/83 Campus Oil ECLI:EU:C:1984:256, [1984] ECR 2727, paras 34–35.
[764] Communication C(2020)1981 final from the Commission of 25 March 2020, Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation), 2020/C 99 I/01 [2020] OJ C 99I/1.
[765] ibid.

Autonomy and economic security of States, with the ultimate goal of safeguarding the essential needs of their populations.[766]

This broad interpretation of national security is not limited to individual Member States but may equally extend to the European Union as a whole. This evolving understanding underscores the growing relevance of the concept of an "EU national security." In fact, the evolving EU legal framework on FDI screening reflects a significant reconceptualisation of the notion of the "public good," which increasingly assumes a "supranational, instead of an exclusively national, connotation".[767] More precisely, Regulation (EU) 2019/452 provides that, where a FDI project is likely to pose a threat to *"*the security or the public order of more than one Member State," the European Commission is empowered to issue an opinion to the Member State concerned.[768] Embedded within this formulation is an implicit recognition of a shared European security interest that transcends purely national concerns.

The 2020 Guidance further reinforces the emerging notion of an "EU national security." This is particularly evident in the following passage: "Today more than ever, the EU's openness to foreign investment needs to be balanced by appropriate screening tools. In the context of the COVID-19 emergency, there could be an increased risk of attempts to acquire healthcare capacities (for example for the productions of medical or protective equipment) or related industries such as research establishments (for instance developing vaccines) via foreign direct investment. Vigilance is required to ensure that any such FDI does not have a harmful impact on the EU's capacity to cover the health needs of its citizens."[769]

These developments, beyond being an immediate response to the health crisis, confirm the gradual emergence of autonomous European security interests. This evolution is encapsulated in the Commission's assertion that, even though the Regulation does not mandate the establishment of national screening mechanisms, "[a] national screening mechanism in all 27 Member States is necessary to safeguard the Union against potentially risky foreign investments from third countries. It would ensure that all 27 Member States and the European

[766] ibid.
[767] See *supra* (n.331), Gallo *et al*.
[768] Regulation (EU) 2019/452, Article 6(3).
[769] See *supra* (n.764), 2020 Guidance to the Member States concerning foreign direct investment.

Commission screen relevant FDI, thereby protecting the collective security of the Member States and the Union, as well as the security of the Single Market and the very high level of economic integration which it allows."[770]

In conducting FDI screening, national authorities are now expected to consider not only domestic security implications, but also the broader impact on the Union. As explicitly stated, "FDI screening should take into account the impact on the European Union as a whole […] Strategic assets are crucial to Europe's security, and are part of the backbone of its economy and, as result, of its capability for a fast recovery."[771] In this framework, the EU has advanced the objectives of national security and public order at the supranational level by means of a horizontal, and therefore non-sector-specific, instrument.[772] Through this approach, the Union has effectively transformed what were traditionally national public interests into an EU-level positive rule, thereby reconfiguring the concept of security as a "common"[773], rather than exclusively national, concern.[774]

This reconceptualisation stems from the recognition that FDI in strategic undertakings or entities of general interest within a Member State may endanger not only that individual State, but also the Union as a whole and its overarching strategic interests. In doing so, the EU has occupied a regulatory space that had previously been governed exclusively by individual Member States. While Member States formally retain sovereignty over the enforcement of screening mechanisms to safeguard their critical infrastructure and technologies, the European Commission exercises a pivotal role by intervening when it considers that security and public order, at national and European level, are threatened. It is precisely this shift, the gradual redistribution of regulatory authority between national governments and the Union, that has brought about a significant

[770] See *supra* (n.722), Second Annual Report on the Screening of Foreign Direct Investments into the Union, cit. 7.
[771] See *supra* (n.764), 2020 Guidance to the Member States concerning foreign direct investment.
[772] See, in particular, in the energy sector, Art 11 Directive 2009/73/EC of the European Parliament and of the Council concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC [2009] OJ L211/94; Art 53 Directive (EU) 2019/944 of the European Parliament and of the Council on common rules for the internal market for electricity and amending Directive 2012/27/EU (recast) [2019] OJ L158/125; Regulation (EU) 2017/1938 of the European Parliament and of the Council concerning measures to safeguard the security of gas supply and repealing Regulation (EU) No 994/2010 [2017] OJ L280/1.
[773] See *supra* (n.331), Gallo *et al*.
[774] See, on this issue, Verellen, T., 'When Integration by Stealth Meets Public Security: The EU Foreign Direct Investment Screening Regulation' (2021) 48 Legal Issues of Economic Integration 19, 39.

development: the emergence of a form of Europeanised sovereignty in the field of FDI.[775] This transformation is emblematic of broader shifts within the EU legal order, wherein systemic changes and paradigm shifts "take place more or less *en souplesse* in acts of an apparently technical nature."[776]

This shift in the understanding of security, both as a national prerogative and a shared European interest, is also reflected in the domestic legal frameworks of Member States. A particularly illustrative example is the Italian regime of "Golden Powers," which has evolved to reconcile national strategic interests with the broader integration objectives of the Union.

"Golden Powers refer to a set of special prerogatives conferred upon the Italian government to protect enterprises operating in sectors deemed strategic[777], from potential takeovers by foreign companies as defense that could jeopardize national security".[778] The Italian golden powers were introduced with Decreto-Legge No. 21/2012[779], replacing the earlier "golden share" regime, which had been invalidated by the Court of Justice of the European Union for its excessive discretion, lack of proportionality, and insufficiently defined criteria, in breach of the principle of free movement of capital under Article 63 TFEU.[780] The 2012 reform thus marked a transition from shareholding-based controls to an administrative mechanism[781] grounded in objective criteria, aimed at safeguarding national security and public order.

The Golden Powers regime functions alongside the EU's coordination and information-sharing framework established by the FDI Screening Regulation. In fact, as noted, the Regulation does not harmonize national screening mechanisms, nor does it mandate their adoption. Rather, it preserves Member States'

[775] See *supra* (n.331), Gallo *et al.*
[776] ibid.
[777] For instance, telecommunications, critical infrastructures, and, more recently, sectors like health and agri-food.
[778] Sandulli, A., 'The relationships between State and European Union during the pandemic, with special emphasis to the golden power', in *Diritto Pubblico, Fascicolo 2* (Il Mulino, 2020).
[779] Italy. Decree-Law No. 21 of 15 March 2012 on special powers in corporate structures in the defence and national security sectors, and for activities of strategic importance in the energy, transport and communications sectors. *Gazzetta Ufficiale della Repubblica Italiana*, No. 63, 15 March 2012. Converted with amendments by Law No. 56 of 11 May 2012, in *Gazzetta Ufficiale della Repubblica Italiana*, No. 111, 14 May 2012.
[780] Case C-326/07, *Commission v. Italy*, ECLI:EU:C:2009:193; Case C-58/99, *Commission v. Italy,* ECLI:EU:C:2000:280. See also Garofoli, R., 'Il controllo degli investimenti esteri: natura dei poteri e adeguatezza delle strutture amministrative', in Napolitano, G. (eds), *Foreign Direct Investment Screening. Il controllo sugli investimenti esteri diretti*, Bologna (2019), at pp. 95-97.
[781] See *supra* (n.778), Sandulli.

competence in national security matters, as also reflected in Article 4(2) TEU[782] and recital 7 of the Regulation,[783] which acknowledge that national security remains the sole responsibility of each Member State. In this sense, the Italian regime illustrates the regulatory competence detained by Member States under EU law, especially in areas where national security, essential security interests or essential public interests are at stake.[784]

In other words, while Article 207 TFEU confers exclusive competence on the Union in the field of FDI, this competence does not entirely displace Member States' prerogatives in sectors considered strategic or related to national security. Rather, as Italy's approach demonstrates, the boundary between Union and national competences in such contexts remains tenuous and blurred, reflecting the inherently labile nature of the division in these sensitive areas. The enduring significance of this regime lies in its function as a constitutional safeguard: measures adopted under Golden Powers must comply with EU law, particularly with the principles of proportionality and non-discrimination, but their legitimacy rests on the protection of essential (security) interests that remain, under the Treaties (more precisely, under article 4(2) TEU and article 346 TFEU), the exclusive responsibility of Member States.

### 6.1.2 The functioning of the Screening Mechanism

To better assess the effectiveness of Regulation (EU) 2019/452 in promoting European SA, it is necessary to examine how the screening mechanism operates in practice, both procedurally and institutionally. Regulation (EU)

[782] Article 4(2), TEU.
[783] Regulation (EU) 452/2019, Recital 7.
[784] Importantly, the application of Golden Powers has evolved significantly, particularly following the COVID-19 pandemic. The so-called Decreto Liquidità (D.L. No. 23/2020, converted into Law No. 40/2020) temporarily expanded both the subjective and objective scope of the regime. Notably, it extended scrutiny to intra-EU investments in sensitive sectors such as media pluralism, data access, cybersecurity, and dual-use technologies, beyond the traditional focus on extra-EU investors and controlling stakes. Prior to this extension, notification obligations in strategic sectors like defense and national security were already in place, regardless of the origin of the investor, including for intra-EU transactions. See Italy**.** Decree-Law No. 23 of 8 April 2020 *on urgent measures regarding access to credit and tax obligations for companies, special powers in strategic sectors, as well as interventions in the field of health and work, and the extension of administrative and procedural deadlines*, in Gazzetta Ufficiale della Repubblica Italiana, No. 94, 8 April 2020, converted with amendments by Law No. 40 of 5 June 2020, in Gazzetta Ufficiale della Repubblica Italiana No. 143, 6 June 2020; see also Sandulli, A.*,* 'Il Golden Power al tempo dell'emergenza Covid-19. Uno strumento camaleontico a protezione del tessuto economico'*, LUISS Open,* (2020).

2019/452 establishes, pursuant to Article 1, a legal framework for the screening of FDI into the Union by the Member States on the grounds of security or public order, and introduces a mechanism of cooperation both among Member States and between them and the Commission with respect to investments likely to affect those interests.[785] The necessity for such a framework is underlined in Recital 5, which refers to the previously missing EU-level regulatory coordination on FDI screening.[786] In accordance with Article 3, Member States retain discretion to maintain, amend, or adopt screening mechanisms, underscoring their primary responsibility in implementing the screening framework, although the duty of sincere cooperation under Article 4(3) TEU[787] could arguably impose a duty not to dismantle such mechanisms once established. Consequently, the intentional dismantling or evasion of the EU screening framework through the abolition of an existing national mechanism may constitute a breach of the obligations arising under the Union treaties.[788]

The Regulation defines "screening mechanism" as an instrument of general application accompanied by implementing measures and administrative procedures enabling authorities to assess, investigate, authorise, condition, and prohibit FDIs on grounds of security or public order.[789] The Regulation sets forth the principles that govern the screening mechanisn, namely transparency and non-discrimination, while the procedural framework is shaped by national law, detailing the triggers for screening, applicable timelines, confidentiality rules, and avenues for legal recourse.[790] Moreover, by establishing a set of evaluative criteria, the Regulation facilitates the identification of investment projects that could affect European security. These criteria include whether the investment is associated with "critical infrastructure, whether physical or virtual, including energy,

[785] Regulation (EU) 2019/452, Article 1(1): 'This Regulation establishes a framework for the screening by Member States of foreign direct investments into the Union on the grounds of security or public order and for a mechanism for cooperation between Member States, and between Member States and the Commission, with regard to foreign direct investments likely to affect security or public order. It includes the possibility for the Commission to issue opinions on such investments'.
[786] ibid, Recital 5: 'There is currently no comprehensive framework at Union level for the screening of foreign direct investments on the grounds of security or public order, while the major trading partners of the Union have already developed such frameworks'.
[787] Article 4(3) TEU: 'Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties'.
[788] See *supra* (n.716), Bungenberg, at p.171.
[789] Regulation (EU) 2019/452, Article 2(4).
[790] ibid, Article 3(2).

transport, water, health, communications, media […]", involves "critical technologies", affects the "supply of critical inputs, including energy or raw materials, as well as food security", or entails "access to sensitive information."[791]

The FDI Regulation applies exclusively to extra-EU investments. As the Court has recently clarified, the notion of a foreign investor within the meaning of Regulation 2019/452 encompasses that of an "undertaking of a third country," defined as "an undertaking constituted or otherwise organised under the laws of a third country." It follows that the scope of application of the Regulation is confined exclusively to investments carried out within the Union by undertakings that are constituted or otherwise governed by the legal order of a third country. Conversely, the Regulation does not extend to scenarios "where investments are made by undertakings registered in Hungary or in another Member State over which an undertaking registered in a third country has [a] majority control".[792] Consistently, in its Guidance, the Commission acknowledged an asymmetry between intra-EU and extra-EU investments, noting that "in the analysis of justification and proportionality", restrictions on the movement of capital to and from third countries take place in a different legal context compared to restrictions to intra-EU capital movements.[793] Accordingly, "additional grounds of justification may be acceptable in the case of restrictions on transactions involving third country,"[794] including "transparency in the governance of the investor".[795] This distinction, as noted by Gallo[796], is inspired by the CJEU's case law on taxation[797], enables a broader interpretation of permissible justifications for restrictions targeting extra-EU FDI, while intra-EU investment remains subject to stricter scrutiny under the Treaties. In light of the divide that can be drawn between extra-EU and intra-EU investments[798], a restriction that would be deemed

[791] ibid, Article 4(1).
[792] Case C-106/22 Xella Magyarország ECLI:EU:C:2023:568, para 33.
[793] See *supra* (n.764), 2020 Guidance to the Member States concerning foreign direct investment, para 4.
[794] ibid.
[795] ibid.
[796] See *supra* (n.331), Gallo *et al.*
[797] Case C-35/11 Test Claimants in the FII Group Litigation ECLI:EU:C:2012:707, para 171, but also Case C-101/05 A ECLI:EU:C:2007:804, [2007] ECR I-11531, para 67, and Case C-194/06 Orange European Smallcap Fund ECLI:EU:C:2008:289, [2008] ECR I-3747, para 65.
[798] As noted by Gallo, D., 'On the Content and Scope of National and European Solidarity Under Free Movement Rules: The Case of Golden Shares and Sovereign Investments' (2016) 1 *European Papers 823*, 844–845.

unjustifiable in the context of intra-EU investment may nonetheless be considered justifiable when applied to an extra-EU investment.[799] In this context, the strategic use of public interest arguments *vis-à-vis* third-country investors reflects an emerging regulatory architecture in which the notion of "European interest" increasingly operates as a counterweight to unilateral protectionism.[800]

As for the cooperation mechanism, Articles 6 to 8 introduce three distinct cooperation regimes: Article 6 applies to FDI undergoing screening, Article 7 to those not undergoing screening, and Article 8 to cases where Union interests are at stake. Notably, the Commission is not endowed with screening power *per se* but may issue non-binding opinions when an FDI is likely to affect projects or programmes of Union interest[801]. Under Article 6(3), the Commission may express its opinion where an FDI potentially impacts security or public order in one or more Member States, and such opinions must be given "due consideration" by the host Member State in accordance with Article 6(9)[802], although the final screening decision shall be taken by the Member State undertaking the screening. The Second Annual report notes that the Opinion, which may also include potential mitigating measures aimed at addressing specific risks, is issued only when warranted by the particular circumstances of the case, especially taking into account the investor's "risk profile"[803] and the strategic importance of the investment target.[804] Moreover, the issuance of the Opinion follows a dual pathway: on the one hand, it must be adopted "after at least one third of Member States consider that a foreign direct investment is likely to affect their security or public order"; on the other hand, the Commission retains the discretion to issue the Opinion "irrespective of whether other Member States" have submitted such comments.[805]

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[799] Snell, J., 'EU Foreign Direct Investment Screening: Europe qui protege?' (2019) 44 EL Rev 137.
[800] See *infra,* Chapter III, section 6.1.4. Note that the Commission proposed to apply EU screening not only to non-EU investors but also to investments by EU investors that are ultimately controlled by non-EU countries' entities. Proposal for a Regulation of the European Parliament and of the Council on the screening of foreign investments in the Union and repealing Regulation (EU) 2019/452 of the European Parliament and of the Council (COM(2024) 23 final).
[801] Regulation (EU) 2019/452, Article 8(1).
[802] ibid, Article 6(9).
[803] See *supra* (n.722), Second Annual Report on the Screening of Foreign Direct Investments into the Union.
[804] ibid.
[805] ibid, Article 6(3).

While Article 6(3) of the regulation applies if the Commission considers that an FDI undergoing screening might affect security of public order in one or more Member States, Article 8(1) applies if there is a possible threat to the Union interests on ground of security or public order.[806] Similarly to article 6(9), Article 8(2)(c), governing opinions concerning threats to the Union's interests, requires Member States "shall take utmost account of the Commission's opinion and provide an explanation to the Commission in case its opinion is not followed.[807] Even absent a national screening mechanism, Member States may comment on investments elsewhere, and the Commission may issue opinions regardless.[808]

It is evident that Regulation 2019/452's architecture promotes an increasingly communitised approach to investment governance, with all Member States, whether equipped with screening mechanisms or not, subject to information-sharing obligations. The Regulation, however, does not establish legal consequences for disregarding these opinions[809], does not subject host states to a veto and does not provide the Commission and the other Member States with tools in case the screening Member States does not give due consideration to the comments or the Opinion. However, despite the non-binding nature of the Opinion[810], Recital 17[811] affirms that the Member State must act in line with Article 4(3) TEU's duty of sincere cooperation.[812] The obligation to give "due consideration" implies a procedural duty to carefully assess and weigh the relevant observations or opinions within the decision-making process. As clarified by the ECJ, the duty of sincere cooperation is, above all, procedural in nature.[813] In the context of the Union's external relations, the CJEU has further established that this

[806] ibid, Article 8(1).
[807] Regulation (EU) 2019/452, Article 8(2)(c): 'The procedures set out in Articles 6 and 7 shall apply *mutatis mutandis*, subject to the following modifications:[…] (c) the Member State where the foreign direct investment is planned or has been completed shall take utmost account of the Commission's opinion and provide an explanation to the Commission if its opinion is not followed".
[808] ibid, Article 7.
[809] Lavranos, N., 'Some Critical Observations on the EU's Foreign Investment Screening Proposal', Kluwer Arbitration Blog, 2 January 2018, p. 2.
[810] See *supra* (n.716), Bungenberg, at p.173.
[811] Regulation (EU) 2019/452, Recital 17.
[812] See, e.g., Case C-246/07, Commission v Sweden ECLI:EU:C:2010:203, [2010] ECR I-3317, paras 71–77.
[813] See e.g., Case C-433/03, Commission v. Germany ('Inland Waterways'), EU:C:2005:462, paras 68–69, in which the ECJ sanctioned Germany for failing to consult and coordinate with the Commission in the implementation of a Council decision authorizing the Commission to negotiate a multilateral agreement on the rules applicable to the transport of passengers and goods by inland waterway between the EU and several of its eastern neighbours.

principle may, in certain cases, compel Member States "to undertake or refrain from undertaking certain actions."[814]

If a Member State resists cooperation, others may activate their own screening mechanism or appeal to the Commission or to the CJEU under Article 259 TFEU.[815] Meanwhile, the Commission could initiate infringement proceedings under Article 258 TFEU[816], though its procedural delays may undermine timeliness.

Regarding access to legal remedies, Article 3(5) of the Regulation states that "foreign investors and the undertakings concerned shall have the possibility to seek recourse against screening decisions of the national authorities". If the national authority implements the Commission's Opinion pursuant to its obligation to "take utmost account" or "due consideration" of it, without independently exercising its discretion, the investor concerned may seek to challenge the Commission's Opinion directly, rather than contesting the implementing measure adopted by the Member State. However, as clarified by Article 263(1) TFEU[817], such an act must be intended to "produce legal effects", and since Commission opinions are intraprocedural acts, of a non-binding nature binding under Article 288(5) TFEU[818], they fall outside the scope of annulment actions under Article 263 (4) TFEU.[819] Thus, affected investors must challenge the national implementing acts, even if national authorities merely followed a Commission opinion without exercising discretion.[820] Although untested, national courts may nonetheless refer questions to the CJEU under Article 267 TFEU within the context of a preliminary reference on validity, to verify whether the Opinions comply with Regulation 2019/452 and EU law as a whole.[821] In this context, the lack of direct access to Union courts raises concerns regarding the right to effective judicial protection under Article 47 of the Charter of

[814] Case C-246/07, Commission v. Sweden ('PFOS'), EU:C:2010:203.
[815] Article 259(1) TFEU.
[816] Article 258 TFEU.
[817] Article 263(1) TFEU.
[818] Article 288(5) TFEU.
[819] Article 263(4) TFEU.
[820] Article 267 TFEU.
[821] On the different topic of the recourse against Member States' screening see Hagemeyer, TM., 'Access to Legal Redress in an EU Investment Screening Mechanism' in Hindelang S, Moberg A (eds) Yearbook of Socio-Economic Constitutions (YSEC): a Common European Law on Investment Screening (CELIS). (Springer, Berlin, Heidelberg, 2020), pp. 806-807.

Fundamental Rights of the European Union[822], as, while the Commission's opinion lacks binding effect, it may nevertheless exert a *de facto* influence on the national authorities and the procedural delay associated with indirect recourse may undermine this right.[823]

### 6.1.3 Regulation 2019/452 and the Pursuit of European Technological Sovereignty: A Critical Appraisal

With respect to the question of whether this instrument effectively contributes to strengthening European Technological Sovereignty, the evaluation yields a nuanced conclusion. On the one hand, the Regulation demonstrates limitations, most notably in that the Commission does not possess the authority to prevent a Member State from permitting an investment likely to affect public order or security beyond its national borders. In fact, as exposed in section 6.1.2. despite the Union's exclusive competence over FDIs, the host Member State retains a wide margin of discretion in authorising a proposed investment in light of the non-binding and intraprocedural nature of the Commission's Opinion. This discretionary power implies that foreign investors, including those "controlled directly or indirectly, for example through significant funding, including subsidies, by the government of a third country or are pursuing State-led outward projects or programmes"[824] may potentially gain control of critical infrastructure and technologies.[825] Moreover, the Regulation does not oblige Member States to adopt or maintain a screening mechanism[826], nor does it impose minimum harmonisation standards on the structure or content of national screening regimes.

Further limitations stem from the institutional design of the screening process itself. While the Commission may issue an Opinion regarding investments likely to affect "projects or programmes of Union interest,"[827] it is debatable

[822] Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391–407, Article 47.
[823] See *supra* (n.716), Bungenberg, at p.173.
[824] Regulation (EU), 2019/452, Recital 13.
[825] See *supra* (n.331), Gallo *et al.*
[826] "Nothing in this Regulation shall limit the right of each Member State to decide whether or not to screen a particular foreign direct investment within the framework of this Regulation". The Commission encouraged all Member States "to set up and enforce a fully-fledged FDI screening mechanism to address cases where the acquisition or control of a particular business, infrastructure or technology would create a risk to security or public order in the EU. See *supra* (n.722), First Annual Report on the Screening of FDI into the Union', 7.
[827] Regulation (EU) 2019/452, Art 8(1).

whether the requirement that Member States merely take such Opinions into "the utmost consideration"[828] suffices to safeguard key enabling technologies such as artificial intelligence, robotics, semiconductors, and telecommunication infrastructure.

The Commission's lack of direct decision-making power contrasts sharply with third-country models. For instance, the EU framework remains less centralised and comprehensive than the United States' approach[829], where the investment review mechanism, particularly with respect to sensitive technologies, has recently been reinforced by additional restrictions targeting investors from "countries of concern," such as China, the Special Administrative Region of Hong Kong, and the Special Administrative Region of Macau.[830]

From a comparative institutional perspective, Callol has juxtaposed the FDI screening system under Regulation 2019/452 with the European Merger Regulation (EUMR)[831], concluding that, "FDI screening for public interest or national security reasons is a quintessentially national competence at the core of

[828] ibid, Art 8(2)(c).

[829] The Committee on foreign investment in the US (CFIUS) is a multi-agency government body chaired by the Secretary of the Treasury that, amongst other things, reviews transactions involving foreign investment in the US. The powers of this committee were expanded in 2018 with the Foreign Investment Risk Review Modernization Act of 2018 (FIRMA), HR 5515-538. See 'FIRMA FAQS' (US Department of the Treasury), available at: home.treasury.gov/system/files/206/FIRRMA-FAQs.pdf. The number of factors affecting national security that CFIUS takes into consideration was expanded in September 2022. See Executive Order 14083 Ensuring Robust Consideration of Evolving National Security Risks by the Committee on Foreign Investment in the United States [2022] Federal Register Vol 87, No 181 and Statement by Secretary of the Treasury Janet L. Yellen on President Biden's Executive Order on the Committee on Foreign Investment in the United States' (US Department of the Treasury, 15 September 2022), available at: home.treasury.gov/news/press-releases/jy0951.

[830] On 9 August 2023 an executive order entitled 'Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern' was enacted by President Biden. The program is described as an instrument that complements the United States' existing export control and inbound screening tools with a "small yard, high fence" approach to address the national security threat posed by countries of concern advancing such sensitive technologies. 'President Biden Signs Executive Order on Addressing United States Investments In Certain National Security Technologies And Products In Countries Of Concern' (The White House, 9 August 2023), available at: www.whitehouse.gov/briefing-room/statements-releases/2023/08/09/president-biden-signs-executive-order-on-addressing-united-statesinvestments-in-certain-national-security-technologies-and-products-in-countries-of-concern/. See 'Executive Order on Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern' (The White House, 9 August 2023), available at: www.whitehouse.gov/briefing-room/presidential-actions/2023/08/09/executive-order-onaddressing-united-states-investments-in-certain-national-security-technologies-and-products-in-countries-of-concern/.

[831] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.1.2004, p. 1–22.

state sovereignty"[832]. A legal reality makes the establishment of a unified EU-level mechanism akin to the EUMR currently unattainable. While such centralisation might be favourable to business actors seeking predictability, its implementation would require a fundamental shift in Member States' willingness to relinquish control over a core domain of sovereignty, an unlikely development in the short term.[833] Pursuant to this approach, Verellen suggests that the Regulation "may paradoxically contribute to the emergence or further consolidation of many national as opposed to a common EU conception of public security"[834] and that the Regulation's policy outcome is suboptimal as "*i*) the operation of the cooperation mechanism will cost investors more time and money compared to the *status quo ante*, which may very well have a chilling effect on investment; and (*ii*) by empowering Member States to screen investments on grounds of public security and order without simultaneously introducing specific enforcement mechanisms at EU level, the Regulation enters into conflict with the Treaty objective of investment liberalization".[835]

Nonetheless, notwithstanding the aforementioned institutional shortcomings, the Regulation displays notable potential in reinforcing the Union's technological sovereignty[836]. This is particularly evident in its explicit recognition that an FDI affecting security and public order in one Member State may qualify as a matter of common interest for all other Member States. Such a conceptual shift, for some authors[837], reflects a broader transformation whereby investment screening, though historically grounded in national security considerations, is now progressively understood as part of a shared European concern. In this perspective, the Regulation fosters greater transparency and information-sharing among Member States and the Commission. It institutionalises a "trialogue" involving the host Member State undertaking the screening, other potentially affected Member States, and the Commission, all of whom may raise objections or concerns. Importantly, the Commission is entitled to issue an Opinion not only where a

[832] Callol, P., 'Protectionist Trends in Cross-Border Mergers and Acquisitions in Europe: National Interest, FDI and other Ingredients of the Growing Regulatory Maze' (2021) 42 European Competition Law Review 117, 126-127.
[833] ibid.
[834] See *supra* (n.774), Verellen.
[835] ibid.
[836] See *supra* (n.331), Gallo *et al*.
[837] ibid.

screening mechanism is in place but also in Member States without such frameworks.[838] Although it remains true that Member States are not legally compelled to act upon objections voiced by the Commission or other Member States, the Regulation reiterates[839] that the Member State hosting the investment must adhere to the, already mentioned, "duty of loyal cooperation" enshrined in Article 4(3) TEU. This obligation persists even in areas of exclusive national competence, such as investment screening on grounds of national security or public order.[840] As a result, the threshold for disregarding the Commission's Opinion or concerns raised by fellow Member States is not low, and doing so could attract legal and political consequences. As noted by Verellen[841], "in the present context, the duty is likely to require a Member State that receives a comment or an opinion to demonstrate that it has taken the comments or opinion seriously. The Member State does not have to agree with its content and ultimate conclusion (otherwise it would lose its ultimate decision-making power, which the Regulation insists it retains), but it must make sure that it is able to explain why it chooses to take a different path than the one recommended to it".[842]

Another commendable feature[843] of the Regulation is its extensive scope, both in terms of the "critical infrastructure" and "critical technologies" it covers, and in the broad and non-exhaustive list of factors that can be assessed when determining whether an investment threatens public order or security. Among these are considerations such as "whether the foreign investor is directly or indirectly controlled by the government of a third country."[844] Additionally, the Regulation recognises the relevance of projects and programmes with a "European dimension,"[845] leaving it to the Commission to evaluate whether a particular FDI affects Union-wide interests. In doing so, the Commission retains a significant role

[838] Regulation (EU) 452/2019, Article 7.
[839] ibid, Recital 17.
[840] See *supra* (n.331), Gallo *et al*.
[841] See *supra*, (n.774), Verellen, at p. 27-8.
[842] ibid.
[843] See *supra* (n.331), Gallo *et al*.
[844] Regulation 452/2019, Recital 13.
[845] Article 8(3) Regulation 452/2019 defines them as involving 'a substantial amount or a significant share of Union funding' or which are 'covered by Union law regarding critical infrastructure, critical technologies or critical inputs which are essential for security or public order.' A non-exhaustive list is included in the Annex I Regulation 2019/452 and has been expanded with the Commission Delegated Regulation (EU) 2021/2126 amending the Annex to Regulation (EU) 2019/452 of the European Parliament and of the Council establishing a framework for the screening of foreign direct investments into the Union [2021] OJ L432/1.

in shaping the assessment of whether the Union's public order and security are indeed at stake.

### 6.1.4 Toward a Revised Screening Framework: From Reactive Instrument to a Strategic Autonomy Tool

In its original proposal for what would later become Regulation 2019/452, the European Commission envisaged a far more ambitious framework for EU-level control over FDI. Notably, Article 3(2) of the Commission's Proposal stated that "the Commission may screen foreign direct investments that are likely to affect projects or programmes of Union interest on the grounds of security or public order*"*.[846] This clause would have allowed the Commission to assume a direct screening function and, potentially, to object to certain FDI transactions. However, this vision was ultimately abandoned, reflecting Member States' reluctance to endow the Commission with such expansive powers. The political context in which the Regulation now operates has changed significantly since 2017, when the Commission submitted its proposal. Indeed, the Regulation was adopted prior to the COVID-19 pandemic and the outbreak of war in Ukraine, two crises that revealed the EU's strategic vulnerabilities. The pandemic acutely exposed the Union's dependence on external supply chains, particularly in the early stages when access to vital goods such as vaccines was at stake. The war in Ukraine, on the other hand, triggered what has been described as a "security earthquake"[847] in the EU.

Initially, the FDI screening instrument was framed as a tool to restore the level playing field in the area of investment[848], a domain destabilised by China's industrial policy.[849] The EU was concerned that China sought to exploit Europe's openness to foreign investment in order to gain influence or control over strategic

[846] See *supra* (n.722), Proposal to establish a framework for screening of foreign direct investments into the European Union, COM(2017)487 final.
[847] See *supra* (n.331), Gallo *et al*.
[848] See *supra* (n.720), 'Proposals for ensuring an improved level playing field in trade and investment'.
[849] This is inferred from the letter written by Germany, Italy and France to the Commission requesting the latter to "develop an appropriate instrument" which could complement existing national measures that could not exclude on the basis of security and public order that "European companies were acquired as part of other countries strategic industrial policies." The reference is clearly to China. See 'European Investment Policy: A Common Approach to Investment Control' (Politico, 28 July 2017), www.politico.eu/wp-content/uploads/2917/08/170728_Investment-screening_ non-paper.pdf.

European companies, even while European firms continued to face significant barriers to accessing the Chinese market.[850] Regulation 2019/452 responded to these concerns by granting Member States considerable authority to screen FDIs, including transactions that could enable foreign investors to acquire key technologies that are instrumental to national industrial strategies.[851]

Following the invasion of Ukraine, the Commission, as noted by Gallo and Poli, has revitalised its approach to protecting critical infrastructure and technologies from foreign influence.[852] It issued targeted guidelines to national authorities regarding investments from Russia and Belarus, asserting that "there is a heightened risk that any investment directly or indirectly related to a person or entity associated with, controlled by or subject to influence by the Russian or Belarusian government into critical assets in the EU may give reasonable grounds to conclude that the investment may pose a threat to security or public order in Member States".[853] This move represents a coordinated attempt to foster convergence across Member States in evaluating national security risks linked to inbound FDIs.

Furthermore, Robert highlights that the Commission, through the evolving interpretation of its current role, is seeking to expand its influence beyond what Regulation 2019/452 formally allows[854]. In its Second Annual Report on implementation, the Commission stated that "Article 7 allows the European Commission to screen *ex officio* investments of which it becomes aware with a Member State [independently] of the question of whether that Member State has its own screening mechanism or not".[855] Although Article 7 provides only for non-binding opinions, this phrasing strongly suggests a more proactive, quasi-operational role, one that blurs the line between coordination and actual oversight.[856] This strategic ambiguity reflects what appears to be a deliberate effort

[850] See Leonard M., Pisani-Ferry, J., Ribakova, E., Shapiro, J., and Wolff, GB., 'Redefining Europe's Economic Sovereignty'(2019) 9 Bruegel Policy Contribution.
[851] See *supra* (n.331), Gallo *et al*; see also *supra* (n.702), Zwartkruis *et al*.
[852] See *supra* (n.331), Gallo *et al*.
[853] European Commission, 'Guidance to the Member States concerning Foreign Direct Investment from Russia and Belarus in view of the Military Aggression against Ukraine and the Restrictive Measures laid down in recent Council Regulations on Sanctions' [2022] OJ C151I/1.
[854] See *supra* (n.711), Robert.
[855] See *supra* (n.722), Second Annual Report on the Screening of Foreign Direct Investments into the Union.
[856] See *supra* (n.711), Robert.

by the Commission to consolidate its competence in protecting the Union's strategic autonomy, even in the absence of explicit treaty powers to that effect.[857]

This evolutionary trend is driven not only by geopolitical shifts, but also by instances in which national decisions have diverged from the Commission's recommendations, most notably, the controversial partial acquisition of the Hamburg port terminal by COSCO, which was approved by Germany despite strong objections from Brussels[858]. This case exposed the limitations of the current regime and intensified calls to endow EU institutions with more robust enforcement powers to protect critical assets of Union-wide strategic relevance.

For all these reasons, the adoption of the new Proposal for a Regulation appeared to be not merely a technical update, but rather a necessary evolution aimed at addressing the critical shortcomings of Regulation 2019/452. This need was reaffirmed, as discussed in Section 4, in the 2024 Communication Advancing Economic Security in the European Union, where it was identified as one of the five key initiatives proposed to strengthen the Union's economic security framework. Subsequently, the Commission, in January 2024, adopted Proposal for a Regulation of the European Parliament and of the Council on the screening of foreign investments in the Union and repealing Regulation (EU) 2019/452 (COM(2024) 23 final)[859], accompanied by an Explanatory Memorandum and a Staff Working Document.

According to the Explanatory Memorandum, the revised Regulation seeks to mandate that all Member States implement a screening mechanism; it designates sectors where screening will be mandatory across the Union; and, importantly, it expands the scope of EU-level screening to cover not only non-EU investors, but also EU-based investors that are ultimately controlled by third-country entities. The Explanatory Memorandum makes this intention clear, asserting that "it is possible to make a distinction between the application of internal market freedoms to investments within the EU where the EU entity is

[857] ibid.
[858] Packroff, J., 'Hamburg Port Terminal Takeover Divides Berlin and Brussels' (21 October 2022) EURACTIV www.euractiv.com Since the opinions that the European Commission may issue on an investment project are confidential, it is not possible to know whether the Commission has issued one in this case. However, Robert (see *supra* (n.711)) assumes that it did, given that an essential infrastructure for the EU is involved.
[859] See *supra* (n.800), Proposal for a Regulation repealing Regulation (EU) 2019/452.

controlled by a non-EU country investor and pure intra-EU situations."[860] It concludes that "restrictions on transactions involving a non-EU country may be based on different considerations. This is also appropriate considering that these transactions are screened as part of a Union-wide cooperation mechanism".[861] In particular, the 2024 Proposal aims to overcome the structural and enforcement gaps of the existing framework by, amongst other things, enhancing the Commission's coordinating and supervisory role.

These reforms seek to transform a previously softly coordinated screening regime into a more harmonised and anticipatory governance tool aligned with the Union's strategic objectives, including the consolidation of European Technological Sovereignty, Economic Security and Strategic Autonomy. The forthcoming legislative process will therefore be decisive in determining whether the EU will equip itself with a more unified and anticipatory mechanism, capable of protecting its economic security.

In parallel, the Commission has also begun to shift its focus on outbound investments, marking a conceptual and institutional evolution: the extension of the logic of technological sovereignty and strategic control beyond inbound investment and toward the Union's outbound economic activity as well. As noted, in its Communication on a European Economic Security Strategy[862], the Commision explicitly states its intent to "examine security risks" associated with outbound investments, in coordination with national authorities. To assist its assessments of the risks of technology leakage linked to outbound investment the Commission in July 2023, as anticipated, established a dedicated Expert Group on Outbound Investments composed of the Commission and Member State experts which has been examining the issues related to the risk of critical technology and know-how leaking from the Union to third countries intentionally or unintentionally in the context of outbound investments. The concern, according to the Commission, is twofold: outbound investments may result in the "leaking" of sensitive technology and know-how, and they may also enable third-country governments to "enhance their military and intelligence capabilities," thereby

[860] European Commission, Explanatory Memorandum**,** in COM(2024) 23 final.
[861] ibid.
[862] European Commission and High Representative of the Union for Foreign Affairs and Security Policy, 'European Economie Security Strategy (2023) JOIN(2023) 20 final, 11.

undermining international security. This proactive stance was soon followed by the release of the White Paper on Outbound Investments, published in January 2024, which reflects a shift from defensive monitoring to anticipatory governance[863].

Subsequently, in January 2025, the Commission issued a Recommendation (EU) 2025/63[864], urging Member States to monitor and review outbound investments in the areas of: *i*) semiconductors, *ii*) artificial intelligence (AI), and *iii*) quantum technologies; identified as areas with significant risks of technology leakage that could enhance military and intelligence capabilities of actors potentially undermining international peace and security.[865] This Recommendation encourages Member States to assess transactions retroactively from January 1, 2021, and to report their findings by June 30, 2026.[866] The outcomes of these reviews are intended to inform potential future measures at both the Union and national levels to safeguard economic security.[867]

### 6.2 The Anti-Coercion Instrument: An Ex-Post Deterrence Tool

The adoption of Regulation (EU) 2023/2675, aimed at safeguarding the Union and its Member States from economic coercion by third countries and commonly referred to as the Anti-Coercion Instrument, represents a significant step in the evolution and pursuit of the EU's economic security and Strategic Autonomy. It exemplifies, as the FDI, the deepening of the so-called "unilateral turn" in the Union's trade and investment policy.[868]

The genesis of the instrument can be traced to the EU–US trade frictions under the Trump administration, but the proposal later acquired greater urgency in the context of increasing tensions with China. Historically, the Union has advanced a rules-based trade policy model focused primarily on economic

[863] White Paper on Outbound Investments (2024) COM/2024/24 final.
[864] Commission Recommendation (EU) 2025/63 of 15 January 2025 on reviewing outbound investments in technology areas critical for the economic security of the Union, C/2025/39, OJ L 2025/63, 15.1.2025.
[865] ibid, point 1.
[866] ibid, points 2 and 6.
[867] ibid, Preamble (6).
[868] Verellen, T., & Hofer, A., 'The Unilateral Turn in EU Trade and Investment Policy', 28(SI), *European Foreign Affairs Review*, (2023), pp. 1–14.

efficiency, growth, and job creation within the Union.[869] However, this orientation evolved. Recent years have seen the EU and its Member States increasingly targeted by economic coercion[870], a concept lacking a precise legal definition under international law.[871] Broadly construed, economic coercion may be understood as the use or threat of economic measures to compel a change in policy by the target state.[872] The phenomenon gained momentum during the Trump administration's "America First" agenda, which both undermined the credibility of the WTO dispute settlement system and reintroduced coercive trade practices into the international arena.[873] Early signs of this trend emerged during the US Section 301 investigation into France's digital services tax. Although the investigation did not culminate in trade sanctions, it did exert notable political pressure.[874] Following a partial and temporary restoration of transatlantic relations[875], China has emerged as the more prominent target of the ACI's operational rationale. Among the most illustrative cases is China's imposition of trade restrictions on Lithuania in retaliation for its diplomatic rapprochement with Taiwan.[876] Despite the EU's decision to initiate a WTO panel against China in this case,[877] the episode illustrated the limits of multilateral redress mechanisms, both in terms of their timeliness and substantive scope. First, the WTO dispute settlement process is notoriously protracted, making it ill-suited for crisis response.[878] Second, the WTO adjudication system is tailored to assess the

[869] Schaupp, L., 'Decoding the Intersection of Trade and Security in the EU's Anti-Coercion Instrument'. *European Foreign Affairs Review* 29, no. 2 (2024), pp. 133–158.
[870] Hackenbroich, J., Defending Europe's Economic Sovereignty: New Ways to Resist Economic Coercion, European Council on Foreign Relations (20 Oct. 2020), https://ecfr.eu/publication/defending_europe_economic_sovereignty_new_ways_to_resist_economic_coercion/.
[871] Milanovic, M., 'Revisiting Coercion as an Element of Prohibited Intervention in International Law,' 117(4) American Journal of International Law, (2023), pp. 601-650.
[872] Carter, B.E., 'Economic Coercion', *Max Planck Encyclopedias of International Law* (Oxford Public International Law (2009).
[873] Bown, C., 'Trump Ended WTO Dispute Settlement. Trade Remedies Are Needed to Fix It', 21(3) W. Trade Rev. 312–329 (2022).
[874] Impact Assessment Report Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union and its Member States from economic coercion by third countries (Impact Assessment Report), SWD(2021) 371 final, 8 December 2021, p. 5.
[875] See *supra* (n.869), Schaupp.
[876] Banka, A., 'Super Atlanticist in the EU? Vilnius Between Washington and Brussels', 28(2) Europen Foreign Affairs Review, (2023), pp. 165–184.
[877] EU Initiates WTO Dispute Complaint Regarding Chinese Restrictions on Trade With Lithuania, WTO (31 Jan. 2022), https://www.wto.org/english/news_e/news22_e/ds610rfc_31jan22_e.htm.
[878] See *supra* (n.869), Schaupp.

consistency of measures with WTO rules, but cannot address violations of customary international law rooted in coercive intent.[879]

The necessity of the ACI was also underscored by the rise of geopolitical instability and the growing phenomenon of economic interdependence being manipulated for strategic ends ("weaponized interdependence").[880] The Russian manipulation of gas flows during the months preceding and following the invasion of Ukraine is a case in point. Despite Russia's diminished leverage over EU economies today, the episode revealed the scale and potential of economic coercion in energy and other strategic sectors.[881] It also underscored the durability of economic coercion as a preferred tool of Statecraft among some of the EU's geopolitical rivals.[882] More recently, China's imposition of export restrictions on raw materials has reinforced the sense that Europe's resource dependencies may constitute a systemic vulnerability.[883]

With the WTO's dispute settlement system effectively paralysed or ineffective, the EU has opted to equip itself with a mechanism enabling unilateral enforcement of its rights. In this regard, the revised Trade Enforcement Regulation[884], operational since February 2021, permits the Union to impose countermeasures when a favourable WTO ruling is obtained but not followed by compliance from the losing party. In such cases, punitive measures such as tariffs or limitations on the applicability of intellectual property rights may be adopted. While this mechanism replaces multilateral enforcement with unilateral sanctions against non-cooperative behaviour, the ACI goes a step further. It empowers the EU to proactively deter and counteract to coercive economic measures imposed by third countries.[885] The European Commission, the Council, and the European Parliament jointly expressed their commitment to crafting a new instrument to deter and counteract economic coercion, aligning with both international and

[879] ibid.
[880] As stated by the Executive Vice-President and Commissioner for Trade, Valdis Dombrovskis, 'EU Strengthens Protection against Economic Coercion', 8 December 2021, https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6642.
[881] It was not the first time the Russian Federation used energy dependence as a foreign policy tool – see e.g., Newnham R., 'Oil, Carrots and Sticks: Russia's Energy Resources as a Foreign Policy Tool', 2(2) Journal of Eurasian Studies (2011), pp.134–142.
[882] See *supra* (n.869), Schaupp.
[883] China Imposes Export Curbs on Graphite, Financial Times (20 Oct. 2023), https://www.ft.com/con tent/8af8c05c-8e54-40e9-9051-5a0b2b036c32.
[884] See *supra* (n.687), Revised Trade Enforcement Regulation.
[885] See *supra* (n.168), Steinbach, at p. 989.

WTO law.[886] The Commission tabled its initial legislative proposal in December 2021, and the Regulation subsequently entered into force on 27 December 2023.[887]

Given the EU's exclusive competence in CCP under article 3(1)(e) TFEU, Member States lack the authority to respond independently to coercive measures targeting the Union.[888] The ACI was thus designed to empower the EU to act in such instances, under the broader strategic framework of both Open Strategic Autonomy[889] and the Economic Security Strategy. By contrast with the Enforcement Regulation, the ACI establishes a more extensive legal framework, enabling the formal qualification of certain third-country measures as acts of economic coercion.[890] Once coercion is established, the Commission must attempt to resolve the issue in an amicably manner.[891] If those efforts fail, the Union may adopt a tailored package of countermeasures, denominated Union Response Measures (URMs), which the Union may adopt to retaliate and to encourage the cessation of the coercion.[892]

Against this backdrop, the ACI emerges as the most visible manifestation of the EU's ongoing shift towards Strategic Autonomy in its trade policy.[893] As outlined in Chapter I, Hoffmeister, in the context of EU external relations, notes that SA entails "striving for multilateral solutions, while being able to take lawful action alone to safeguard the Union's values, fundamental interests, security, independence and integrity."[894] The ACI gives tangible expression to this doctrine. In contrast to other recently adopted autonomous trade measures, such as the

[886] For a discussion on the ACI's compliance with International Law, see Weiß, W., Furculita, C., 'The Anti-Coercion Instrument: Is There a Place for Unilateralism under International Rules?' In: *Open Strategic Autonomy in EU Trade Policy: Assessing the Turn to Stronger Enforcement and More Robust Interest Representation*. Cambridge Studies in European Law and Policy. Cambridge University Press, (2024), pp. 198-243; see also *supra* (n.293), Kübek *et al.*
[887] European Commission Press Release, New tool to Enable EU to Withstand Economic Coercion Enters into force (27 Dec. 2023), https://ec.europa.eu/commission/presscorner/detail/en/ip_23_6804.
[888] ACI Regulation, Preamble, recital 10; Xavier Fernández Pons, 'The European Commission's Proposed Anti-Coercion Instrument from an International Law Perspective' (2023) CIDOB, www.cidob.org/en/articulos/monografias/la_estrategia_geoeconomica_de_china/the_european_commission_s_proposed_anti_coercion_instrument_from_an_international_law_perspective, 57–63 at 60.
[889] See *supra* (n.869), Schaupp.
[890] ACI Regulation, Article 2.
[891] ACI Regulation, Article 6.
[892] ACI Regulation, Annex I.
[893] See *supra* (n.869), Schaupp.
[894] See *supra* (n.4), Hoffmeister, at p. 673.

Foreign Subsidies Regulation[895] or the International Procurement Instrument[896], which aim to level the playing flied with third countries, the ACI embodies a broader transformation. In fact, while the shift from multilateralism to unilateralism is evident across instruments.[897] the ACI differs in its core rationale. Its objective is not merely to level the playing field, but to respond to evolving geopolitical dynamics. The ACI is not just a legal mechanism regulating trade; it is a strategic tool for confronting threats posed by state-driven economic coercion.[898] As such, it sits at the intersection of trade law, sovereignty, and foreign policy, anchoring the EU's evolving conception of itself as a geopolitical actor.[899]

### 6.2.1 The Content of the ACI

As noted, through the adoption of the ACI, the EU intends to safeguard both its own interests and those of its Member States by establishing the capacity to respond to economic coercion exerted by third countries in a "uniform and structured manner".[900] The principal objective of this regulatory mechanism is conceived as a deterrent; the European Commission aspires that the very existence of the ACI will discourage third countries from resorting to economic coercive practices. Should deterrence prove ineffective, in the event of failure to dissuade third countries from engaging or continuing economic coercion conducts, the Regulation envisages the deployment of Union Response Measure as a measure of last resort.[901]

Article 2 of the ACI Regulation delineates the scope of application of the instrument, specifically in circumstances involving "economic coercion" directed at the Union or its Member States. According to the first paragraph, two cumulative conditions must be satisfied in order for a situation to qualify as

[895] See *supra* (n.334), Foreign Subsidies Regulation.
[896] Regulation (EU) 2022/1031 of the European Parliament and of the Council of 23 June 2022 on the International Procurement Instrument, OJ L 173 (30 Jun. 2022).
[897] Meunier, S., 'The End of Naivety: Assertiveness and New Instruments in EU Trade and Investment Policy', European University Institute, (2022).
[898] The ACI's mission is to deter economic coercion by enabling the EU to respond to third countries' attempts to exert economic leverage, coercing a Member State or the entire bloc into altering their sovereign policy choices. See ACI Regulation, Preamble recital 7.
[899] See *supra* (n.869), Schaupp.
[900] See *supra* (n.880), Dombrovskis.
[901] Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union and its Member States from economic coercion by third countries, COM(2021) 775 final, 8 December 2021, Explanatory Memorandum, pp. 1, 6; ACI Regulation, Preamble, recital 8.

economic coercion.[902] First, there must be an act or a threat by a third country to apply a third-country measure that impacts trade or investment.[903] Second, such act or threat must pursue the objective of preventing, inducing the cessation of, modifying, or securing the adoption of a particular act by either the Union or a Member State, thereby "interfering with the legitimate sovereign choices of the Union or a Member State".[904] Moreover, paragraph 2 of Article 2 sets out a number of elements that must be "taken into account" in determining whether the criteria for economic coercion are fulfilled: (1) "the intensity, severity, frequency, duration, breadth and magnitude of the third country's measure, including its impact on trade or investment relations with the Union, and the pressure arising from it on the Union or a Member State"; (2) "whether the third country is engaging in a pattern of interference seeking to prevent or obtain particular acts from the Union, a Member State or another third country"; (3) "the extent to which the third-country measure encroaches upon an area of the Union's or a Member State's sovereignty"; (4) "whether the third country is acting on the basis of a legitimate concern that is internationally recognised"; and (5) "whether and in what manner the third country, before the imposition or application of the third-country measure, made serious attempts, in good faith, to settle the matter through international coordination or adjudication, either bilaterally or within an international forum".[905]

According to the Impact Assessment Report that accompanied the proposal for the ACI Regulation, the notion of "economic coercion" as set out in Article 2(1) is broadly constructed, encompassing a variety of forms in terms intensity, formality and nature.[906] Accordingly, coercive measures may be overt, such as those enabled by Section 301 of the United States Trade Act of 1974, which authorizes the imposition of trade-restrictive measures by the United States in response to practices by other countries considered unjustified and harmful to U.S. business interests, even where no breach of international law is alleged. At the same time, coercive actions may take more subtle forms, including the strategic misuse of apparently lawful instruments, such as the introduction of

[902] ACI Regulation, Article 2.
[903] ibid.
[904] ibid.
[905] ibid, Article 2(2).
[906] See *supra* (n.874), Impact Assessment Report, p. 7.

discriminatory sanitary or phytosanitary regulations ostensibly for health protection, but, in reality, aimed at exerting pressure. The definition also extends to other types of conduct that satisfy the relevant conditions, including informal practices such as boycotts conducted by private firms acting under unofficial direction from a third country's government with the aim of influencing the policy choices of another government.[907] Extraterritorial sanctions, such as those covered under the EU Blocking Statute[908], which aims to shield EU entities from having to comply with such foreign sanctions, may also fall within the scope of the ACI, but only where such sanctions simultaneously exert pressure on the government of the EU operator.[909]

The inclusive nature of this definition further derives from the fact that the interference may occur in any field of competence belonging either to the Union or to its Member States, and is not confined to areas of trade or investment policy.[910] Additionally, coercive actions undertaken through entities located within the Union but controlled or directed by a third country could also fall within the scope of the Regulation, to the extent that they are imputable to the third country under Article 8 of the ILC Draft Articles on State Responsibility[911] and provided that they exert a coercion on the Union or its Member States.[912] Nonetheless, the Regulation's preamble underscores that economic coercion only qualifies as an internationally wrongful act when it attains a particular "qualitative or quantitative threshold," such that only coercive acts producing a sufficiently serious impact, or, in the case of threats, only those that are credible, trigger the Regulation.[913]

The procedural mechanism set out in the Regulation begins with an assessment of whether the measure adopted by the third country satisfies the conditions for economic coercion as defined in Article 2. This assessment may be launched at the initiative of the Commission or in response to duly substantiated

[907] ibid, p. 9.
[908] See *supra* (n.693), EU Blocking Statute.
[909] Impact Assessment Report, pp 9-10.
[910] See *supra* (n.886), Weiß, *et al.*
[911] Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries (ILC Draft Articles with Commentaries), in Report of the International Law Commission on the Work of Its Fifty-third Session, UN Doc. A/56/10, (2001) *Yearbook of the International Law Commission*, vol. II, Part Two.
[912] ACI Regulation, Preamble, recitals 7, 16.
[913] ACI Regulation, Preamble, recital 15.

information received from a credible source.[914] Upon conclusion of the examination, the Commission may propose a decision to the Council, in the form of an implementing act, in which the latter determines whether the requirements of Article 2 are met[915]. Before making such a proposal, the Commission may invite the third country to present its observations.[916] Where appropriate, the Commission may also propose that the Council formally request the third country to repair the injury caused by the coercive measure.[917] The Council, acting by qualified majority voting, is responsible for determining whether the third country's conduct constitutes economic coercion and, if so, for issuing a formal request of cessation of the measure immediately, and of reparation of the injury caused in a reasonable period of time.[918] The European Parliament must be kept informed about the outcome of the Commission's examination and any acts adopted by the Council.[919]

Once the determination is made, the Commission must ensure that the third country is offered an adequate opportunity to enter into consultations aimed at ending the coercive conduct and, if requested, at securing reparation through mechanisms such as negotiations, mediation, conciliation, good offices, or recourse to international adjudication.[920] These avenues are pursued without prejudice to the Commission's right to raise the issue in pertinent international fora, following consultation with the Council.[921]

Should the above avenues fail to yield results, the Commission is authorized, as a last resort, to adopt countermeasures (or URM).[922] These are taken by the Commission through implementing acts designating the specific measure to be taken and the date for application, when it is necessary to protect Union's or Member States' interests and rights and the action is in the interest of the Union in light of the available options.[923]

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[914] ibid, Article 4(1), (2).
[915] ibid, Article 2.
[916] ibid, Article 5(1), (3).
[917] ibid, Article 5(2).
[918] ibid, Article 5(2), (5), (9).
[919] ibid, Article 5(4), (8).
[920] ibid, Article 6(1).
[921] ibid, Article 6(2).
[922] ibid, Article 8(1).
[923] ibid.

The Commission decides which URM to adopt but it is required to comply with strict standards and criteria concerning the appropriateness of the response measures.[924] The adoption of implementing acts is subject to comitology procedures governed by Article 18 of the ACI[925]. While the standard procedure permits the Commission to proceed in the absence of an opinion by the examination committee, Article 18(2) modifies this rule such that the failure to issue an opinion effectively blocks adoption[926]. Nonetheless, pursuant to Article 5(4), third subparagraph of the Comitology Regulation[927], the matter can be referred to an appeal committee, whereupon the Council may only block the act through a qualified majority, raising the bar for obstruction.[928]

Following the adoption of response measures, the third country is to be notified and given the opportunity to cease its conduct and repair the injury done (if requested by the Council), while also being offered the possibility of entering negotiations.[929] In urgent situations requiring immediate action to ensure effectiveness, the Union may proceed without delay.[930] Annex I to the Regulation provides a binding list of permissible measures the Commission may adopt under Article 8(2)[931]; unlike the original proposal, the final text prohibits the Commission from modifying this Annex.

Response measures may include the non-performance of international obligations vis-à-vis the third country, provided that its conduct qualifies as an internationally wrongful act.[932] This means that two categories of measures exist: those that consist of the non-performance of an international obligation, and those that are self-standing measures. As noted by Schaupp, "together, these measures underline the unilateral nature of the instrument. They constitute an integrated approach for responding to third country economic coercion by creating a one-stop-shop for a range of sanctions from which the Commission can design a

[924] ibid, Article 8(2),(3).
[925] ibid, Article 18; See *supra* (n.513), Comitology Regulation, Article 3.
[926] ACI Regulation, Article 18(2).
[927] See *supra* (n.513), Comitology Regulation.
[928] For critcisim see Dreyer, I., 'Ostrich Policy: The EU's Anti-coercion Instrument Risks Becoming a Damp Squib' (2022) *Borderlex*, 1 February 2022, https://borderlex.net/2022/02/01/comment-ostrich-policy-the-eus-anti-coercion-instrument-risks-becoming-a-damp- squib/.
[929] ACI Regulation, Article 8(7).
[930] ibid, Article 8(10).
[931] ibid, Annex I and Article 8(2).
[932] ACI Regulation, Article 8(4).

response to interference with the sovereign decisions of the EU and its Member States".[933]

***Range of Potential URM under the ACI Pursuant to Annex I of Regulation (EU) 2023/2675 (n. 6).***

| | |
|---|---|
| 1. | Imposition of new or increased customs duties, including those beyond most-favoured-nation levels |
| 2. | Introduction or increase of import/export restrictions or payment restrictions on goods |
| 3. | Introduction of trade restrictions affecting transiting or internal measures for goods |
| 4. | Measures impacting participation in public procurement, including exclusion of goods, services, or suppliers and score adjustments of a tender resulting from its evaluation |
| 5. | Measures affecting trade in services |
| 6. | Measures affecting foreign direct investment (FDI) access to the Union |
| 7. | Restrictions on intellectual property (IP) rights or their commercial exploitation for third-country nationals |
| 8. | Restrictions on banking, insurance, capital market access, and other financial services |
| 9. | Introduction or increase of restrictions on goods under Union chemical regulations |
| 10. | Introduction or increase of restrictions on goods under Union sanitary and phytosanitary (SPS) regulations |

In principle, all conceivable types of actors can be subject to URM. Indeed, the URMs may be applied as measures of general application, for instance, if all exports to a third country become subject to restrictions or can target specific natural or legal persons.[934] Article 10 of the ACI Regulation defines the criteria for a natural or legal person being considered connected to a third country's government.[935] This connection can be established if the government has significant ownership or control over it, if it benefits from government-granted

[933] See *supra* (n.869), Schaupp.
[934] ibid, Article 8(3).
[935] ibid, Article 10.

exclusive rights or operates in a sector with limited competition due to government actions, as well as if the legal or natural person acts on behalf of or under the direction of the third country's government. By doing so, the ACI accounts for a wide set of potential actors which it can cover. The example of China shows the importance of this extensive approach, as the intertwined nature of the economy, the administration and the Chinese Communist Party render it difficult to address bilateral issues through established *fora* such as the WTO.[936]

Article 11 outlines the governing selection and design criteria of countermeasures[937]. In particular, such measures must be proportionate to the injury suffered and must be designed with regard to the determinations and evaluative elements considered during the coercion assessment process, while also reflecting the Union's overall interests. Additional criteria include their effectiveness, the avoidance or minimization of negative impacts on affected EU actors, on the investment environments, on promotion of economic growth and employment, and on Union policies or objectives, potential to provide relief, avoidance of disproportionate administrative complexities and costs, measures taken by other countries, and any other relevant criteria established in international law.[938] While private enforcement was omitted[939], the regulation does introduce a genuine innovation in EU trade law which has the potential to enhance the effectiveness of the instrument. In fact, where other countermeasures prove inadequate, the Commission may, as a final option, implement internal EU

[936] Wu, M., 'The 'China, Inc.' Challenge to Global Trade Governance', 57(2), Harvard International Law Journal, (2016), pp. 1001–1063.
[937] ACI Regulation, Article 11.
[938] ibid, Article 11(2).
[939] The Regulation does not establish a mechanism for private enforcement, thereby precluding private economic operators from invoking the Anti-Coercion Instrument before national or Union courts, or from compelling institutional action in response to coercive measures, this omission reflects the instrument's deliberately intergovernmental and centralised enforcement architecture. Unlike other areas of EU law, such as competition or internal market regulation, where private parties may play an active role in initiating proceedings or seeking judicial remedies, the ACI confers exclusive initiative and implementation powers on the European Commission and the Council. As a result, affected individuals or undertakings are not vested with standing to trigger or contest the application of the instrument, nor to claim redress under its framework. This institutional design choice underscores the Union's preference for a uniform and politically coordinated response to acts of economic coercion, which are inherently linked to external action, foreign policy sensitivities, and the exercise of EU-level discretion under the CCP. Nevertheless, despite the exclusion of private enforcement mechanisms, the Regulation constitutes a genuine innovation in EU trade law by introducing a unified legal framework capable of responding, in a structured and proportionate manner, to third-country conduct that threatens the Union's legitimate sovereign choices and economic autonomy.

measures targeting foreign direct investment or trade in services involving entities owned or controlled by nationals of the coercing third country (Article 11(4)).

To ensure proportionality and temporal limitation, the Regulation mandates that response measures not remain in force longer than necessary. For instance, if the third country suspends the coercive conduct and both parties agree to submit the matter to binding dispute resolution, the Commission is required to suspend the response measures through an implementing act.[940] Final termination of the measures shall occur, again by implementing act, in the event that the coercion ceases and the injury is remedied (if such reparation was demanded), or in cases where the injury remains unremedied but coercion has ended, where a mutual solution is achieved, where a binding decision of by a third-party adjudicating on the economic coercion requires withdrawal, or where it is otherwise in the Union's interest to do so.[941] In addition, response measures may be suspended or amended for duly justified grounds, particularly to ensure consistency with the Union's international obligations.[942]

### 6.2.2 The ACI Between Trade and Security Policy

The European Union's pursuit of Strategic Autonomy and economic security increasingly involves navigating the intersection between economic instruments and foreign policy objectives. This convergence is evident in the recent evolution of the Union's external action toolbox, particularly through mechanisms that operate at the threshold between trade regulation and security policy. Among these, ACI represents a paradigmatic development. Indeed, the ACI was heralded as proof that the Union was prepared to adapt its trade policy to emerging threats, "as if the calls for the EU to adapt to the increasing geopoliticization of economic measures had been answered".[943] In particular, the ACI was interpreted by some as "potentially leading to a further pushing of the boundaries of the EU's exclusive Common Commercial Policy (CCP) competence to the detriment of the more intergovernmental Common Foreign and Security

[940] ibid, Article 12(2), second subparagraph.
[941] ibid, Article 12(4).
[942] ibid, Article 12(5).
[943] Meunier, S., & Nicolaïdis, K., 'The Geopoliticization of European Trade and Investment Policy', 57(S1) Journal of Common Market Studies, (2019), pp. 103–113.

Policy (CFSP),"[944] *de facto* conferring executive competences in foreign and security policy to the Union that were previously absent.[945]

The ACI seeks to defend EU's economic sovereignty by deterring and counteracting coercive measures imposed by third countries, yet does so through a legal framework rooted in the Union's CCP. As such, the ACI exemplifies the growing interdependence between trade and security and reveals the legal and institutional tensions embedded in the architecture of the EU's Economic Security Strategy.

The negotiation history of the ACI illuminates the complexity of this nexus. One of the most significant points of contention during the legislative process was the allocation of the power to determine whether a third-country measure qualifies as "economic coercion" under Article 2 of the Regulation. The initial Commission proposal conferred this competence upon the Commission itself, thereby equipping it with considerable discretionary authority.[946] In this context, as noted, the notion of economic coercion is not construed narrowly. This expansive approach was matched by a significant delegation of executive discretion to the Commission, which would have unilaterally assessed whether the cumulative conditions for coercion were met.[947] However, the final version of the ACI shifted this power to the Council, which must now adopt an implementing act, proposed by the Commission, by qualified majority voting to determine the existence of economic coercion.[948] The Council's capacity to amend the Commission's proposal of the implementing act prior to adoption underscores the degree to which executive control has been rebalanced in favour of the intergovernmental dimension.[949] This outcome is particularly notable given that the ACI is legally founded upon the CCP, an area of exclusive EU competence where supranational decision-making typically prevails.[950]

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[944] See *supra* (n.868), Verellen.
[945] For a recent discussion in the proximity of CFSP and Trade sanctions in the context of EU strategic autonomy, see Lonardo, L., & V. Szép, V., 'The Use of Sanctions to Achieve EU Strategic Autonomy: Restrictive Measures, the Blocking Statute and the Anti-Coercion Instrument', 28(4) European Foreign Affairs Rev. 363–378
[946] See *supra* (n.901), Proposal of the European Commission's, Article 4.
[947] ibid.
[948] ACI Regulation, Article 5.
[949] ibid, Article 5(5).
[950] Supranational decision-making refers to decisions that are subject to the ordinary legislative procedure under Arts 289 and 294 TFEU. This involves the European Parliament and the Council acting as co-legislators, with the latter using a QMV to adopt or reject legislative proposals.

The legal mechanism enabling this shift lies in Article 291(2) TFEU, which establishes that implementing powers are ordinarily conferred on the Commission but may be allocated to the Council in "duly justified specific cases" or in the cases provided for in articles 24 and 26 TEU (cases within the CFSP). In the context of the ACI, the Council justified its intervention on the basis that the designation of economic coercion could generate significant diplomatic and geopolitical repercussions, warranting Member State oversight.[951] While Council implementing acts are not unprecedented, they have traditionally been used in fields with direct fiscal or budgetary implications for Member States[952] and do not require more than a detailed statement of reasons why implementing powers are to be conferred to the Council.[953] This position found partial validation in the CJEU's Fenix International judgment, which held that implementing powers may be entrusted to the Council where budgetary impacts on Member States justify such delegation.[954] Though the ACI Regulation explicitly states that it should not set a precedent[955], it remains the only trade instrument currently in force that entrusts the Council with implementing power, an anomaly that signals the political sensitivity surrounding the trade–security interface.

The transfer of decision-making authority from the Commission to the Council can thus be understood as an institutional recalibration, reflecting both legal flexibility and political compromise. The Treaties provide no predetermined procedural model for instruments that operate at the intersection of the CCP and the CFSP. On the one hand, the Commission is, under Article 17(1) TEU, charged with representing the Union externally, save in matters of CFSP; on the other, the Council retains the power to define the Union's external strategic objectives under Article 16(6) TEU, and to frame and implement CFSP decisions under Article

Decisions are consequently subject to approval by both supranational legislators. CFSP decisions, by contrast, are taken unanimously by the Council, with Parliament's role being limited to information and consultation. Even though the Council, acting at EU level, is formally a supranational body as well, it is composed of ministers from each EU country, thus representing the different national interests of the Member States.

[951] ACI Regulation, Preamble recital 18.

[952] Examples include the Recovery and Resilience Facility (Regulation (EU) 2021/241) as well as the Rule of Law Mechanism (Regulation (EU) 2020/2092), where the Council adopts the implementing act 'in view of the financial effects of the measures' (recital 20).

[953] Case C-440/14 P – National Iranian Oil Company v. Council ECLI:EU:C:2016:128. paras 49 and 50.

[954] Case C-695/20 Fenix International ECLI:EU:C:2023:127. para. 39.

[955] ACI Regulation, Preamble recital 18.

26(2) TEU. The Council and Commission, assisted by the High Representative, must cooperate to ensure consistency in external action, comprising areas such as the CCP and the CFSP. However, no legal mechanism operationalises this obligation when a measure straddles both domains, as the ACI arguably does.[956]

The Commission and co-legislators relied on Article 207(2) TFEU throughout the legislative process, not questioning the choice of legal basis.[957] Nevertheless, the formulation of economic coercion in the ACI touches on concerns extending beyond trade policy narrowly construed. As noted, the that ACI is not intended to create a level playing field in the area of international trade, but to safeguard sovereignty, therefore, it essentially pursues distinct security interests, displaying substantive elements of a CFSP logic. In fact, although the ACI does not formally invoke CFSP competences, its functional proximity to foreign policy is difficult to ignore. The objective of deterring coercive interference in "legitimate sovereign choices" resonates with the broader aim of protecting political autonomy, an aim traditionally associated with state security.[958] Nevertheless, the ACI is explicitly grounded in Article 207 TFEU, which anchors the CCP and grants the EU exclusive competence in matters of trade. As such, despite its hybrid content, the ACI is qualified as a *de jure* a trade instrument.

This choice of legal basis raises complex interpretive questions. Under the its "centre of gravity" doctrine[959] the ECJ has attempted to provide certainty in cases of overlapping competences, affirming that the determination of the appropriate legal base must be guided by the measure's predominant objective or main purpose rather than incidental affects when assessing its legality or appropriateness[960]. In Daiichi Sankyo, the Court held that an EU act does not fall

[956] See *supra* (n.869), Schaupp.
[957] Compare ACI Regulation, the European Commission's Proposal and Council of the European Union, Mandate for negotiations with the European Parliament on the Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union and its Member States from economic coercion by third countries, Interinstitutional File 2021/0406 (COD) (2021).
[958] ibid.
[959] See Case C-45/86 – Commission v. Council ECLI:EU:C:1987:163, para. 11; Case C-300/89 Commission v. Council ECLI:EU:C:1991:244; para. 10. Case C-263/14 – Parliament v. Council ECLI: EU:C:2016:435, para. 43. Case C-244/17 – Commission v. Council (Agreement with Kazakhstan) ECLI: EU:C:2018:662, para. 36; Case C-180/20 – Commission v. Council (Agreement with Armenia) ECLI:EU: C:2021:658, para. 32 and the case-law cited therein.
[960] A. Engel, A., 'The Choice of Legal Basis for Acts of the European Union Competence Overlaps, Institutional Preferences, and Legal Basis Litigation', 14f (1st ed., Springer International Publishing, (2018).

under the CCP merely because it affects trade[961]. Rather, it must "relate specifically" to international trade and be "essentially intended to promote, facilitate or govern trade," while having "direct and immediate effects" on trade flows.[962] Therefore, two central criteria must be observed in order to determine whether a measure falls within the scope of the CCP. First, the measure must be "specifically related to trade, while leaving open the precise nature of that relationship, whether it aims to "promote, facilitate or govern" trade. Second, it must produce "direct and immediate effects" on trade. As for the second criterion, it is crucial to conduct an in analysis of the legality of Union Response Measures. With regards to some of Union Response Measures enumerated in Annex I of the ACI, as those covering tariffs, restrictions on services, foreign direct investment, and trade-related intellectual property, as they are expressively mentioned by the first paragraph of Article 207 TFEU, they clearly fall within the scope of the CCP. For other measures, the ECJ in Opinion 2/15 established that an EU act falls under the CCP if "it relates specifically to such trade in that it is essentially intended to promote, facilitate or govern such trade and has direct and immediate effects on it".[963] Accordingly, where a response measure is not expressly enumerated in Article 207 TFEU, its inclusion under the scope of the CCP requires demonstration that it exerts direct and immediate effects on trade. The ECJ extended the reach of the CCP to encompass ancillary disciplines that, while not trade measures *stricto sensu*, are sufficiently trade-related in their impact.[964] This includes areas such as public procurement, which the Court acknowledged as falling within the CCP insofar as it governs market access for goods and services. Similarly, measures concerning chemicals and sanitary or phytosanitary (SPS) standards, although not explicitly mentioned in Article 207(1), form part of the EU's international trade commitments, as they are regularly incorporated into bilateral and multilateral trade agreements concluded by the Union pursuant to its exclusive trade competence.[965] Consequently, where the ACI contemplates the suspension of such

[961] Case C-414/11 – Daiichi Sankyo ECLI:EU:C:2013:520, para. 32(1).
[962] ibid.
[963] See *supra* (n.322), Opinion 2/15, para. 36.
[964] Cremona, M., 'Defining the Scope of the Common Commercial Policy', in Hahn, G., & Van Der Loo, B., *Law and Practice of the Common Commercial Policy* (2020), pp. 47–70.
[965] See the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) and the Rotterdam Convention on the prior informed consent procedure for certain hazardous chemicals and pesticides in international trade.

obligations as a form of Union response, the legal basis remains within the confines of the CCP. These measures relate to the non-performance of international commitments undertaken in trade agreements and, by virtue of their direct and immediate effects on trade flows, satisfy the substantive conditions established by the Court for falling under Article 207 TFEU.

With regard to the first criterion, whether the measure is specifically related to trade, it is necessary to interpret the ACI based on its overall objective and legal context. This requires "to consider [...] the context in which it occurs and the objects of the rules of which it is part."[966] Thus, to assess whether the ACI is specifically related to trade (and therefore the CCP), one must identify its stated objectives. According to the text of the Regulation, the ACI aims at "deterring economic coercion or obtaining the cessation of economic coercion, whilst enabling the Union, as a last resort, to counteract economic coercion through Union response measures."[967] In this light, the instrument's core objective is to empower the EU to react to economic coercion, which is defined as occurring: "where a third country applies or threatens to apply a third-country measure affecting trade or investment in order to prevent or obtain the cessation, modification or adoption of a particular act by the Union or a Member State, thereby interfering in the legitimate sovereign choices of the Union or a Member State". [968] This interpretation confirms a structural link between economic coercion and the domains of trade and investment, thereby fulfilling the conditions established in the Court of Justice's case law.

However, this raises a further question: does the reference to "legitimate sovereign choices" also indicate a connection between the ACI and CFSP competences? The preamble of the Regulation seems to reinforce this interpretation, affirming that: "[...] it is essential that the Union possess an appropriate instrument to deter and counteract economic coercion by third countries in order to safeguard its rights and interests and those of its Member States. This is particularly the case where third countries interfere in the legitimate sovereign choices of the Union or a Member State by applying or threatening to

[966] Case C-292/82 – Merck Hauptzollamt Hamburg-Jonas ECLI:EU:C:1983:335, para. 12.
[967] ACI Regulation, Article 1(2).
[968] ibid, Article 2(1).

apply measures affecting trade or investment".[969] This definition clearly goes beyond trade policy objectives alone. It encompasses a wider category of sovereign policy decisions, thereby introducing a link to broader non-trade objectives, most notably, the preservation of political and institutional sovereignty, which are fundamentally tied to state security. While the Regulation does not explicitly refer to foreign and security policy competences, it does draw from the foundational principles of EU external action outlined in Articles 3(5) and 21(1) TFEU.[970] The Treaty of Lisbon thus mandates that such goals be pursued through all instruments of the Union's external policy, including those based on the CCP.

Yet the ACI never refers to CFSP competences as its formal legal basis, nor does it align with the criteria proposed by Advocate General Bobek in CSUE v KF, who suggested that an CFSP act must both be "formally based on CFSP provisions"[971] and "correspond, as to its content or substantively, to a CFSP measure".[972] While the ACI may meet the second criterion, it does not satisfy the first, leading to the unsatisfactory but legally necessary conclusion that it cannot be treated as a CFSP act.[973] To sum up, the ACI *de facto* operates at the intersection of trade and security, while *de jure* being a trade instrument.[974]

That the ACI advances more than one policy objective is not an isolated phenomenon, as the coexistence of multiple legislative aims is a well-established feature of EU law. Where an act pursues several substantive objectives that are not merely ancillary, the Union legal order typically adopts a pragmatic solution, allowing the act to be based on multiple corresponding legal bases.[975] The deeper issue here lies in the inadequacy of the EU's current competence framework to account for hybrid instruments that operate across trade and security. The Treaty architecture, by rigidly separating CCP and CFSP, each with distinct procedural and institutional logics, makes it impossible to base a single instrument on both.

In fact, the recourse to a dual legal basis is not possible where different procedures apply for each legal basis.[976] This leads to artificial choices that

[969] ibid, Preamble, recital 7.
[970] ibid, Preamble, recitals 1 and 2.
[971] Opinion of AG Bobek, Case C-14/19 P – CSUE v. KF ECLI:EU:C:2020:220, para. 61.
[972] ibid.
[973] See *supra* (n.869), Schaupp.
[974] ibid.
[975] Case C-130/10 – European Parliament v. Council of the European Union ECLI:EU:C:2012:472, paras 43– 45 and the case-law cited therein.
[976] ibid, para. 45.

obscure the functional realities of EU external action. As a result, as noted by Schaupp, instruments like the ACI must adopt a legal "costume" that fits one domain, even when their operational logic clearly spans both.[977] This legal fiction may ensure procedural conformity, but it complicates the effectiveness and legitimacy of EU action in the face of external threats. Indeed, while the Commission successfully preserved the trade legal basis, the Council strategically asserted its role by demanding implementing powers. The resulting compromise illustrates a broader institutional dynamic: in the absence of legal mechanisms to share control over hybrid instruments, political negotiation becomes the *de facto* mode of coordination. This logic is not inherently problematic. On the contrary, the interaction between formal legal provisions and informal political practices has historically underpinned the emergence of compromise solutions throughout the development of the EU.[978] While these compromises often lead to institutional arrangements that are incomplete or fragmented, such institutional incompleteness tends to generate demands for further reform. In many respects, it is precisely this ongoing pursuit of institutional refinement that fuels deeper integration and drives the overall evolution of the EU legal and political system.[979]

In other words, Schaupp contends that this dialectical process of provisional solutions followed by incremental correction characterizes the Union's *sui generis* institutional architecture.[980] Nonetheless, this observation risks oversimplifying the case of the ACI, and possibly of future instruments that similarly seek to expand EU action in foreign and security policy by relying on existing legal competences. Such an approach presents, in Schaupp's vision, at least two concerns. First, from the standpoint of legal certainty, it blurs the delineation between different policy domains as set out in the Treaties.[981] Second, and arguably of greater relevance for those focused on the Union's external action, is that the formulation of new legal instruments primarily on the basis of institutional logic, rather than in response to strategic necessity, risks undermining their effectiveness.[982] If the design of such instruments reflects internal

[977] See *supra* (n.869), Schaupp.
[978] ibid.
[979] Jones, E., Kelemen R., & Meunier, S., 'Failing Forward? Crises and Patterns of European Integration', 28(10) Journal of European Public Policy, (2021), pp. 1519–1536.
[980] See *supra* (n.869), Schaupp.
[981] ibid.
[982] ibid.

institutional compromises more than the nature of the external challenges they are meant to address, their functional adequacy may be impaired[983].

The rationale for maintaining a legal separation between policy areas with different procedural regimes becomes questionable when, in practice, the political process rightly dissolves such rigid boundaries. Yet, the current division of competences in EU law renders a strict separation between trade and security effectively unavoidable from a legal standpoint. This, however, only becomes a significant concern if the legal basis of such an instrument is successfully contested before the Court of Justice. In the case of the ACI, such a challenge, in Schaupp's opinion[984], appears improbable, as there exists broad consensus on the need for the instrument, and its contribution to strengthening the Union's trade posture has not provoked significant legal opposition. A definitive resolution that would allow legal acts to simultaneously and explicitly pursue both trade and security objectives, without engaging in artificial legal constructions, would require an amendment of the Treaties.[985] Although institutional discussions on Treaty reform have recently gained traction[986], the prevailing political uncertainty in the Union suggests that, at least for now, the persistence of legal ambiguity must be accepted.

In conclusion, the ACI reveals both the potential and limitations of the EU's current legal order to respond to security-related challenges through economic instruments. It affirms the Union's capacity to defend its autonomy and interests against economic coercion, yet does so within a framework that remains structurally ill-suited to addressing hybrid threats. The legal classification of the ACI as a CCP measure is formally correct but functionally incomplete; its operation is unavoidably intertwined with security logics more typical of CFSP instruments. As the EU continues to develop its economic security strategy, the ACI may serve as both a model and a cautionary tale: a model of legal innovation in defence of sovereignty, and a reminder of the constitutional and institutional frictions that continue to shape the contours of European Strategic Autonomy.

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[983] ibid.
[984] ibid.
[985] ibid.
[986] European Parliament Press Release, EU Treaties Reform: MEPs Submit Proposals to Strengthen EU Capacity to Act (25 Oct. 2023), https://www.europarl.europa.eu/news/en/press-room/ 20231023IPR08163/eu-treaties-reform-meps-submit-proposals-to-strengthen-eu-capacity-to-act.

# CONCLUSION

The evolution of Strategic Autonomy as a normative, legal, and operational concept within the European Union reflects the Union's sustained attempt to reconcile its foundational commitments to multilateralism, legalism, and integration with the imperatives of resilience, geopolitical maturity, and economic sovereignty. This thesis has argued that Strategic Autonomy, far from being a fixed or singular objective, represents a dynamic and contested legal-political project. Its realisation depends on the interplay between institutional capacity, normative commitments, and legal constraints. SA is not merely a slogan or strategic narrative; it is a complex process embedded in the constitutional fabric of the Union, requiring not only legal instruments and policy coherence but also a structural alignment between competence, legitimacy, and effectiveness.

Chapter I demonstrated how SA has evolved from its early associations with defence and crisis management under the Common Security and Defence Policy (CSDP), to become a central organising principle in a range of policy domains including trade, technology, and industrial policy. The Saint-Malo Declaration and the 2016 EU Global Strategy laid foundational political ground for its development, but the decisive turn came with the von der Leyen Commission's agenda to frame the EU as a "geopolitical actor." The Trade Policy Review (2021), the European Economic Security Strategy (2023), and the Competitiveness Compass (2025) each illustrate how Strategic Autonomy has been reframed as an internal resilience strategy with external effects. However, this evolution has also diluted the definitional clarity of SA. As the thesis has argued, the more SA is deployed across heterogeneous contexts, the more its conceptual coherence is placed at risk. The Commission's embrace of Open Strategic Autonomy (OSA) captures this duality: it reflects both a desire for flexible global engagement and a tendency toward constitutional ambiguity. The Commission's endorsement of Open Strategic Autonomy (OSA) as "the EU's ability to make its own choices and shape the world around it through leadership and engagement, reflecting its strategic interests and values" reflects both the ambition and the ambiguity of the term. On one reading, this inclusiveness facilitates strategic flexibility; on another, it risks reducing SA to a malleable slogan, undermining its coherence as a legal and political standard.

Chapter II analysed the constitutional foundations and constraints on the pursuit of Strategic Autonomy. It found that the Treaties both empower and restrain the Union in external action. Article 3(5) and Article 21 TEU articulate a normative mandate for the EU to promote peace, rule of law, human rights, and multilateralism. Yet this mandate is counterbalanced by the principle of conferral (Article 5 TEU), the strict delineation of competences (Articles 2-4 TFEU), and the doctrine of autonomy of the EU legal order. The CJEU's case law, especially Opinions 1/91, 2/13, and 1/17, underscores that autonomy is a structural safeguard: it ensures that EU law is insulated from external judicial control. This constitutional autonomy allows the EU to act independently in the global arena, but it also imposes limits on its ability to bind itself through international adjudicatory mechanisms or hybrid forms of cooperation.

The chapter also examined the procedural complexity surrounding mixed agreements. The practice of mixity, as confirmed in Opinion 1/19 and academic literature, often leads to legal and political deadlocks, particularly when unanimity or domestic ratification processes are required. The Court's recognition of incomplete mixity offers some flexibility, but the lack of distinction between facultative and mandatory mixity continues to generate legal uncertainty. Moreover, institutional practices like the common accord technique, while not legally required, *de facto* introduce unanimity requirements that hinder swift EU action. These dynamics reveal that Strategic Autonomy, while normatively desirable, is procedurally fragile.

At the same time, the principle of autonomy of the EU legal order, while safeguarding the Union’s legal identity, also limits its capacity to fully integrate into binding international legal frameworks. This tension between Strategic Autonomy and legal autonomy is emblematic of a broader paradox. As argued in Chapter II, the autonomy of EU law, carefully constructed by the CJEU to insulate the EU legal order from external control, is both a source of strength and a structural constraint. On the one hand, it reinforces the Union’s capacity to act independently, safeguarding the internal coherence and primacy of its legal system. On the other hand, it limits the EU’s ability to enter into binding dispute settlement mechanisms or adopt flexible modes of international cooperation that could enhance its strategic influence. When the EU invokes Strategic Autonomy to justify measures that bypass established multilateral procedures, this may place

strain on the principle of legal autonomy itself, by transforming it from a constitutional safeguard into a rationale for legal unilateralism. This duality underscores the need for a more coherent doctrinal framework capable of reconciling strategic agency with normative discipline, allowing the EU to act autonomously without undermining its foundational commitment to a rules-based international order.

The dual character of the legal framework, as both enabling and restraining, emerges with particular clarity in the domain of external economic relations. As Chapter III has demonstrated, the EU's instruments for ensuring economic security, specifically the FDI Screening Regulation (EU) 2019/452 and the ACI Regulation (EU) 2023/2675, illuminate both the potential and the limitations of SA when translated into operational legal tools.

The FDI framework illustrates both the potential and limitations of SA. While the Regulation underscores the growing importance of European Technological Sovereignty and European Security within the Union's industrial and trade policy and is formally grounded in Article 207 TFEU (Common Commercial Policy), it reveals significant intergovernmental dynamics: screening remains a national competence, and the Commission's role is limited to coordination and issuing non-binding opinions. However, it institutionalises a trialogue mechanism that reinforces information-sharing and coordination, thereby fostering a nascent European understanding of technological sovereignty. As argued in section 6.1.3, this instrument contributes to European Technological Sovereignty (ETS) by enabling the Commission to issue opinions on investments that affect projects or programmes of Union interest, and by emphasising the duty of loyal cooperation under Article 4(3) TEU. This asymmetry reflects Member States' reluctance to surrender sovereignty in an area intimately tied to security and industrial competitiveness. The Commission's more recent push for outbound investment monitoring and reform of the FDI framework further attests to the insufficiency of the current legal design and the practical need to expand the EU's toolbox in light of systemic vulnerabilities.

The ACI, by contrast, represents a more assertive, and constitutionally complex, step forward. While it too is based on Article 207 TFEU, its substantive content straddles the domains of trade, foreign policy, and security. This hybrid character raises a series of tensions. Formally, the ACI is a Common Commercial

Policy instrument, falling under exclusive EU competence. Yet, its very object, retaliation against economic coercion by third countries, aligns closely with foreign and security policy considerations, which fall under the Common Foreign and Security Policy, an intergovernmental domain structurally shielded from judicial review and supranational control. The participation of the Council in identifying coercive acts through qualified majority voting, reflects a functional entanglement of CCP and CFSP logics, effectively pushing the boundaries of the legal basis without formally departing from the framework of exclusive competence. This institutional choreography exemplifies the kind of informal, practice-driven constitutional evolution that characterises the EU's response to global challenges. In other words, the ACI illustrates the normative and legal ambiguities that arise when SA is pursued through instruments that lack clearly delineated legal safeguards. The regulation declares that all actions must be consistent with international law and the Union's existing obligations, but the compatibility of the ACI with WTO law is far from guaranteed. The definition of "economic coercion" employed by the ACI is broader than that recognised under customary international law or the WTO framework, opening the door to countermeasures that may not withstand judicial scrutiny before international dispute settlement bodies. Moreover, the absence of mandatory recourse to multilateral fora, and the wide discretion granted to the Commission in selecting response measures, raise concerns about legal certainty, proportionality, and the potential erosion of the Union's commitment to rules-based global trade.

The analysis developed across these three chapters converges on a central finding: Strategic Autonomy is not a singular policy objective, but rather a dynamic legal and political project shaped by evolving geopolitical realities, institutional constraints, and normative commitments. As such, it cannot be realised through legal instruments alone, nor can it be reduced to a technocratic agenda of industrial policy and supply chain management. It requires a careful balancing of legal competences, institutional roles, and strategic priorities, each of which must be navigated within the constitutional framework of the EU. In this sense, Strategic Autonomy is both a means and an end: it is a method of conducting policy in a more coordinated, resilient, and sovereign manner, and it is also a normative horizon that guides the Union's evolution.

The analysis developed in this thesis also highlights the growing entanglement between economic policy and security policy, a development which the Treaty framework only partially anticipates. Instruments like the FDI Regulation and the ACI demonstrate that economic interdependence can no longer be treated as a neutral terrain. Instead, it is increasingly weaponised, with flows of capital, technology, and data becoming vectors of geopolitical influence. In this context, the EU's aspiration to strategic autonomy requires more than sectoral interventions; it demands a constitutional rethinking of how security concerns are accommodated within the framework of EU competences. While Treaty amendments are politically unlikely in the short term, legal innovation through secondary legislation, institutional practice, and judicial interpretation will continue to shape the contours of permissible action. The ACI is a paradigmatic case of such constitutional experimentation.

At the same time, this constitutional creativity must be anchored in principles that preserve the legitimacy and coherence of the Union's legal order. As Hoffmeister has noted, strategic autonomy is not the pursuit of isolation, but the capacity to "take lawful action alone to safeguard the Union's values, fundamental interests, security, independence and integrity." This definition encapsulates both the ambition and the constraint that define the EU's external posture: the ability to act, but within law. It is in this space between power and principle, autonomy and interdependence, that the Union's strategic future will be negotiated.

Notably, the concept of Strategic Autonomy has yet to receive direct engagement from the Court of Justice of the European Union. There is, to date, no jurisprudence, decision, or opinion in which the CJEU has substantively interpreted or applied SA as a legal concept. This judicial silence raises important questions about the normative weight and legal status of the notion. While currently framed as a policy objective and strategic narrative, one may wonder whether Strategic Autonomy could, in the future, evolve into a general principle of EU law, particularly if its invocation becomes more frequent and normatively dense across institutional acts and legislative instruments. Such a development would require careful doctrinal consolidation, but it would also signal a deeper constitutional anchoring of the EU's external identity as an autonomous actor.

Finally, the emergence of economic security as a distinct policy lens, foregrounded in the 2023 European Economic Security Strategy and the 2024 "Advancing Economic Security" Communication, signals a paradigmatic shift. These initiatives institutionalise the nexus between internal resilience and external autonomy, reaffirming the importance of protecting critical infrastructure, diversifying supply chains, and reducing dependencies on systemic rivals. They do not replace the multilateral ethos of the EU but recalibrate it, acknowledging that openness must be conditional on reciprocity and resilience. The 2025 Competitiveness Compass further embeds these objectives in a long-term strategic vision, explicitly linking Open Strategic Autonomy with industrial policy, innovation, and competitiveness.

What emerges from this analysis is a shift in the status of economic security within the EU legal order. Traditionally conceived as a national prerogative justified by extra-economic considerations, such as national security, as reflected in Article 4(2) TEU and in the derogatory clauses of secondary law instruments like Article 1(2) of Regulation 2019/452 or Article 21 of the 2004 Merger Regulation, economic security is now being reframed as a Union-level interest with intrinsically economic dimensions. This evolution challenges the classical distinction between market integration and justified restriction, suggesting a shift whereby what was once a narrowly construed derogation may be progressively acquiring the contours of a structural element within the Union's external action.

Significantly, although the CJEU has historically insisted that purely economic objectives cannot justify restrictions on the fundamental freedoms of the internal market, its jurisprudence, particularly in the *Essent* line of cases, has opened the door to the acceptance of derogations based on economic considerations, provided that such measures pursue legitimate non-economic public interest objectives and satisfy the requirements of proportionality. The elevation of economic security to a shared or even Union interest, as illustrated by the legal design of the FDI Regulation and the ACI, appears to signal that the EU is gradually framing economic security not merely as a policy narrative, but as a legitimate objective of general interest capable of shaping competence allocation, guiding regulatory choices, and influencing interpretation of Treaty provisions. This shift, while still in progress, marks a significant development in the Union's

constitutional identity, expanding the horizon of legitimate EU action in a way that ultimately requires judicial consolidation.

In sum, this thesis has argued that Strategic Autonomy, understood as a functional, legal, and political framework, represents both an aspiration and a site of contestation. Its successful realisation requires not only policy instruments but also a constitutional imagination capable of reconciling unity with plurality, ambition with restraint, and autonomy with the rule of law. The EU's capacity to act strategically will depend not only on its legal competences or institutional tools, but on its ability to maintain coherence between its values, its treaties, and its evolving place in the international order.

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