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The Legal Implications of the EU's Geopolitical Awakening

Narin Idriz, Eva Kassoti, Joris Larik (eds.)

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THE LEGAL IMPLICATIONS OF THE EU'S GEOPOLITICAL AWAKENING: INTRODUCTION

Narin Idriz, Eva Kassoti, and Joris Larik*

1. STRATEGIC AUTONOMY AND THE EMERGENCE OF THE EU'S GEOPOLITICAL *ACQUIS*

This paper series is the result of two rounds of PhD workshops organized by the editors at the TMC Asser Institute and Leiden University in 2024 on 'The legal implications of the EU's geopolitical awakening', with the generous financial assistance of the Municipality of The Hague.[1] The interest shown in the topic and the wide variety of issues presented during the workshops demonstrated both the wide-ranging implications of the 'EU's geopolitical turn' as well as the fact that it has gone mainstream, i.e. it is studied by a growing number of political scientists and legal scholars, including emerging scholars from both disciplines.[2] The interest shown by legal scholars could, undoubtedly, be attributed to the numerous legal instruments generated by the recent turn to geopolitics. This edited series contains a selection of the papers examining this turn as well as some of the key instruments that by now have been dubbed the EU's 'geopolitical law'.[3]

While Russia's invasion of Ukraine was an important turning point, called 'a tectonic shift in European history' by EU leaders,[4] it accelerated and amplified a trend that was already set in motion by the economic challenges presented by China and the US under the first Trump administration. 'EU strategic autonomy', a term that is closely linked to the EU's geopolitical awakening, was first mentioned in the context of the Common Security and Defense Policy (CSDP) in the European Council Conclusions of 2013.[5] In its next appearance, the concept

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[1] The workshops took place on 6-7 May 2024 and 14-15 November 2024. We are indebted to a number of colleagues who acted as expert commentators in the workshops. These include: Elaine Fahey (City University London), Sebastian Krapohl (University of Amsterdam), Peter van Elsuwege (Ghent University), Luigi Lonardo (University College Cork), Machiko Kanetake (Utrecht University), Geraldo Vidigal (University of Amsterdam, Viktor Szep (University of Groningen), Thomas Verellen (Utrecht University), Gesa Kübek (University of Groningen), Anna Marhold (Leiden University), Antoine Duval (TMC Asser Institute), Tarik Gherbaoui (TMC Asser Institute), and Daniel Schade (Leiden University).

[2] For an example, see the Special Issue of the European Foreign Affairs Review of 2022.

[3] J.E. Larik 'Geopolitiek recht' in de EU: inter arma germinant leges', 12 *SEW – Tijdschrift voor Europees en economisch recht* 2024, at 523.

[4] Informal meeting of the Heads of State and Government, Vesailles Declaration, 10-11 March 2022, para. 6. Available online at: <www.consilium.europa.eu/media/54773/20220311-versailles-declaration-en.pdf>.

[5] European Council, 'Conclusions on Common Security and Defence Policy', 19-20 December 2013, p. 7.

was used as a broader foreign policy objective by former High Representative of the Union for Foreign Affairs and Security Policy, Federica Mogherini, in the foreword of the Global Strategy of 2016, the adoption of which was hoped to 'nurture the ambition of strategic autonomy for the European Union'.[6] After this, the concept reappeared in documents relating to CSDP,[7] and was also further fleshed out in documents on the CCP (Common Commercial Policy).[8] In the context of the latter, it was further qualified as 'open' strategic autonomy, to account for the commitment that trade needs to remain largely liberalized.[9]

As to the meaning of the concept, political scientists have defined it 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'.[10] According to Hoffmeister, an academic as well as the Head of the Legal Department of the European External Action Service (EEAS), it entails '[s]triving for multilateral solutions, while being able to take lawful action alone to safeguard the Union's values, fundamental interests, security, independence and integrity'.[11] What is common to both is the ability for autonomous decision-making as well as action. This aspiration for the EU to be an independent and autonomous actor is not limited to a single-issue area but encompasses many policy domains. As stated by former High Representative Josep Borell: 'the EU must be more than a soft power … However, we need to realise that the concept of hard power cannot be reduced to military means: it is about using the full range of our instruments to achieve our goals'.[12] The contributions to this paper series demonstrate the wide range of instruments adopted in the last few years to this very end.

This shift towards learning the language of (hard) power has not been an easy endeavor for the EU. Not only because of the EU's traditional identification as a civilian/soft power, but arguably, also because of its constitutional DNA, as

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[6] EEAS, 'Shared vision, common action: A stronger Europe. A Global Strategy for the European Union's Foreign and Security Policy, June 2016, p. 4.

[7] The concept is mentioned only once in this important document. The underlying reason being the apprehension that this might be interpreted by some Member States as 'a weakening of primordial relations with the United States in the military field'. Hoffmesiter, n 11 *supra*, 696. See also, EEAS, 'A Strategic Compass for Security and Defence', 24 March 2022. Available online at: <www.eeas.europa.eu/eeas/strategic-compass-security-and-defence-0_en>.

[8] European Commission, 'Trade policy review – An open, sustainable, and assertive trade policy', COM(2021)66, p. 4.

[9] A. Steinbach, 'The EU's Turn to 'Strategic Autonomy': Leeway for Policy Action and Points of Conflict', 34 *The European Journal of International Law* 2023, at 975.

[10] N. Helwig and V. Sinkkonen, 'Strategic Autonomy and the EU as a Global Actor: The Evolution, Debate and Theory of a Contested Term', 27 *European Foreign Affairs Review* 2022, 2-3.

[11] F. Hoffmeister, 'Strategic Autonomy in the European Union's External Relations Law', 60 Common Market Law Review 2023, at 673. See also, E. Kassoti and R. Wessel, 'Strategic Autonomy: The Legal Contours of a Security Policy Construct', 28 European Foreign Affairs Review 2023, 305-310.

[12] EEAS, 'Europe in the Interregnum: our geoplitical awakening after Ukraine', 24 March 2022. Available online at: <www.eeas.europa.eu/eeas/europe-interregnum-our-geopolitical-awakening-after-ukraine_en#top>.

enshrined in Article 2 TEU as well as reflected in the external relations objectives codified in 21 TEU. What made this shift difficult was also the fact that the very origins of European integration lie in the rejection of power politics.[13] According to Borrel, it was no longer possible to resolve the issues and crises of today with the usual EU tactics of de-politicisation, technical fixes or the market. The EU had no other choice but to learn to think and act in terms of power. The challenge ahead was 'to ensure that the EU's geopolitical awakening is turned into a more permanent strategic posture'.[14]

It was the work of the 'geopolitical' Commission of President von der Leyen,[15] which through its proposals and initiatives sought to tackle the identified challenges. While issues of national and international security have traditionally been considered, respectively, as falling withing Member State competence and an area of intergovernmental cooperation, in the current global context the entanglement of economic and security policies empowered the Commission to launch initiatives and take bolder steps. As the papers in this series aptly demonstrate, trade, investment, competition and technology have all become strategic areas that have important security implications.

Steps have been taken both in the area of CCP as well as in the area of security and defence. To begin with some of the important trade and investment related instruments adopted in this period, Hoffmeister categorizes them as 'instruments to protect European economic interests' and those that aim 'to promote certain European values'.[16] The focus of the papers in this series is on the former. To provide a brief overview of the most important instruments in this category, the first to mention is the Modernization Regulation aiming to level the playing field by updating EU's trade defence instruments.[17] It establishes a 'new methodology' in anti-dumping cases allowing the Commission to determine the 'normal value of a good exported from a country with "significant distortions" […] from international benchmarks'.[18] Under this new methodology, the Commission is also able to take into account social and environmental standards in the con-

[13] ibid.

[14] ibid.

[15] European Commission, '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', Strasburg, 27 November 2019. Available online at: <ec.europa.eu/commission/presscorner/detail/MT/speech_19_6408>.

[16] Hoffmeister, *supra* n 11, at 674. Two examples to instruments under this latter category are the Carbon Border Adjustment Mechanism (CBAM) introduced by Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism *OJ* [2023] L 130/52, 16.5.2023; and the marketing ban for goods made from forced labour introduced by Regulation (EU) 2024/3015 of the European Parliament and of the Council of 27 November 2024, *OJ* [2024] L 2024/3015, 12.12.2024.

[17] Regulation (EU) 2017/2321 of the European Parliament and of the Council of 12 December 2017 amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union, *OJ* [2017] L 338/1, 19.12.2017.

[18] Hoffmeister, *supra* n 11, at 675.

struction of the 'normal value' of the good in question.[19] The second instrument is the Anti-Coercion Instrument,[20] which aims to deter as well as provide the EU with a structured framework to respond to economic coercion. It equips the EU with a wide range of possible countermeasures: from imposition of tariffs to restrictions on access to foreign direct investment and public procurement. The third instrument in this category is the International Procurement Instrument (IPI).[21] It allows the Commission to investigate whether EU companies are facing 'serious and recurring impairment on access … to the public procurement or concession markets of [a] third country'.[22] If the Commission finds that to be the case, it can adopt IPI measures in the form of implementing acts, imposing a score adjustment on tenders submitted by companies of that third country, or exclude the foreign bid altogether.[23]

The remaining three instruments are the Foreign Subsidies Regulation,[24] the Investment Screening Regulation,[25] and the Critical Raw Material Act (CRMA).[26] While the first two aim at levelling the playing field in the respective areas of foreign subsidies and foreign investments, the CRMA seeks to ensure EU access to critical raw materials which are susceptible to supply disruptions. Since these instruments are examined extensively in three separate papers, they will not be examined in more detail here.

Before providing an overview of the papers in this series, it is important to briefly outline some of most critical developments that illustrate the EU's geopolitical awakening in the areas of foreign policy and defence. Russia's invasion of Ukraine is a milestone in these areas. While some important steps were taken

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[19] This became possible with a further amendment that entered into force in 2018. Regulation (EU) 2018/825 of the European Parliament and of the Council of 30 May 2018 amending Regulation (EU) No 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) No 2016/1037 on protection against subsidized imports from countries not members of the European Union, *OJ* [2018] L 143/1, 7.6.2018. J. Cornelis, 'The EU's Modernization Regulation: Stronger and More Effective Trade Defence Instruments?', 13 *Global Trade and Customs Journal* 2018, 539-543.

[20] 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 against economic coercion by third countries *OJ* [2023] L 2675/1, 7.12.2023.

[21] Regulation (EU) 2022/1031 of the European Parliament and of the Council of 23 June 2022 on the access of third-country economic operators, goods and services to the Union's public procurement and concession markets and procedures supporting negotiations on access of Union economic operators, goods and services to the public procurement and concession markets of third countries (International Procurement Instrument – IPI), *OJ* [2022] L 173/1, 30.6.2022.

[22] ibid, Art. 2(i).

[23] ibid, Art. 6(6)(a)&(b).

[24] Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market *OJ* [2022] L 330/1, 23.12.2022.

[25] 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, *OJ* [2019] L 79 I/1, 21.3.2019.

[26] Regulation (EU) 2024/1252 of the European Parliament and of the Council of 11 April 2024 establishing a framework to ensure a secure and sustainable supply of critical raw materials, *OJ* [2024] L 1252/1, 3.5.2024.

prior to the full-scale invasion, there was both a quantitative as well as qualitative increase in EU activities after the invasion. A brief introduction cannot do justice to all the developments taking place in these areas. The aim is merely to sketch the trend by mentioning a selection of instruments and developments. Two important developments worth mentioning which took place prior to the invasion were the activation of the Permanent Structured Cooperation (PESCO) in 2017,[27] and the launch of the European Defence Fund (EDF) in 2021.[28] The former aims to provide Member States a framework for cooperation in the areas of security and defence. What distinguishes PESCO from 'other forms of cooperation is the legally binding nature of the commitments undertaken by the participating Member States'.[29] All Member States, except Malta, have joined PESCO. As to the EDF, it is part of the EU budget and enables the Commission to support Research and Development in the area of defence by granting subsidies to promising projects, including PESCO projects.

Following the invasion, Russia was the target of an unprecedented amount and variety of sanctions deployed by the EU.[30] In addition to economic sanctions, the EU adopted novel sanctions, such as the broadcasting ban against media outlets linked to Russia,[31] or disconnecting several Russian and Belorussian banks from the SWIFT financial messaging system.[32] The EU had already imposed travel bans against a list of citizens of the Russian Federation after Russia's annexation of Crimea. This list was maintained and further expanded after Russia's invasion of Ukraine in February 2022.[33]

In addition to the instruments sanctioning Russia, a plethora of measures were taken to support Ukraine. The first of these measures was the transformation of the European Peace Facility (EPF), originally created as the African Peace Facility, to support Ukraine in its defence efforts against Russia by providing funding for (lethal) aid. In March 2024, the EU established a dedicated Ukraine

[27] Council Decision (CFSP) 2017/2315 of 11 December 2017 establishing Permanent Structured Cooperation (PESCO) and drawing up the list of participating Member States, *OJ* [2017] L 331/57, 14.12.2017.

[28] Regulation (EU) 2021/697 of the European Parliament and of the Council of 29 April 2021 establishing the European Defence Fund and repealing Regulation (EU) 2018/1092, *OJ* [2021] L 170/149, 12.5.2021.

[29] See, <www.pesco.europa.eu/about/>.

[30] For an overview, see the following link: <www.consilium.europa.eu/en/policies/sanctions-against-russia/timeline-sanctions-against-russia/>.

[31] These measures were part of the third sanctions package against Russia. See, Council Decision (CFSP) 2022/351 of 1 March 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, *OJ* [2022] L 60/5, 2.3.2022; and Council Regulation (EU) 2022/350 of 1 March 2022 and amending Regulation (EU) 883/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, *OJ* [2022] L 65/1, 2.3.2022.

[32] ibid.

[33] For the latest amendment, see Council Decision (CFSP) 2024/747 of 23 February 2024 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, *OJ* [2024] L 2024/747, 23.2.2024.

Assistance Fund under the EPF and increased the financial ceiling of the EPF by € 5 billion. This brought the financial support provided to Ukraine to € 11.1 billion.[34] Further measures to support Ukraine and ensure supply for the armed forces of Member States have been the promulgation of the Act in Support of Ammunition Production (ASAP),[35] and the creation of an instrument for the reinforcement of the European defence industry through common procurement (EDIRPA).[36] The second Trump administration's approach both vis-à-vis Ukraine and the EU has already brought European leaders together in an emergency summit in February 2025 to discuss the road ahead,[37] which signals that further steps, further cooperation and integration in this area are inevitable.

The aim of the present collection of essays is to shed light on various aspects of the legal implications of the EU's geopolitical awakening, paving the way for more research on this burgeoning topic.

2. CONTENT OF THIS EDITED SERIES

The papers in this edited series are presented in the order of the issues discussed in this introduction, that is, trade and investment related issues are tackled before the foreign policy and security related ones. These are followed by papers examining additional challenges presented by Russia's invasion of Ukraine.

2.1 **Move to (Geo)economics**

The papers in this section examine the Foreign Subsidies Regulation, the Investment Screening Regulation, the EU's ambition to use export controls as a tool for tech supply chain governance, and lastly, the EU's objective to achieve strategic autonomy through the implementation of the CRMA. The latter paper is also an illustration of how some issues straddle the boundaries between (geo) economics and foreign policy. While the legal basis of the CRMA is Article 114 TFEU, the internal market, the quest to achieve strategic autonomy by concluding 'strategic partnerships' with third countries, clearly brings the issue into the domain of geopolitics and foreign policy.

The first paper in this section by Pierfrancesco Mattiolo's analyses the Foreign

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[34] See, European Council, 'European Peace Facility', available online at: <www.consilium.europa.eu/en/policies/european-peace-facility/>.

[35] Regulation (EU) 2023/1525 of the European Parliament and of the Council of 20 July 2023 on support for the production of ammunition *OJ* [2023] L 185/7, 24.7.2023.

[36] Regulation EU) 2023/2418 of the European Parliament and of the Council of 18 October 2023 on establishing an instrument for the reinforcement of the European defence industry through common procurement (EDIRPA), *OJ* [2023] L 2023/2418, 26.10.2023.

[37] Rishi Iyengar, 'Europe's Top Leaders Meet in Paris to Stay Relevant', *Foreign Policy*, 18 February 2025. Available online at: <foreignpolicy.com/2025/02/18/europe-emergency-meeting-paris-munich-vance-russia-saudi/>.

Subsidies Regulation (FSR) with a particular focus on the Commission's competence to regulate mergers and acquisitions by foreign entities. The paper introduces the concentrations procedure of the FSR rooted in the 'geopolitical' dimension of the tool and shows how certain of its provisions can be used to integrate economic and geopolitical considerations. It argues that EU competition law is expanding to defend new interests not previously addressed and thus, it can become a useful tool in the context of economic security. At the same time, Mattiolo warns that the quest for more economic security may reduce the openness of the EU economy and push away foreign direct investment in times of economic difficulties for the bloc. The paper dialogues with recent academic and policy literature on the FSR and aims to feed into the debate on the reach and impact of the Regulation, whose boundaries are still unclear due to the early stage of its enforcement.

The second paper by Najib Zamani examines the Investment Screening Regulation. The Regulation established a framework for the screening of Foreign Direct Investment (FDI) into the Union on the grounds of security and public order. Taking into account OECD and Court of Auditors reports evaluating the functioning and effectiveness of the instrument, on 24 January 2024, the Commission adopted a legislative proposal amending the Screening Regulation. In light of these reports and academic literature criticizing the framework established by the Regulation for not providing effective protection, but resulting in protectionism, Zamani examines the Commission's legislative proposal to establish if and to what extent the identified shortcomings have been remedied. He concludes that while the legislative proposal takes important steps in the right direction, the design features of the Regulation that facilitate protectionism remain unaddressed.

The third paper of this section by Ahn Nguyen explores the EU's ambition of employing export controls as a tool for tech supply chain governance. It queries into how the EU's self-perception as a 'GeoTech' player shapes the legal dynamics surrounding export controls and the economic, technology and supply chain security policies driving such legislation. The paper reflects on the EU's legal-political struggle to craft its own export controls policy and emerge as a credible player in the global arena of tech supply chain governance. Nguyen argues that current legal dynamics mobilising export controls as instruments of governance over critical technology supply chains have focused more on building a '(high) fence' instead of lending more scrutiny over what technological 'yard' should necessarily be protected or whether they should necessarily be ringfenced. The author concludes by highlighting that this shrouds the more fundamental question on whether export controls are fit for purpose within the specific reality of EU interests.

Last but not least, Cecilia Nota's paper explores the EU's strategy to achieve 'open' strategic autonomy through the lens of Critical Raw Materials (CRMs). Access to reliable and affordable CRMs is crucial for the success of the EU's energy transition and its sustainability agenda. The risks posed by economic interdependencies and supply chain vulnerabilities have led the EU to adopt

the Critical Raw Materials Act (CRMA). Nota examines the provisions of the Act and its role in strengthening the EU's energy security strategy, focusing on EU's external supply strategy, as envisioned by CRMA's framework of strategic partnerships. She demonstrates through the case study of the EU-Ukraine Strategic Partnerships on Raw Materials, how the EU aims to integrate CRMs value chains, diversify supply sources, and mitigate vulnerability to supply disruptions. However, Nota argues that the non-binding nature of these partnerships coupled with the diverse interests of partner countries, cast a shadow on their effectiveness. Hence, she calls for a more robust and diversified approach, warning that these partnerships alone will not be sufficient to 'adequately address the complex dynamics of global supply chains and geopolitical rivalries'.

2.2 **CFSP/CSDP in Times of Geopolitical Shifts**

Turning to security and defence, Christos Karetsos' and Alexandros Bakos' paper critically discusses the EU Strategic Autonomy conundrum. The paper begins by arguing that autonomous security and defence policy is a necessary component of 'strategic autonomy', without which the concept loses its substance. Against this background, the paper continues by investigating whether the EU acts autonomously in the security and defence sphere through an examination of recent developments at the EU and Member State-level triggered by the war against Ukraine. Karetsos and Bakos argue that although significant steps have been taken towards realising the EU's strategic autonomy agenda, this has yet to materialize fully. The authors conclude by highlighting the potential of the EU's defense industrial policies to act as a tool for integrating security and foreign policy considerations in a Strategic Autonomy doctrine.

The focus of Federica Fazio's paper is on the mutual assistance (Article 42(7) TEU) and solidarity (Article 222 TFEU) clauses introduced into the Treaties with the 2007 Lisbon Treaty revision. Fazio argues that in light of the war in Ukraine and concerns over President Trump undermining NATO's mutual security guarantee, it is of utmost importance to understand how credible the EU's mutual defence commitment is and how it can be operationalised. To this end, Fazio analyses the mutual assistance clause by examining its formulation, interpretation, and evolution over time. By examining past treaties and relevant documents, special attention is paid to the historical and geopolitical context in which this clause was adopted and operated over the years. Lastly, Fazio examines the differences and overlaps with EU's solidarity commitment (Article 222 TFEU) as well as NATO's own mutual defence clause (Article 5 North Atlantic Treaty).

2.3 **Challenges Emerging from Russia's Invasion of Ukraine**

Beyond traditional trade and security issues, the paper by Natasha Georgiou provides a temporal case study of the European Union's external energy rela-

tions with Russia before and after Russia's invasion of Ukraine, with a specific focus on the policies developed by the European Commission. By focusing on the Commission's approach, Georgiou investigates whether there has been a pivot or shift from a liberal approach (pre-Ukraine) to an increasingly realist approach (post-Ukraine) and if so, identify the underlying reasons for this shift. Moreover, Georgiou sheds light on the EU's role as Global Actor as well as the emergence of the European Commission as a significant energy security actor after the Russian invasion of Ukraine.

The final paper of this collection by Nikolas Sabján scrutinizes whether possible confiscation of the assets of the Russian Central Bank would be in line with the EU's doctrine of strategic autonomy. Even if the answer were in the affirmative and plausible politico-economic and security reasons to confiscate could be identified, Sabján raises the question whether these should trump international legal concerns, in particular immunity law. In other words, the paper identifies a potential quandary, entailing two competing imperatives: the geopolitical/geoeconomic imperative (supposedly stemming from strategic autonomy), and the aim of the EU to remain true to its founding values (namely respecting international law). After analysing the issue through the lens of the concept of strategic autonomy, Sabján proposes a solution that balances the identified imperatives and aims.

MOVE TO (GEO)ECONOMICS

A NEW PHASE OF GEOPOLITICAL MERGER CONTROL? ON THE FOREIGN SUBSIDIES REGULATION AND OTHER RECENT DEVELOPMENTS IN EU (GEO)ECONOMIC LAW

Pierfrancesco Mattiolo*

1. INTRODUCTION

With Regulation (EU) 2022/2560 on foreign subsidies distorting the internal market (the Foreign Subsidy Regulation, hereafter FSR), the EU has developed a new tool to 'effectively deal with distortions in the internal market caused by foreign subsidies' and 'ensure a level playing field.'[1] This tool is only one of the several recently developed by the EU to modernise its trade toolbox for the 'age of geopolitics.' Since subsidisation is a phenomenon regulated both domestically and internationally, respectively by State aid law and the WTO Agreement on Subsidies and Countervailing Measures (ASCM), the FSR has a hybrid nature that requires the lens of both the competition lawyer and the trade lawyer to be fully understood. Additionally, other areas of law regulate the economic activities potentially affected by subsidies. Notably, in the case of concentrations, the same acquisition may need to comply with the FSR, Regulation (EC) 139/2004 on the control of concentrations between undertakings (Merger Regulation, hereafter EUMR)[2] and one of the national procedures for the screening of foreign direct investments (FDIs). National FDI screening procedures are coordinated by Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the Union (hereafter FDI Regulation).[3] While 'purely political' considerations are the norm in FDI screening, and 'purely economic' considerations guide merger reviews, the FSR somewhat allows for both, even if it ostensibly favours the economic objective of restoring a level playing field.

This contribution analyses the FSR and, particularly, its Chapter 3 on concentrations, to understand the Commission's ability to regulate mergers and acquisitions orchestrated by foreign entities. The choice of focusing on the specialised procedure on concentrations is driven by the availability of more information[4] on its enforcement, compared to the general *ex officio* procedure

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[1] Recital 6, Regulation 2022/2560 on foreign subsidies distorting the internal market (FSR), *OJ* [2022] L 330/1, 23.12.2022.

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

[3] 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 (FDI Regulation), *OJ* [2019] LI 29/1, 21.3.2019.

[4] L. Moscoso and I. Stoyanova, 'The Foreign Subsidies Regulation – 100 days since the start

– which could also be used to scrutinise concentrations in certain cases, as the paper explains – and by its affinities with the EUMR and FDI screening – which allow for a fruitful comparative exercise. Part 2 presents an overview of the legislative and geopolitical context that led to the Regulation. The FSR emerged as an alternative to other tools to tackle foreign subsidisation and pursue the 'open strategic autonomy' paradigm, while also being acceptable to more free trade-oriented Member States. In Part 3, the general structure and provisions of the FSR are presented, alongside the very first cases that became public. Part 4 delves more into Chapter 3 of the Regulation, presenting its scope, notification obligation and procedural flow. In Part 5, the paper juxtaposes FSR provisions with the EUMR, so as to explore their interactions. Part 6 provides a succinct comparison between the FSR and FDI screening rules and explores the provocative suggestion that the FSR offers an expedient workaround for the Commission to screen investments at the EU level, given that Member States are protective of their existing FDI screening competences.

Ultimately, the contribution aims to offer an introduction to the concentrations procedure of the FSR rooted in the 'geopolitical' dimension of the tool and underline how certain provisions can be used to integrate economic and geopolitical considerations. It argues that EU competition law is expanding to defend new interests not previously addressed in the Commission's enforcement and become a tool for economic security policy, while also granting the Commission more discretion and freedom to bend enforcement to new policy goals. Yet, the quest for more economic security may reduce the openness of the EU economy and push away FDI in a moment of economic difficulties for the bloc. Did the EU find an effective balance between these two priorities? The paper dialogues with the recent academic and policy literature on the FSR and aims to participate in the critical debate on the reach and impact of the Regulation, whose boundaries are still unclear due to the early stage of its enforcement.

2. (GEO)POLITICAL AND LEGISLATIVE CONTEXT TO THE FSR

'Strategic autonomy' has been the lodestar of the recent trade policy efforts of the Commission, both in developing an overarching strategy and setting up specific tools. Since 2013, the term has been increasingly used in EU policymaking and discourse, with its legal contours increasingly discussed in scholarship.[5] The FSR is one of such autonomous tools, and its legislative process is inextricably tied to the developments in the geoeconomic scenario and EU's strategy since 2019.

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of the notification obligation for concentrations', 1 *Competition FSR Brief* 2024, 1-6.

[5] E. Kassoti and R.A. Wessel, 'Strategic Autonomy: The Legal Contours of a Security Policy Construct', 28 *European Foreign Affairs Review* 2023, 305-307.

2.1 **An open and autonomous trade policy**

The year 2019 can be considered a turning point for EU trade policy, as it witnessed a series of geoeconomic disruptions for the EU, as well as for the rest of the world. The bloc's shifted its policy towards China, defining it as a 'systemic rival' to compete with, while maintaining a certain degree of cooperation.[6] In December of the same year, the paralysis of the WTO Appellate Body triggered by the US refusal to agree on new appointments became finally concrete, barring the way to the conventional way to multilateral dispute settlement.[7] US trade policy was indeed becoming increasingly more assertive, with President Donald Trump imposing tariffs on EU products. The Trump Administration hit, in 2018, EU steel and aluminium, invoking the national security exception of Article XXI(b)(iii) of the General Agreement on Tariffs and Trade (GATT),[8] and, in 2019, aircraft products and an array of other goods.[9] While the latter tariffs represented a legitimate retaliation sanctioned by the WTO in the context of the years-long dispute between the two sides of the Atlantic on the subsidies to Boeing and Airbus, the infamous steel tariffs were highly controversial and later found incompatible with WTO law.[10] These events coincided with the inauguration of the Commission presided by Ursula von der Leyen, heralded right from the beginning as the 'geopolitical Commission.'[11] Since the 'first geopolitical Commission' came right after Jean-Claude Juncker's 'first political Commission,'[12] it is worth wondering what is the meaning of that added 'geo-.' It could be observed that, in the last years, the new label has been quite successful as many practitioners and analysts[13] have started grafting 'geopolitics' in their EU lingo; even if, after years, many of us (and especially EU citizens) have not yet a clear idea of what that really means.[14]

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[6] European Commission and High Representative of the Union for Foreign Affairs and Security Policy, 'EU-China Strategic Outlook' Joint Communication, JOIN(2019) 5 final 5, 12.03.2019.

[7] J. Miranda and M. Sánchez Miranda, 'Chronicle of a Crisis Foretold: How the WTO Appellate Body Drove Itself into a Corner', 26 Journal of International Economic Law 2023, 435–437.

[8] H. Long, 'Trump Has Officially Put More Tariffs on U.S. Allies than on China', *Washington Post,* 31 May 2018, available at <www.washingtonpost.com/news/wonk/wp/2018/05/31/trump-has-officially-put-more-tariffs-on-u-s-allies-than-on-china/>.

[9] P. Blenkinsop, 'Factbox: Planes, Handbags and Cheese on U.S. Tariff Target List', *Reuters,* 3 October 2019, available at <www.reuters.com/article/world/factbox-planes-handbags-and-cheese-on-us-tariff-target-list-idUSKBN1WH1DZ/>.

[10] Panel Report *United States – Certain Measures on Steel and Aluminium Products*, WTO Doc. WT/DS544/R; WT/DS552/R; WT/DS556/R; WT/DS564/R, 9 December 2022.

[11] Lili Bayer, 'Meet Von Der Leyen's "Geopolitical Commission"', *Politico,* 4 December 2019, available at <www.politico.eu/article/meet-ursula-von-der-leyen-geopolitical-commission/>.

[12] D. Sarmiento, 'The Juncker Presidency – A Study in Character' 31 *European Journal of International Law* 2020, 727–728.

[13] According to Google Books Ngram Viewer, the use of the 'geopolitical' in English surged especially from 2009. By searching for 'geopolitical' on EUR-Lex, the reader may observe that the keyword nets 713 documents for 2023, 107 for 2019, 25 for 2009, 15 for 1999 and 3 for 1989. By searching 'European Union geopolitical' on Google Scholar, the 2020-2023 period nets 52700 results circa, 2018-2019 shows 68200, 2008-2009 shows 25800, 1998-1999 shows 8460. These numbers do not have the presumption to be conclusive data. Colleagues versed in quantitative methods could be interested in analysing properly the spread of 'geopolitics' to the EU policy and legal discourse.

[14] H. Kundnani, 'Europe's Geopolitical Confusion', *Internationale Politik Quarterly*, 4 January

In the field of trade policy and, more particularly, subsidies regulation, the new Commission would substantiate its geopolitical agenda first in von der Leyen's 2019 mission letter to then *in pectore* Trade Commissioner, Phil Hogan, and in its Communication 'Trade Policy Review – An Open, Sustainable and Assertive Trade Policy' of 18th February 2021.[15] Von der Leyen tasked the Trade Commission with addressing 'the distortive effects of foreign subsidies in the internal market,' protecting the EU 'from unfair trade practices' by 'making better use of our trade defence instruments (…) and implementing the new system for screening Foreign Direct Investment.'[16] An essential problem posed by the mission letter is how to deal with the crisis of WTO 'when others (…) block the WTO dispute settlement process': the general strategy indicated by the new President is to 'strengthen our trade toolbox.'[17] The letter's recommendations were developed in an 'open, sustainable, and assertive trade policy,'[18] published by the Commission's Directorate General (DG) for Trade two years later. The new Commission's trade policy, which united economic and security interests, was translated into various *autonomous* tools, *inter alia* the FSR,[19] to pursue 'EU's geopolitical interests.'[20] These developments blossomed from a 'politicisation' of EU trade strategies that, by 2019, had been germinating for already two decades, with security and great power relations becoming central themes in the conceptual world of EU policy-makers and analysts.[21] The concept of economic security, which could be sketched as 'keeping an eye on the trajectories of growth and innovation while managing anticipated security threats and creating enough policy bandwidth to tackle unanticipated ones,'[22] has been deeply rooted in Washington for decades, going back to the years at the turn of the Second World War,[23] and is now mainstream in the policy talks of Brussels and Tokyo.[24]

Another formula used to describe this geopolitical turn is the concept of open strategic autonomy.[25] The strategy is two-pronged. On the 'open' prong, Brus-

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2023, available at <ip-quarterly.com/en/europes-geopolitical-confusion>.

[15] European Commission, 'Trade Policy Review: An Open, Sustainable and Assertive Trade Policy', COM(2021) 66 21, 18.2.2021.

[16] U. von der Leyen, 'Mission Letter to Phil Hogan, Commission for Trade', (Brussels, 1 December 2019) 5, available at <ec.europa.eu/commission/commissioners/sites/default/files/commissioner_mission_letters/mission-letter-phil-hogan-2019_en.pdf>.

[17] See U. von der Leyen, *supra* note 16.

[18] See European Commission, *supra* note 15.

[19] See European Commission, *supra* note 15, at 21.

[20] See European Commission, *supra* note 15, 8–9.

[21] P. Leblond and C. Viju-Miljusevic, 'EU Trade Policy in the Twenty-First Century: Change, Continuity and Challenges', 26 *Journal of European Public Policy* 2019 , at 1842.

[22] H. Farrell and A. Newman, 'The New Economic Security State' 102 *Foreign Affairs* 2023, at 106.

[23] A. Aresu, *Il Dominio Del XXI Secolo. Cina, Stati Uniti e La Guerra Invisibile Sulla Tecnologia* (Milano: Feltrinelli 2022), chapter 2.

[24] See H. Farrell and A. Newman, *supra* note 22.

[25] P. Mattiolo, 'Concordia Discors? The Foreign Subsidies Regulation and Increased Subsidization in the EU under the Open Strategic Autonomy Model' in J. Fechter and J. Wiesenthal (eds.), *The Age of Open Strategic Autonomy* (Baden Baden: Nomos 2025), 151–153.

sels promotes the multilateral trade system by advocating the reform of the WTO at the multilateral level, e.g., by cooperating on the matter of industrial subsidies rules with the US and Japan in periodic 'Trilateral Meetings' to rein in 'non market-oriented policies and practices of third countries.'[26] The EU has also championed WTO reform and the benefits of a multilateral, rules-based, trade system. At the bilateral level, the EU pushes for free trade agreements (FTAs) that expand reciprocal market access and mutual obligations between trade partners, for instance, via the inclusion of competition chapters in its 'second generation' FTAs.[27] The EU economy profits much from liberalising trade flows[28] and it has been geared, from its very origin, towards this overarching objective. Even before the adoption of the Treaty of Rome, European decision-makers have been aware that subsidies (from an intra-EU perspective, we would call them *State aid*) may undo the positive effects of trade liberalisation.[29] Trade agreements and schemes can facilitate the exchange of products, as well as contain obligations that affect other goals, such as sustainable development and human rights.[30] But what to do when a trade partner violates its WTO obligations, and there is no Appellate Body to adjudicate, or deploys aggressive trade practices that are not caught in the scope of current WTO law? What remedies could the EU seek to vindicate the principles of free trade?

In the logic of European decision-makers, this is where the 'autonomous' prong comes into play. Here we find tools such as the FSR, the Anti-Coercion Instrument[31] or the EU Carbon Border Adjustment Mechanism (CBAM).[32] The open strategic autonomy paradigm may appear an oxymoron when applied to trade: how can the EU credibly extend its hand, seeking further cooperation, while also sharpening its trade weapons? Analysts have different ideas on the matter. These policies could indeed incentivise the respect of trade rules and ideals,[33] as they target trade practices, rather than specific countries or companies; or they may ultimately result in protectionist outcomes,[34] and exacerbate trade

[26] Joint Statement of the Trilateral Meeting of the Trade Ministers of Japan, the United States and the European Union, Washington D.C. 25 September 2018, available at <trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157412.pdf>.

[27] For instance, Chapters 11, 12 and 13 of the Agreement between the European Union and Japan for an Economic Partnership (*OJ* [2018] L 330/3, 27.12.2018) are dedicated respectively to competition, subsidies and State-owned enterprises (SOEs).

[28] C. Salm, 'Benefits of EU International Trade Agreements', European Parliamentary Research Service Briefing, PE 603.269, 1–2, available at <www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2017)603269>.

[29] J. Blockx and P. Mattiolo, 'The Foreign Subsidies Regulation: Calling Foul While Upping the Ante?', 28 *European Foreign Affairs Review* 2023, at 56.

[30] A. Poletti *et al.*, 'Promoting Sustainable Development through Trade? EU Trade Agreements and Global Value Chains', 51 *Rivista Italiana di Scienza Politica* 2021, at 339.

[31] 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, *OJ* [2023] L 2675, 7.12.2023.

[32] Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism, *OJ* [2023] L 130/52, 16.5.2023.

[33] J. Hillebrand Pohl, 'Strategic Autonomy as a Means to Counter Protectionism', 22 *ERA Forum* 2021, at 183.

[34] See P. Mattiolo, *supra* note 25.

tensions. Policy tools, as with their material counterparts, can be used in many ways and for different goals and it can be assessed only *ex post* if they are more useful or harmful. Does the same apply to the FSR?

2.2 **The positions of the Member States**

The EU Member States have different sensibilities on trade and industrial policy, depending on their economic interests and the domestic stakeholders that can make their voices more heard in their capitals. Some Member States prioritise the openness of the EU economy and are sceptical towards policy options that may result in protectionist outcomes, like the Netherlands and the Nordic countries. Some others, such as France and Italy, are more receptive towards autonomous tools and may settle for less liberalisation if that allows for protecting certain domestic industries or achieving non-trade goals. The committees and working groups of the Council are animated by the dialectics between these two informal coalitions. Germany may be ascribed to the 'openness' coalition – predictably, considering its export-oriented economy – but it has been receptive to the call for autonomous tools more recently.

Alongside these general policy trends, the Commission was pressured to act on the specific issue of foreign subsidies by Member States and domestic stakeholders, eager to reduce the influence of the EU's newfound rival, China, in the internal market. Two decisive nudges in this sense came from the Netherlands and Germany, in contrast with their general reluctance to restrict free trade and create tensions with foreign partners. In December 2019, the Dutch government presented, in a non-paper, its 'level playing field proposal' to 'address the distortive effects of foreign state ownership and state financing in the internal market' and to 'form a sixth branch to the existing EU competition law.'[35] The non-paper recommended 'stricter supervision' on 'economic operators with (discriminatory) aid benefits and unregulated market power' as the EU's 'third-best option' since the first two – a multilateral solution at the WTO level or bilateral agreements – required third countries to commit to a policy shift.[36] In the meantime, the German *Monopolkommission* was working on its Biennial Report, centred over the issue of Chinese State capitalism as a 'challenge for the European market economy,'[37] which was published in July 2020. The German authority too endorsed the introduction of a third-country State aid instrument.[38] While China remains an essential market for the largest German companies, as proven by the fact that Chancellor Olaf Scholz is frequently accompanied by a delegation of CEOs on

[35] Ministry of Foreign Affairs of the Netherlands, 'Non-Paper on Strengthening the Level Playing Field on the Internal Market', available at <www.permanentrepresentations.nl/documents/publications/2019/12/09/non-paper-on-level-playing-field>.

[36] See Ministry of Foreign Affairs of the Netherlands, *supra* note 35, 1–2.

[37] German Monopolies Commission, 'Chinese State Capitalism: A Challenge for the European Market Economy', Biennial Report of the Monopolies Commission, Chapter IV XXIII, available at <www.monopolkommission.de/images/HG23/Main_Report_XXIII_Chinese_state_capitalism.pdf>.

[38] See German Monopolies Commission, *supra* note 37, para 4.1.3.

his official visits to Beijing,[39] both the German government and firms seem also worried about Chinese competition.[40] With two of the 'free trade champions' advocating for a new tool, the Commission had the political momentum to start the legislative process for the future FSR.

2.3 **A regulatory gap to be addressed: the 2020 White Paper**

In the time between the Dutch non-paper and the German report, and just a few months after the inauguration of von der Leyen's College, the Commission published the White Paper on levelling the playing field as regards foreign subsidies of 17th June 2020 (the White Paper). The White Paper presented a blueprint of the future FSR[41] and built on the ideas succinctly enucleated by the Dutch non-paper for the first time. The German *Monopolkommission* would later acknowledge the Commission's document as mostly 'convincing.'[42] The Commission reiterated, on the one hand, the necessity to fill a 'regulatory gap'[43] and scrutinise more how the financial contributions from foreign governments affect the single market. Yet, on the other, such control should not compromise Europe's inclination to welcome incoming FDI.[44]

The White Paper defined the regulatory gap to be filled by the FSR by looking at the limits of several areas of EU and international law. EU State aid law applies only to EU Member States and prohibits in principle the granting of aid unless it is authorised *ex ante* by the Commission,[45] while an enterprise active in the internal market could freely receive support from a foreign government through a parent company located in that jurisdiction or excessively favourable terms from a State-owned enterprise (SOE) or an undertaking influenced by a government.[4647] EU competition law ensures that a dominant position in the internal market is not abused[48] or that concentrations do not significantly impede

[39] 'Top German CEOs Join Scholz's China Trip despite "de-Risking" Push', *Reuters,* 4 April 2024, available at <www.reuters.com/world/europe/top-german-ceos-join-scholzs-china-trip-despite-de-risking-push-2024-04-04/>.

[40] 'Majority of German Firms Feel Unfair Competition in China, Commerce Chamber Says', *Reuters,* 10 April 2024, available at <www.reuters.com/business/majority-german-firms-feel-unfair-competition-china-commerce-chamber-says-2024-04-10/>.

[41] European Commission, 'White Paper on Levelling the Playing Field as Regards Foreign Subsidies', COM(2020) 253 final, 17.6.2020, available at <ec.europa.eu/competition-policy/system/files/2021-06/foreign_subsidies_white_paper_en.pdf>.

[42] See German Monopolies Commission, *supra* note 37, para 4.1.1.2.

[43] See European Commission, *supra* note 41, at 5.

[44] See European Commission, *supra* note 41, 6–8.

[45] Art. 107, Treaty on the Functioning of the European Union (TFEU), *OJ* [2012] C 326/47, 26.10.2012.

[46] S. Mathieson, 'Accessing China's Public Procurement Market: Which State-Influenced Enterprises Should the WTO's Government Procurement Agreement Cover Note', 40 *Public Contract Law Journal* 2010, at 235.

[47] G. Sabatino, 'The "Golden Power" on Foreign Investments in EU Law in the Light of Covid Crisis', 18 *European Company Law* 2021, at 195.

[48] TFEU, art 102.

effective competition,[49] but third countries may allow and even support financially companies in creating conditions of this type in their domestic markets, so that they can outcompete European firms. State intervention may also be aimed at the acquisition of EU targets that hold key technologies or a strategic position,[50] posing a risk to the technological or economic security of the Union. This geopolitical dimension will make the future FSR not just a competition tool to restore the level playing field, but an economic tool for national security policy, playing a similar role to and integrating the FDI screening regime.[51]

Finally, the EU Procurement Directives[52] ensure equal access and transparency for the benefit of all companies, European or not; but, by establishing the lower price offer as the main parameter for awarding public tenders, they may unwillingly favour bidders that offer unnaturally lower prices thanks to foreign subsidies.[53] The EU considers its procurement market quite open to foreign companies, with important exceptions such as military supplies,[54] at a level that is not reciprocated by other countries.[55] For this reason, Brussels has been pushing its trade partners to open their public procurement markets, using bilateral (i.e., free trade agreements with *ad hoc* provisions for public procurement)[56] and autonomous tools, like the specialised FSR procedure for public tenders and Regulation (EU) 2022/1031 of 23 June 2022 (International Procurement Instrument, or IPI).[57] The IPI was first proposed in 2012 and finally approved in 2022: after seven years of legislative impasse,[58] the negotiations between the Commission and the Council regained momentum in 2019 – again, thanks to Germany moving closer to France in supporting autonomy in trade policy. While the FSR is applied to a subsidised undertaking in the context of a specific public tender, the IPI may restrict the participation of a company incorporated in or using products from a jurisdiction that does not grant the same level of access to the public procurement market to EU companies and goods.[59] The goal is not to restore fair competition in a specific tender but to push the other country

[49] EUMR, art 2(3).

[50] See European Commission, *supra* note 41, 6–8.

[51] See European Commission, *supra* note 41, at 10.

[52] See Directive 2014/23/EU on the award of concession contracts (*OJ* [2014] L 094/1); Directive 2014/24/EU on public procurement (*OJ* [2014] L 094/65); Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors (*OJ* [2014] L 094/243).

[53] See European Commission, *supra* note 41, 10–12.

[54] E.g., the exceptions in Articles 15, 16 and 17 Directive 2014/24.

[55] Recitals 5 and 8, Regulation (EU) 2022/1031 of the European Parliament and of the Council of 23 June 2022 on the access of third-country economic operators, goods and services to the Union's public procurement and concession markets and procedures supporting negotiations on access of Union economic operators, goods and services to the public procurement and concession markets of third countries (International Procurement Instrument – IPI), *OJ* [2022] L 173/1, 30.6.2022.

[56] S. Woolcock, 'Policy Diffusion in Public Procurement: The Role of Free Trade Agreements', 18 *International Negotiation* 2013, 166–168.

[57] IPI.

[58] M. Szczepański, 'EU international procurement instrument', *EU Legislation in Progress*, European Parliamentary Research Service Briefing 2022, 5-7, available at <www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2020)649403>.

[59] Art. 5 and 6 IPI.

to change its policies.[60] It could be argued that the FSR too shares this broader goal, as third countries may become less inclined to subsidisation, if then the beneficiary companies are penalised when bidding for EU public tenders.

At the level of international law, the White Paper hints at the EU's grievances towards the rules on industrial subsidies contained in the WTO's ASCM. *Inter alia*, Brussels laments that the current rules do not restrict subsidisation granted through formally private companies that are controlled or influenced by governments. It was already discussed how autonomous tools like the FSR became viable options for EU decision-makers due to the obstacles in solving the matter at the multilateral or bilateral level. To target foreign subsidies, before the adoption of the FSR, the EU had already at its disposal those tools that apply unilaterally WTO rules, i.e., Regulations 2016/1036 (the 'Basic Anti-Dumping Regulation,' BADR) and 2016/1037 (the 'Basic Anti-Subsidies Regulation,' BASR), but these tools present the limit that they do not cover trade in services or capital investments.[61] Having defined the problem, the White Paper proposes three 'modules' that will later become the three procedures of the FSR, analysed in Part 3.

2.4 Quelling the flame or fighting fire with fire? Alternatives to the FSR

The FSR could be considered one of the 'defensive' tools that the EU uses to counter foreign subsidies, as opposed to other 'offensive' tools.[62] We could ascribe to the first category all those policies that remove the effects of the subsidy with the ambition of restoring the level playing field; to the second category, all those policies that, in a nutshell, allow Member States to grant more State aid. With a subsidy race 'flaring up' at the global level, the first tools may be pictured as pouring water on the fire, the second ones as a controlled backfire.[63] Alongside the FSR, we find in the defensive toolbox other domestic instruments, like the BADR and the BASR, but also bilateral agreements like the EU partnerships and FTAs when they establish WTO+ frameworks or rules equivalent to Article 107 of the Treaty on the Functioning of the European Union (TFEU) *et seq*.[64] The advocacy for a WTO reform of subsidy rules, e.g., the above-mentioned Trilateral Meetings, is also part of this defensive strategy.

The offensive toolbox encompasses the several EU competition and industrial policy initiatives that, in recent years, allowed for more State aid and made the prohibition in principle of Article 107 TFEU more malleable. For instance, the Important Projects of Common European Interest (IPCEI) under Article 107(3)

[60] Recitals 19 and 24 IPI.

[61] See J. Blockx and P. Mattiolo, *supra* note 29, 59–61.

[62] See J. Blockx and P. Mattiolo, *supra* note 29, 53–54.

[63] P. Mattiolo, 'Quelling the Flames or Fighting Fire with Fire? The EU's Two Approaches to Foreign Subsidies', *CELIS Institute Blog*, 26 October 2023, available at: <www.celis.institute/celis-blog/quelling-the-flames-or-fighting-fire-with-fire-the-eus-two-approaches-to-foreign-subsidies/>.

[64] See European Commission, *supra* note 41, 43–44.

(b) TFEU, long forgotten and recently rediscovered, permits Member States to pool their resources and has been used to support the development of key industries on EU soil, from batteries to cloud services.[65] Another example is the 'matching aid' to counter a subsidy given by a third country provided by two recently revised frameworks, respectively the Framework for State aid for Research, Development and Innovation[66] and the Temporary Crisis and Transition Framework.[67] This trend was at its earliest days when the FSR debate started, as it is acknowledged also by the White Paper.[68] Yet, year by year, crisis by crisis, exception by exception, the backfire may now seem out of control. In key sectors such as semiconductors and green technologies, the EU has to face both US and Chinese competition. For Brussels, it is very difficult to deploy, at the EU level, subsidy packages like the ones granted by Washington, e.g., the unprecedented Inflation Reduction Act[69] or the multi-billion contributions to attract chip-making manufacturers.[70] This is due to an institutional limit of the EU: State aid is, as the label suggests, granted by a Member State. The EU lacks competences (and resources) in industrial policy, even if it was able to muster its own resources in a few instances in recent years, like NextGenerationEU and the Chips for Europe Initiative.[71] These two policies are somewhat exceptional and were made possible by a consensus among Member States and stakeholders that is achieved in Brussels usually in times of crises. The main risks associated with fighting 'subsidy with subsidy' are, internally, that smaller Member States are largely outspent by larger Member States, threatening the cohesion of the single market; externally, third countries may either challenge the EU to a subsidy race or, when short of money, deploying protectionist policies to keep the subsidised EU companies out of their markets. Looking at the global data on subsidies, this subsidy race is run almost solely by the US, the EU and China.[72] Offensive tools are more controversial than defensive ones in the inner EU policy debate,[73] making the FSR a more politically viable alternative to increased subsidisation.

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[65] See J. Blockx and P. Mattiolo, *supra* note 29, at 63.

[66] See J. Blockx and P. Mattiolo, *supra* note 29, at 63.

[67] See J. Blockx and P. Mattiolo, *supra* note 29, at 68.

[68] See European Commission, *supra* note 41, 4–5.

[69] European Commission, 'Launch of the US-EU Task Force on Inflation Reduction Act', STATEMENT/22/6402, Brussels 26 October 2022, available at <ec.europa.eu/commission/presscorner/detail/en/statement_22_6402>.

[70] D. Shepardson and S. Kelly, 'TSMC Wins $6.6 Bln US Subsidy for Arizona Chip Production', *Reuters,* 8 April 2024, available at <www.reuters.com/technology/tsmc-wins-66-bln-us-subsidy-arizona-chip-production-2024-04-08/>.

[71] See J. Blockx and P. Mattiolo, *supra* note 29, 63–64.

[72] S. J. Evenett and J. Fritz, 'Subsidies and Market Access: Towards an Inventory of Corporate Subsidies by China, the European Union and the United States', *The Global Trade Alert Report 28* 2021, 12–15.

[73] See P. Mattiolo, *supra* note 25.

3. COMMON PROVISIONS OF THE FSR

The FSR comprises three procedures: one general *ex officio* procedure and two specialised procedures, one for concentrations and one for public procurement, which are started upon notification. Before delving into the concentrations procedure, it is necessary to grasp the common concepts and procedural rules of the Regulation. The *ex officio* procedure acts both as a blueprint for the other two, and a failsafe for the Commission, which can start a review of its own initiative, if no notification was filed under a specialised procedure.

3.1 **The notion of distorting foreign subsidy**

First of all, it is necessary to understand the notion of *foreign subsidy* given by Article 3(1) FSR: a foreign subsidy is a 'financial contribution,' provided by a third country directly or indirectly, which confers a benefit selectively on one or more undertakings active in the internal market. As shown by Table 1, the concept mirrors, with a few differences, the notion of State aid enshrined in Article 107 TFEU, with some interpolations inspired by the ASCM.

ASCM (Art. 1)	**TFEU (Art. 107)**	**FSR (Art. 3)**
Financial contribution/benefit	'Any aid'	'Financial contribution … which confers a benefit'
by a government or any public body	'granted by a Member State or through State resources in any form whatsoever'	'third country'
to a specific recipient (Art. 2 ASCM)	'by favouring certain undertakings or the production of certain goods shall'	'which is limited, in law or in fact, to one or more undertakings or industries'
Prohibited: export/import. Actionable: adverse effects on the interest of other Members	'in so far as it affects trade between Member States'	'to an undertaking engaging in an economic activity in the internal market'
Injury (for actionable subsidies, Art. 5 ASCM).	'which distorts or threatens to distort competition'	Distortion (Art. 4 FSR)

Table 1. A comparison between the notions of subsidy and State aid in the ASCM, Article 107 TFEU and the FSR.

Article 3(2) FSR provides a non-exhaustive list of the financial contributions under the scope of the Regulation. It does so by describing, in the first subparagraph, what the contribution can be materially (e.g., transfer of funds, foregoing of due revenues, provision or purchase of products) or, in the second subparagraph,

the nature of its granter (e.g., public authorities, private entities under the control or influence of a third country). The difference between the respective scopes of the FSR and the ASCM is particularly evident from this provision, as the material description is closer to the broader scope of Article 107 TFEU,[74] rather than the WTO concept, and the second subparagraph explicitly exceeds the ASCM notion of 'public body.'[75]

The other key notion is the 'distortion' described in Article 4 FSR, which clearly recalls the same concept in Article 107 TFEU. Generally speaking, a subsidy is considered distortive when it improves the position of one undertaking active in the internal market and affects negatively, 'actually or potentially,'[76] competition in the internal market. To determine if the distortion occurred or not, the Commission assesses the subsidy's effects through the parameters indicated in Article 4(1) FSR or recognises one of the situations that qualify the subsidy as 'unlikely'[77] or 'most likely' distortive.[78] The presumption of a most likely distortion can be challenged by the undertaking.[79]

If the subsidy is deemed distortive, under Article 6 FSR, the Commission has the faculty to conduct a *balancing test* on the negative and positive effects of the subsidy. Article 11 FSR, by referring to Articles 4 to 6 FSR, clarifies that the test is conducted during the in-depth phase of a procedure, alongside a further assessment of the distortion; additionally, Article 10 FSR on the preliminary review omits any reference to the balancing test.[80] These positive effects pertain primarily[81] to the development of the 'subsidised economic activity on the internal market,' but also to 'relevant policy objectives, in particular those of the Union.'[82] This formula deserves some attention. The first part on economic development was already present in Article 5 of the Draft FSR Regulation, signalling that the Commission envisioned a balancing test limited to economic effects.[83] The second part on policy objectives was added during the Trialogue and is reminiscent of the broad formulation of the 'EU interest test' described in the White Paper.[84] If the White Paper's EU interest test was oriented towards many, also non-economic, policy goals, the Regulation's balancing test is focused more on economic considerations but it still leaves the door open to discretionary policy

[74] L. Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective* (Oxford: Oxford University Press 2009), at 183.
[75] See J. Blockx and P. Mattiolo, *supra* note 29, at 57.
[76] Art. 4 FSR.
[77] Art. 4(2) FSR.
[78] Art. 5(2) FSR.
[79] Art. 5(2) FSR.
[80] L. Hornkohl, 'The EU Foreign Subsidy Regulation – What, Why and How?', in J. Hillebrand Pohl *et al.* (eds.), *Weaponising Investments*, volume II, (Cham: Springer Nature Switzerland 2024), 21–22.
[81] See L. Hornkohl, *supra* note 80, at 12.
[82] Art. 6(1) FSR.
[83] See L. Hornkohl, *supra* note 80, at 13.
[84] See European Commission, *supra* note 41, at 17.

evaluations from the Commission.[85] Article 46(1) FSR obliges the Commission to publish guidelines on the balancing test by January 2026, which may make this aspect of the FSR procedure more predictable. Until then, the boundaries of the balancing test will be slowly revealed by the Commission's enforcement. In July 2024, the Commission provided some 'initial clarifications' on the balancing test, mentioning, as examples of potentially relevant policy objectives, 'environmental protection, social standards, the promotion of research and development' or 'more generally, where certain positive effects on the internal market have been acknowledged under the EU State aid rules.'[86] According to the Commission, if the balancing test is performed and a positive effect emerges, the balancing can only result in a more favourable decision for the undertaking, by leading to a no objection decision or a decision with redressive measures (or commitments) that is adapted so as 'to cater for those positive effects, while still ensuring that the negative effects are fully and effectively redressed.'[87]

3.2 **General structure of the Regulation**

The Foreign Subsidies Regulation was adopted on 14 December 2022, followed by an Implementing Regulation adopted on 10 July 2023, which integrated the rules on notifications and procedure.[88] After setting up some common provisions, the FSR delineates three procedures: one general *ex officio* review and two specialised procedures – one for concentrations and one for public procurement. Since the focus of this paper is the procedure for concentrations, described in Chapter 3 of the Regulation, the present paragraph offers a brief overview of the other two.

The *ex officio* review is described in Chapter 2, Articles 9 to 18 FSR. The Commission can start this procedure whenever it learns about a subsidy that falls under the FSR scope, and also when the subsidy affects concentrations and public tenders that do not fall under the scope of the specific procedures. The *ex officio* review can also be activated if the notification required to start the specific procedures is not performed and, regarding the second procedure, the concentration was already implemented.[89] The procedure is divided into two phases: a preliminary review and an in-depth investigation. In the first phase, the Commission verifies if an undertaking active in the internal market has

[85] See L. Hornkohl, *supra* note 80, 12–14.

[86] European Commission, 'Initial Clarifications on the Application of Article 4(1), Article 6 and Article 27(1) of Regulation (EU) 2022/2560 on Foreign Subsidies Distorting the Internal Market', SWD(2024) 201 final 6, 26.7.2024, available at <competition-policy.ec.europa.eu/document/download/b4c8bb13-839b-4bfb-8863-78b188523d22_en?filename=20240726_SWD_clarifications_on_application_of_FSR.pdf>.

[87] See European Commission, *supra* note 86, at 7.

[88] Commission Implementing Regulation (EU) 2023/1441 of 10 July 2023 on detailed arrangements for the conduct of proceedings by the Commission pursuant to Regulation (EU) 2022/2560 of the European Parliament and of the Council on foreign subsidies distorting the internal market (FSR Implementing Regulation), *OJ* [2023], L 177/1, 12.7.2023.

[89] See L. Hornkohl, *supra* note 80, 18–19.

received a financial contribution from a foreign government and a distortion in the internal market occurred.[90] If both conditions are present, the Commission starts an in-depth investigation and informs the undertaking. The parties and other companies active in the same sector can submit their observations. Since the two specialised procedure chapters refer to some of these procedural provisions, the two-phase structure is common to all three FSR procedures. Finally, the Commission adopts, within 18 months from the start of the in-depth investigation, a decision, either with redressive measures or no objections (the Commission's powers are discussed in paragraph 2.3). A third potential outcome is that the undertaking offers commitments to address the distortion and the Commission accepts them with a binding decision.[91] Before reaching a decision, the Commission can impose *interim* measures to avoid an 'irreparable damage to competition on the internal market.'[92]

The procedure for public procurement is described in Chapter 4, Articles 27 to 33. If the public tender is worth 250 million euros or more and a bidding undertaking has received a subsidy from a third country of more than 4 million euros in the previous three years, the company must notify the contracting authority, which then transmits the information to the Commission.[93] This threshold is designed to reduce the procedure's scope only to particularly significant tenders, reducing therefore the administrative burden for smaller authorities. In this case too, the Commission first conducts a preliminary review and, eventually, an in-depth investigation, with a set timeframe to not slow the public tender procedure.[94] If the Commission suspects that a bidder has received subsidies but did not notify it, it can either start an *ex officio* review or demand the notification so that the specialised procedure can start.[95] While the Commission investigates, the contracting authority can continue but not conclude the procedure, as the Commission may establish that the bidder benefitted from a distorting subsidy and prohibit awarding the tender to it.[96]

Interestingly, in February 2024, the Commission launched the first FSR in-depth investigation related to a 610 million euro public procurement procedure for electric trains: CRRC, a Chinese SOE active in train manufacturing, notified the Bulgarian Ministry of Transport and Communication that it had received foreign subsidies.[97] One month after the Commission's announcement, CRRC withdrew its bid.[98] As of the composition of this manuscript in April 2024, the

[90] Art. 10 FSR.
[91] Art. 11 FSR.
[92] Art. 12 FSR.
[93] Art. 28 FSR.
[94] Art. 30 FSR.
[95] Art. 29(8) FSR.
[96] Art. 31(2) FSR.
[97] European Commission, 'Commission Opens First In-Depth Investigation under the Foreign Subsidies Regulation', Press release IP/24/887, 16.2.2024, available at <ec.europa.eu/commission/presscorner/detail/en/ip_24_887>.
[98] F. Bermingham, 'Chinese Rail Company CRRC Withdraws Bulgarian Bid amid EU Inquiry', *South China Morning Post,* 27 March 2024, available at <www.scmp.com/news/china/ar-

Commission has initiated two additional in-depth investigations, both pertaining to public procurement and involving Chinese operators, in the context of a Romanian tender for solar panels.[99]

3.3 **The Commission's decisions**

At the end of the in-depth investigation, the Commission may adopt redressive measures under Article 7. The Article provides a non-exhaustive list of available measures: *inter alia*, it may order to abstain from specific investments or divest assets, adapting the governance structure or, more radically, to dissolve the concentration. An *ex officio* procedure could result in imposing certain remedies that could be used to pursue national security goals in the field of technology, e.g., the imposition to offer access to the newly acquired infrastructure, license assets or publish R&D results;[100] although, not in the context of the concentrations procedure, as there is no mention to Article 7 FSR in its provision.[101] The specialised procedure, as the EUMR,[102] can only stop the concentration or accept the commitments offered by the undertaking: imposing additional conditions to the concentration may render it unpalatable to the undertakings and void their previous arrangements. The open nature of Article 7's list of remedies may generate some uncertainty among companies. Probably the Commission will borrow some measures from other fields of EU law, such as competition law, as long as they are compatible with the letter of the FSR. An interesting case is fines, which are used in antitrust law, but are limited by Article 17 FSR only to sanctioning misconduct or negligence performed by the investigated undertaking during the procedure. Even so, for concentrations, Article 26(3) allows for a fine of up to 10% of the undertaking's turnover if it fails to notify a notifiable concentration or implements the concentration against other Regulation's provisions, similar to Article 14(2) EUMR.

An undertaking under investigation may avoid a redressive measure by offering a commitment to remedy the distortion. If the undertaking's proposal is accepted, the Commission adopts a 'decision with commitments' that binds the undertaking. In principle, the measures and the commitments must be proportionate, transparent, full and effective in remedying the distortion.[103]

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ticle/3256843/chinese-rail-company-crrc-withdraws-bid-bulgarian-public-tender-amid-eu-inquiry>.

[99] European Commission, 'Commission Opens Two In-Depth Investigations under the Foreign Subsidies Regulation in the Solar Photovoltaic Sector', Press release IP/24/1803, 3.4.2024. available at <ec.europa.eu/commission/presscorner/detail/en/ip_24_1803> accessed 6 April 2024.

[100] Art. 7(4) FSR.

[101] Art. 25 FSR.

[102] See L. Hornkohl, *supra* note 80, 28–29.

[103] Art. 7(2)(3) FSR.

4. THE CONCENTRATIONS PROCEDURE OF THE FSR

Concentrations among undertakings that may have received foreign subsidies are scrutinised by the Commission mainly via the specialised procedure, after receiving a notification from the undertaking. The notification is mandatory if the concentration falls within the scope of the procedure.

4.1 **The concentrations procedure: scope**

The concentrations procedure is described in Chapter 3 of the Regulation. Article 20 defines what are the notifiable concentrations under the FSR through two elements. First, an 'FSR concentration' occurs when a merger, an acquisition or a full-function joint venture[104] produces 'a change of control on a lasting basis.' This first element follows the trail of established concepts in EU merger control practices,[105] and steers away from the broader scope suggested by the Commission in the White Paper, which included the acquisition of a certain percentage of shares, voting rights or 'material influence' over the target.[106] Second, both the concentration and the foreign financial contributions received by *all* the concerned undertakings need to surpass certain thresholds: respectively, at least € 500 million of aggregate turnover in the EU and 'combined aggregate *financial contributions* of more than EUR 50 million from third *countries* (emphasis added) in the three years preceding' the concentration.[107]

The provision setting the second threshold, Article 20(3)(b) FSR, has significant consequences for the compliance workload of companies – and on the amount of information gathered by the Commission through notifications. Undertakings need to notify all 'financial contributions' ex Article 3(2), not 'foreign subsidies' *ex* Article 3(1), from *all* third countries. As mentioned before, the category of foreign subsidy, in the FSR, comprises financial contributions which presents also the element of selectiveness; therefore, by referring to financial contributions instead of foreign subsidies, Article 20(3)(b) FSR potentially expands the notification scope to non-selective measures, e.g., the lowering of general corporate taxes.[108] Additionally, the distortion *ex* Article 4 is not mentioned, therefore also non-distortive financial contributions have to be calculated.[109] As mentioned, this scope will allow for the Commission to gather much more data on foreign subsidies: it may not be relevant for that specific concentrations procedure, but

[104] Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, *OJ* [2008] C 95/1, 16.4.2008, paras 97–105.

[105] See L. Hornkohl, *supra* note 80, at 24.

[106] See L. Hornkohl, *supra* note 80, at 24.

[107] Art. 20(3) FSR.

[108] See L. Hornkohl, *supra* note 80, 25–26; T. Bauermeister, 'A Tool to Investigate M&A Transactions with Regard to Foreign Financial Contributions', 25 *Zeitschrift für europarechtliche Studien* 2022, at 483.

[109] See T. Bauermeister, *supra* note 108, at 483.

the information may be retained[110] and could be used for other procedures or to partly work around the problem of the lack of transparency under the WTO framework.[111] Undertakings are sometimes groups comprised of hundreds of companies incorporated all over the world. For them, keeping track and reporting all the financial contributions that they may have received from different governments may be an especially burdensome task. This may require them to introduce recurring report exercises[112] and perhaps appoint an 'FSR officer.'[113]

4.2 **The notification**

If the concentration is notifiable, the undertakings concerned are obliged to notify the Commission prior to their implementation.[114] The notification is temporally and procedurally situated between the conclusion of the concentration agreement and its implementation. It constitutes a limit when it comes to starting a specialised procedure *ex* Chapter 3 instead of a general *ex officio* review on the concentration. In other words, if the undertakings do not notify the concentration and proceed with the implementation, the Commission has the power to either initiate an *ex officio* review or demand the notification, triggering the specialised procedure.[115] Similar to merger control,[116] companies can pre-notify the Commission of the concentration of their own accord, anticipating part of the information exchange and facilitating cooperation between the private and the Commission.[117] Between the entry into force of the FSR and the end of January 2024, the Commission has already received and processed 53 pre-notifications,[118] far more than the expected 33 cases per year foreseen in the FSR Impact Assessment.[119]

Annex I to the FSR Implementing Regulation contains the form for the notification. The notification must contain a description of the concentration, with a detailed account of ownership and control; information about the parties; the turnover in the EU for the purpose of the notification thresholds; the foreign financial contributions received in the previous three years; information useful to determine the impact on the internal market of the foreign financial contributions,

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[110] Art. 18(1) FSR Implementing Regulation.

[111] J. Blockx and P. Mattiolo, *supra* note 29, at 72.

[112] V. Van Weelden *et al*., 'The Foreign Subsidies Regulation's Impact on M&A Transactions – the Third Wheel of Regulatory Reviews', 1 *Tijdschrift Mededingingsrecht in de Praktijk* 2024, at 22.

[113] This was confided to the author by a manager of a multinational group made of more than 700 companies.

[114] Art 21 FSR.

[115] Art. 21(5) FSR.

[116] Art 4 EUMR.

[117] Annex I para 8, FSR Implementing Regulation.

[118] See Van Weelden *et al*., *supra* note 112, at 22.

[119] European Commission, 'Impact Assessment Accompanying the Proposal for a Regulation of the European Parliament and of the Council on Foreign Subsidies Distorting the Internal Market', SWD(2021) 99 final 53, 5.5.2021, available at <eur-lex.europa.eu/legal-content/EN/ALL/?uri=SWD:2021:99:FIN>.

such as the different business lines or activities of the company, its turnover, the products offered, and the potential positive effects on the internal market of the financial contribution.

The Regulation explicitly provides for a standstill period, spanning from before the notification to after it, during which the concentration cannot be implemented.[120] After the notification, the standstill expires if the Commission reaches a favourable decision or does not respect one of the procedural terms set in Article 24(1). Implementing the concentration before the lapse of the standstill or in violation of the notification obligation ('gun-jumping') may result in the fine discussed in paragraph 2.3 (up to 10% of the aggregate turnover) or in the dissolution of the concentration if it is found distortive by the Commission at the end of its investigation. The notification opens a two-phase procedure similar to the one described for the *ex officio* review: a preliminary review that may be followed by an in-depth investigation.[121] In the second phase, the Commission carries out the balancing test *ex* Article 6. At the end of the investigation, the Commission either adopts a no-objection decision or prohibits the concentration.[122] It can also accept the undertakings' commitments via decision as detailed by the Regulation for the *ex officio review*, but it cannot take redressive measures, similarly to merger law.[123]

5. THE INTERACTION BETWEEN THE FSR AND THE EU MERGER REGULATION

An undertaking may need to notify a concentration under the FSR, the EUMR and the national rules on FDI screening. This overlapping may be burdensome for companies and raise questions whether the reform of the two, older, tools (EUMR and FDI Regulation), was preferable to developing a third tool, the FSR. Comparing the EUMR's and FSR's provisions offers more insight into the concentrations procedure of the latter.

5.1 **One concentration, three procedures**

Companies which are planning a concentration have to notify if it falls under the scope of the FSR concentrations tool. At the same time, the concentration may fall also under the scope of the EUMR if it meets the threshold and satisfies the requirement of the Union dimension. The FSR and the EUMR have similar scopes and procedures, yet they are entirely distinct and so are handled by the Commission and companies separately.[124] Alternatively, if not at the EU level, the

[120] Art. 24(1) FSR.
[121] See L. Hornkohl, *supra* note 80, 27–28.
[122] Art. 25(3) FSR.
[123] See L. Hornkohl, *supra* note 80, 28–29.
[124] See L. Hornkohl, *supra* note 80, 31–32.

concentration may fall under the scope of national merger control procedures.[125] Looking at the singular elements of the FSR scope, the notion of 'concentration' is shared with the EUMR and the turnover thresholds are practically aligned, so both procedures have the same 'starting point.'[126]

The main difference in scope is that the FSR introduces the element of foreign financial contributions, which are not considered by the EUMR. Yet, even before the introduction of the FSR, the merger control could already consider foreign subsidies in the assessment of a concentration.[127] The German *Bundeskartellamt*, for instance, cleared the acquisition of the train manufacturer Vossloh by the Chinese SOE CRRC in 2020,[128] but it did so after considering, in the forecast of the evolving market situation, the nature of CRRC as a SOE and the implications of operating in a 'centrally planned economy.'[129] The *Bundeskartellamt* openly discusses the matter of the impact of Chinese subsidies on the competition in a given market and the limits of EU competition on the issue at that point.[130] The fact that a national authority already considered, although limitedly, the issue of foreign subsidies in a pre-FSR merger review gives some weight to the observation of some scholarship[131] and stakeholders[132] that the EU may have also taken another route to fill the regulatory gap, i.e., reforming its existing tools to include forms of control on foreign subsidies, thus avoiding the doubling of notifications and procedures. Interestingly, the paper has already mentioned the Chinese CRRC twice: under the pre-FSR regime, it was able to pass the *Bundeskartellamt's* scrutiny and complete the acquisition; under the FSR, the sole fact that the Commission started an in-depth investigation on its public procurement bid led to its withdrawal.

Finally, the fact that the concentration may involve a non-EU undertaking makes the framework set by the FDI Regulation relevant as well,[133] as discussed more in-depth in Part 6. This framework is operated at the Member State level: the FDI Regulation sets the essential elements, but national legislation defines most of how FDI screening works, leading to differences in the enforcement among Member States. In other words, companies may have to deal with three different

[125] See T. Bauermeister, *supra* note 108, 483–484.

[126] See T. Bauermeister, *supra* note 108, at 485.

[127] See L. Hornkohl, *supra* note 80, 33–34.

[128] Federal Cartel Office, 'Decision B4-115/19 of 27 April 2020 on the Acquisition of Vossloh Locomotives GmbH by CRRC Zhuzhou Locomotives Co., Ltd.', Case summary, available at <www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Fusionskontrolle/2020/B4-115-19.pdf?__blob=publicationFile&v=5>.

[129] See L. Hornkohl, *supra* note 80, at 32.

[130] See Federal Cartel Office, *supra* note 128, 4–8.

[131] See L. Hornkohl, *supra* note 80, 32–33.

[132] European Commission, 'Summary of the Responses to the Public Consultation on the White Paper on Levelling the Playing Field as Regards Foreign Subsidies', 2020, 3–5, available at <ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12452-White-Paper-on-Foreign-Subsidies/public-consultation_it>.

[133] FDI Regulation.

compliance procedures for the same concentration,[134] potentially at both the EU and the Member State levels, multiplying their compliance burden.

5.2 **The assessment in the two procedures: affinities and divergences**

After the two notifications have opened the FSR specialised procedure and the EUMR procedure, their unfolding may present divergences. On the side of the Commission's assessment, the main goal of its FSR investigation is to determine if the concentration facilitated by foreign financial contribution would distort the internal market;[135] whereas the EUMR exercise seeks to determine whether a 'significant impediment to effective competition' (SIEC) would take place.[136] The two different assessments are succinctly outlined in Table 2. While the focus of the FSR is on foreign subsidies and their effects, the EUMR looks at the structure of competition in the market affected by the concentration.[137] This difference in assessment may also create a sort of discrimination between companies which receive Member State aid and companies which receive foreign subsidies: the first may be advantaged in a concentration by State aid and that would not be considered negatively by the Commission.[138]

	Art. 4 FSR	**Art. 2(1) EUMR**
To be established:	'distortion in the internal market,' i.e., improving 'the competitive position of an undertaking' and 'actually or potentially negatively affects competition in the internal market'	the concentration does 'not significantly impede effective competition in the common market or in a substantial part of it'
Indicators	*Inter alia*: a) amount of the foreign subsidy b) its nature c) the situation of the undertaking; size and the markets concerned d) the economic activity of the undertaking on the internal market e) purpose and conditions of the foreign subsidy; its use.	a) need to maintain and develop effective competition within the common market, looking at, *inter alia*: o structure of concerned markets concerned o actual or potential competition from other undertakings b) market position of the undertakings; their economic and financial power; the interests of consumers, *etc.*

Table 2. A comparison between Article 4 FSR and Article 2(1) EUMR.

[134] See L. Hornkohl, *supra* note 80, 31–32.
[135] Art 4, FSR.
[136] Art 2, EUMR.
[137] See European Commission, *supra* note 41, at 40.
[138] J. Blockx, 'The Proposal for an EU Regulation on Foreign Subsidies Distorting the Internal Market: How Will It Impact Corporate Mergers and Acquisitions?', in B. de Jong *et al.* (eds.), *The Rise of Public Security Interests in Corporate Mergers and Acquisitions* (Nijmegen: Wolf Legal Publishers 2022), 149–154.

It is still early to substantiate how the Commission will verify such distortion in the cases not included in the catalogue in Article 5, but it will probably follow the established practices of State aid law: as mentioned before, the concept of distortion is presented in both the Regulation and Article 107 TFEU. The distortion test for Article 107 TFEU does not require the Commission to provide exact details on how it has assessed the competitive advantage given by the Member State aid to the company, nor to define or analyse the relevant market that may be distorted;[139] additionally, the FSR enumerates certain subsidies that are presumed distortive.[140] On the opposite side, the Commission has the burden of proof in the SIEC test and there are no presumptions.[141] The EUMR review may be more extensive than the FSR one on this aspect, but narrower in terms of potential 'geopolitical' considerations. It is true that, as shown in the aforementioned Vossloh decision by the German *Bundeskartellamt*,[142] a merger procedure could hypothetically take into consideration that the acquirer is an SOE operating in a 'centrally planned economy,'[143] when a competition authority has to analyse the potential evolution of the relevant market. The *Bundeskartellamt* openly discussed the impact of Chinese subsidies on the competition in a given market and the limits of EU competition on the issue at that point.[144][145] Yet, its assessment is purely economic, the decision can only be taken in the interest of effective competition.

Whereas, in an FSR procedure, the Commission could choose to leverage the balancing test and allow for a concentration that distorts the market, but aligns with other policy goals. For example, in July 2024 the Commission opened its first in-depth investigation under the concentrations procedure, following the notification from the Emirati telecom company e& of its planned acquisition of PPF Telecom – in particular, of the latter's activities and assets in Bulgaria, Hungary, Serbia and Slovakia.[146] The next step, for the Commission, is to verify if the subsidies received by e& affected negatively the acquisition process by putting its competitors for the acquisition (if present) at a disadvantage or enabling an operation that would have been impossible otherwise; or if the resulting entity may compete, in the future, from an advantageous position in the internal market.[147] Even if the concentration is found distorted by foreign subsidies, the

[139] G. Peretz and D. Mackersie, '17. State Aids', in D. Bailey and L. E. John (eds.), *Bellamy & Child: European Union Law of Competition* (Oxford: Oxford University Press, 8th edition 2018), 1463–1464.

[140] Art 5(1), FSR.

[141] R. Whish and D. Bailey, *Competition Law* (Oxford: Oxford University Press, 10th Edition 2021), at 909.

[142] See Federal Cartel Office, *supra* note 128.

[143] See L. Hornkohl, *supra* note 80, at 32.

[144] See Federal Cartel Office, *supra* note 128, 4–8.

[145] Even so, the German Authority cleared the acquisition of the train manufacturer Vossloh by the Chinese SOE CRRC.

[146] European Commission, 'Summary Notice Concerning the Initiation of an In-Depth Investigation in Case FS.100011 – Emirates Telecommunications Group / PPF Telecom Group Pursuant to Articles 10(3)(d) of Regulation (EU) 2022/2560', C/2024/3970, 21.6.2024, available at <eur-lex.europa.eu/eli/C/2024/3970>.

[147] See European Commission, *supra* note 146, at 2.

FSR *literal legis* does not exclude that the Commission could still justify the acquisition as it may bring some positive effects for the EU (e.g., the development of strategic telecommunication infrastructure in the interested Member States, with positive effects for their overall competitiveness). Yet, the positive effects may not offset the negative ones if the subsidy comes from a geopolitical rival of the EU – in that case, the investment could potentially compromise EU competitiveness, instead of bolstering it. The FSR assessment could factor in more variables than the EUMR assessment, making the FSR outcomes more discretionary – and unpredictable. This scenario may be as well exaggerated: the Commission designed the FSR to be 'origin-neutral'[148], and its officials disclosed that nationality is not a determinant for their assessment.[149] The first FSR decisions may confirm these reassurances.

6. IS THE FSR A TOOL TO SCREEN INVESTMENT AT THE EU LEVEL? SOME (PRELIMINARY) THOUGHTS

The contours of the EU FDI screening regime are defined by the FDI Regulation; then, Member States decide if and how to set up their national mechanism. While trade policy is an EU exclusive competence,[150] investment screening is primarily at the national level due to its security component. National security is, after all, one of the 'essential State functions' and a 'sole responsibility' of Member States,[151] and national governments are jealous of their FDI screening powers. The FSR presents some elements that make it similar to investment screening, yet it is firmly in the hands of the Commission: could the FSR be considered a tool to screen investment at the EU level, in the absence of an EU-wide FDI procedure?

6.1 **The EU FDI screening framework: essential elements and overlapping with the FSR**

A screening procedure can be used to stop an investment by a foreign company with the goal of protecting a national security interest; at the expense of renouncing, entirely or partially, the investment. Investments can take the form of a new economic activity by the company (the so-called 'greenfield investments,' e.g., opening a new plant) or the acquisition of an existing company ('brownfield investments').[152] The policy culture of the Member States on the matter varies greatly: some prioritise economic security and domestic control

[148] F.-C. Laprévote and W. Lin, 'Between State Aid, Trade and Antitrust: The Mixed Procedural Heritage of the Foreign Subsidies Regulation and the Overarching Principle of Non-Discrimination', 25 *Zeitschrift für europarechtliche Studien* 2022, 450–452.

[149] In a private event dedicated to the Regulation.

[150] Art 3 TFEU.

[151] Art. 4(2) Treaty on the European Union (TEU), *OJ* [2012] C 326/13, 26.10.2012.

[152] T. Galeza and J. Chan, 'What Is Direct Investment?' 52 *Finance & Development* 2015, at 34.

of key companies, some others want to welcome as much foreign investment as possible, so they opt for not having a national screening mechanism: it is the case of Croatia, Cyprus and Greece.[153] Ireland[154] and Bulgaria[155] have approved, respectively in October 2023 and February 24, *ad hoc* laws to align with the FDI Regulation and establish their own national screening regimes, which should become operational at the end of 2024.

The purpose of the FDI Regulation is to coordinate the different national mechanisms,[156] define certain common requirements,[157] and ensure that the Commission and the other Member States can submit, respectively, an opinion and comments when an investment is likely to affect the security of more than one Member States or an EU-wide strategic project.[158] The final decision, though, is of the Member State which would receive the investment.[159] The FDI Regulation provides some factors to assess whether an investment poses a threat to security, most notably, for a comparison with the FSR, the fact that 'the foreign investor is directly or indirectly controlled by the government, including state bodies or armed forces, of a third country, including through ownership structure or significant funding.'[160] This same situation would probably lead the Commission to establish the presence of a foreign subsidy under Article 3 FSR. A brownfield investment may easily fall under the scope of both a national FDI mechanism and the FSR.

6.2 The difficult 'Europeanisation' of FDI screening. Could the FSR be a workaround?

In December 2023, the European Court of Auditors published a special report on FDI screening in the EU.[161] The key findings of the report were already clear from the subtitle on the first page: 'first steps taken, but significant limitations remain in addressing security and public-order risks effectively.'[162] The FDI Regulation provides no tools to verify compliance by the Member States and there are no-

[153] European Commission, 'List of Screening Mechanisms Notified by Member States', 2024, available at: <circabc.europa.eu/rest/download/7e72cdb4-65d4-4eb1-910b-bed119c45d47>.

[154] Department of Enterprise, Trade and Employment of Ireland, 'Inward Investment Screening', available at <enterprise.gov.ie/en/what-we-do/trade-investment/investment-screening/investment-screening.html>.

[155] UNCTAD Investment Policy Hub, 'Bulgaria Establishes a Mechanism for Screening FDI Related to National Security and Public Order', 12 March 2024, available at <investmentpolicy.unctad.org/investment-policy-monitor/measures/4599/bulgaria-establishes-a-mechanism-for-screening-fdi-related-to-national-security-and-public-order>.

[156] Art. 5-7 FDI Regulation.

[157] Art. 3, 4 and 9 FDI Regulation.

[158] Art. 6 FDI Regulation.

[159] Recital 17 FDI Regulation.

[160] Art. 4 FDI Regulation.

[161] European Court of Auditors, 'Screening Foreign Direct Investments in the EU', Special Report 27/2023, available at <http://www.eca.europa.eu/en/publications/sr-2023-27>.

[162] See European Court of Auditors, *supra* note 161, at 1.

table differences among national mechanisms,[163] most notably their absence in some Member States, despite the call from the Commission to establish them in all EU countries.[164] The solution to this issue could be proceeding towards a deeper 'Europeanisation' of FDI Screening,[165] as set out by the Economic Security Package proposed by the Commission in January 2024.[166] The Package includes a draft proposal for a revised FDI Regulation,[167] which, most notably, would require all Member States to establish an investment screening mechanism, impose certain factors to be necessarily considered by Member States when assessing the risks to their security and equate intra-EU investments by EU entities controlled by non-EU investors to FDI.[168] This last provision reminds the FSR, which scrutinises all 'undertaking engaging in an economic activity in the internal market,'[169] regardless of their jurisdiction of incorporation. In any case, Member States would remain in charge of investment screening: the new Regulation would further harmonise investment screening,[170] but not move it to the EU level.

As mentioned, national security is, as the name suggests, a national competence, and the Treaties enshrines this axiom.[171] Under the current constitutional architecture, and as long as Member States remain jealous of their investment screening powers, they will remain the ultimate gatekeepers to the European Single Market for foreign investors. Yet, the FSR may represent a workaround to these obstacles for the Commission. At least when the FDI takes the form of a corporate acquisition, the Commission can use the FSR to investigate, at the EU level and at its discretion, the operations that involve undertakings with ties to foreign governments. The key difference with FDI screening is the assessment, as the FSR does not consider directly security risks and address market distortions. The question requires further consideration and, again, observing the first FSR decisions may provide clarity to how the Commission intends to use the tool.

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[163] See European Court of Auditors, *supra* note 161, 30–40.

[164] See European Commission, *supra* note 15, at 20.

[165] S. Bohnert, 'FDI Screening Regulation 2.0: Towards Greater Regulatory Convergence?', *CELIS Institute Blog*, 6 February 2024, available at: <www.celis.institute/celis-blog/fdi-screening-regulation-2-0-towards-greater-regulatory-convergence/>.

[166] European Commission, 'Commission Proposes New Initiatives to Strengthen Economic Security', Press release IP/24/363, 24.1.2024, <ec.europa.eu/commission/presscorner/detail/en/ip_24_363>.

[167] European Commission, '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' (2024) Draft Legislative Proposal 2024/0017 (COD) <circabc.europa.eu/ui/group/aac710a0-4eb3-493e-a12a-e988b442a72a/library/f5091d46-475f-45d0-9813-7d2a7537bc1f/details?download=true>.

[168] See S. Bohnert, *supra* note 165.

[169] Art. 3 FSR.

[170] See S. Bohnert, *supra* note 165.

[171] Art. 4(2) TEU and Art. 346(2) TFEU.

7. CONCLUSION

The comparison between the FSR, the EUMR and FDI screening has shown that they present both overlaps and differences. The fact that the three separate procedures may take place at the same time, potentially at two different institutional levels and even result in conflicting outcomes, may increase the required efforts of both the Commission and companies. More importantly, this 'fragmentation' may reduce the effectiveness of the efforts by the Commission and the Member States to defend the internal market from either distortive foreign subsidies and hostile FDI. It could be (and was) argued that updating the existing tools instead of adopting the FSR, therefore avoiding an additional procedure, would have been a more effective option, but it should be remembered that the FSR covers also new situations. Bundling together different situations affected by subsidies in one sole tool may lead to a homogeneous approach to regulating them, and it simplified the legislative process. Yet, the Commission will need to ensure the coordination between the FSR, the EUMR and also FDI screening.

The recent developments in investment screening, notably the EU Economic Security Package, were only touched upon in the article. The Europeanisation of FDI screening may facilitate coordination between this tool and the FSR, even if a scenario where both tools are administered at the EU level is unlikely at the current stage. Another critical aspect is how such interaction may swell up in an 'over-securitisation' of the scrutiny over acquisitions, with the risk of reducing the openness of the EU economy in the name of autonomy and driving away incoming FDI. The boundaries of the balancing test of Article 6 FSR, which is *per se* fit to expand the Commission's assessment beyond 'purely' economic aspects towards more political considerations, should be delimitated by the Commission as soon as possible if it wants to disprove the suspects that it may use the FSR to exercise FDI screening or industrial policy 'through the back door,'[172] strong of an open catalogue of redressive measures. In fact, using the FSR *politically* is not necessarily against the spirit of the tool, as the paper described in Part 2.

Finally, still on the use of the FSR in the EU's geopolitical manoeuvres, if the tool is indeed 'origin-neutral'[173], it should be used consistently and not selectively, only when a foreign subsidy comes from a geopolitical rival. If the FSR was discriminatory, it may be incompatible with WTO law, or even just with the EU's commitment to multilateralism and open trade. The matter of WTO compatibility was not considered in this contribution. Indeed the FSR appears compatible with international trade rules,[174] but this may not shield the EU from criticism by trade partners penalised by the FSR, or ensure that their investments continue to flow into the European economy.

[172] See L. Hornkohl, *supra* note 80, at 34.

[173] See F.-C. Laprévote and W. Lin, *supra* note 148, 450–452.

[174] C. I. Nagy, 'The EU's New Regime on Foreign Subsidies: Has the Time Come for a Paradigm-Shift?', 57 *Journal of World Trade* 2023.

THE COMMISSION'S LEGISLATIVE PROPOSAL FOR AMENDING THE SCREENING REGULATION: A STEP TOWARD MORE PROTECTION AND LESS PROTECTIONISM?

Najibullah Zamani*

1. INTRODUCTION

With the collapse of the Soviet Union, the end of the Cold War, the adoption of the General Agreement on Trade in Services (GATS) and the creation of the World Trade Organization (WTO), the world entered a new era of 'true economic liberalism' and (hyper) economic globalization in the 1990s.[1] Globalization is a multifaceted phenomenon, with economic globalization specifically being characterized by, *inter alia,* '[…] the gradual integration of national economies into one borderless global economy, [and] […] [encompassing] both (free) international trade and (unrestricted) foreign direct investments'.[2] The prevalent belief, and hope, in the 1990s was therefore that from then on states would 'make trade, not war'. Free international trade and liberalized foreign direct investments (FDI) would prevent destructive wars because they disincentivize states to employ military means to settle their conflicts. This idea can be traced back to inter alia Montesquieu who wrote in 1758 that '[t]he natural effect of trade is to bring about peace'.[3] Precisely this idea also underpinned the start of the European integration project back in 1951 with the creation of the European Coal and Steel Community (ESCS).

The good old days of trade bringing peace are however gone, for indeed, trade and investment policies are nowadays used as alternatives to ordinary military and political policies to pursue security and (geo)political interests. Edward Luttwak noted this phenomenon already in the 1990s, when he argued that '[t]he methods of commerce are displacing military methods- with disposable capital in lieu of firepower, civilian innovation in lieu of military-technical advancement, and market penetration in lieu of garrisons and bases'. Luttwak used the term

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[1] K.C. Cai, The Politics of Economic Regionalism. Explaining Regional Economic Integration in East Asia (Hampshire: Palgrave Macmillian 2010), at 57-67. See with regard to the globalisation of the economic order: D. Rodrik, The Globalization Paradox: Democracy and the Future of World Economy (New York: W.W. Norton 2011).

[2] P. Van Den Bossche, The Law and Policy of the World Trade Organization. Text, Cases and Materials (Cambridge: Cambridge University Press 2005), at 3.

[3] C. Montesquieu, De l'esprit des Lois (1758) referred to it by P. Martin et al., 'Make trade not war?', 75 The Review of Economic Studies 2008, at 865.

geo-economics to describe this '[…] admixture of the logic of conflict with the methods of commerce'.[4] More recently, Trade Commissioner Valdis Dombrovskis also noted that trade is being weaponized, with the EU and its Member States finding themselves increasingly subjected to economic intimidation.[5]

In order to protect itself and its Member States against the weaponization of trade and investment policies, the EU has adopted various instruments[6] such as the FDI Screening Regulation[7], the Anti-coercion Instrument[8] and the Foreign Subsidies Regulation.[9] More recently, the European Commission (Commission) announced the European Economic Security Strategy, which is aimed at comprehensively assessing and evaluating the risks posed to the EU's economic security across four key areas: supply chains, critical infrastructure, technology security and technology leakage and economic dependencies or economic coercion.[10] While it is necessary for the EU and its Member States to protect their interests, it is at the same time vital that they abide by their international obligations flowing from *inter alia* international trade and investment agreements. Therefore, the design and application of these instruments must be capable of protecting the vital interests of the EU and its Member States without resulting in an overt or covert protectionism.[11] For the purpose of the present paper, protectionism

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[4] E. Luttwak, 'From Geopolitics to Geo-economics: Logic of Conflict, Grammar of Commerce', 20 The National Interest 1990, at 17-19.

[5] European Commission, Press release: EU Strengthens Protection Against Economic Coercion, 8 Dec. 2021, available at <ec.europa.eu/commission/presscorner/detail/en/ip_21_6642>. For an example, see the trade restrictions imposed by China on Lithuania. As a consequence of these trade restrictions, on January 27, 2022, the European Commission announced its intention to file a case against China with the World Trade Organization (WTO) for discriminatory trade practices that contravene WTO law. In response to the EU's accusations, the spokesperson for the Chinese Ministry of Foreign Affairs, Zhao Lijian, stated that the conflict between China and Lithuania is not economic but rather political in nature, and that the responsibility lies entirely with Lithuania for violating the one-China principle. See: Foreign Ministry Spokesperson Zhao Lijian's Regular Press Conference on December 31, 2021', 31 December 2021, available at <http://www.chinaembassy.or.th/eng/fyrth/202112/t20211231_10478051.htm>. Other examples include the economic sanctions imposed by the West on Russia and Russia's attempts to utilize trade in commodities such as grain and gas as strategic weapons to exert pressure on the West.

[6] For a discussion of these instruments, see, inter alia, N. Zamani and H. de Waele, 'Nobody Has any Intention of Building a Wall' Some Reflections on the EU's New-Found Assertiveness in the Sphere of Trade and Investment', 28 European Foreign Affairs Review 2023, 397–416.

[7] 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, *OJ* [2019] L 791/1, 21.3.2019.

[8] 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, *OJ* [2023] L 2675/1, 7.12.2023.

[9] Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market, *OJ* [2022] L 330/1, 23.12.2022.

[10] European Commission, European Economic Security Strategy, JOIN(2023)20 final, 20.6.2023. For a short overview of the strategy, see, e.g. N. Zamani, 'A legal symphony: The need for a quartet of instruments protecting the interests of the Union and its Member States in the current geopolitical environment', Op-Ed EU Law Live 2023.

[11] See e.g. N. Zamani and H. de Waele, *supra* note 6 for an assessment on whether these instruments are protecting the interests of the EU and its Member States or whether they are facilitating protectionism.

refers to the rather broadly defined notion of restricting international trade and investments to help and protect domestic industries from foreign competition.

The focus of the present contribution is on the Screening Regulation, which establishes a framework for the screening of FDI into the Union on grounds of security and public order. Article 15(1) Screening Regulation requires that by 12 October 2023 the Commission must evaluate the functioning and effectiveness of the Regulation. In November 2022 the Organization for Economic Cooperation and Development (OECD) published its report, which was carried out at the request of the Commission and co-financed by the EU, wherein it had assessed the effectiveness and efficiency of the framework established by the Screening Regulation.[12] Yet another evaluation took place by the European Court of Auditors, which published its final report in December 2023.[13] Both reports recommended amendments to the Screening Regulation. Besides these reports, a vast amount of literature has emerged about the Screening Regulation, wherein authors have discussed, praised and criticized various aspects of the Screening Regulation.[14] To address the identified shortcomings, the Commission announced[15], in line with Article 15(2), on the 24th of January 2024 the adoption of a legislative proposal amending the Screening Regulation.[16]

In the literature, it is, quite convincingly, argued that the Screening Regulation facilitates protectionism[17] whereby some authors[18] even submit that the underlying goal of the Regulation is roundly protectionist. At the same time, the recent evaluations of the Screening Regulation by OECD[19] and the ECA[20] show that the Screening Regulation is not entirely effective and efficient in protecting the

[12] OECD Secretariat, Framework for Screening Foreign Direct Investment into the EU: Assessing effectiveness and efficiency (November 2022).

[13] European Court of Auditors: Screening foreign direct investments in the EU: First steps taken, but significant limitations remain in mitigating security and public order risks effectively (6 December 2023).

[14] See in general e.g. the contributions in H.J. Bourgeois (ed), EU framework for Foreign Direct Investment control (Alphen aan den Rijn: Wolters Kluwer 2020) and in S. Hindelang and A. Moberg (eds), YSEC Yearbook of Socio-Economic Constitutions 2020: A common European law on investment screening (CELIS), (Cham: Springer 2020).

[15] European Commission, Press release: Commission proposes new initiatives to strengthen economic security, 24.1.2024, available at <ec.europa.eu/commission/presscorner/detail/en/IP_24_363>.

[16] Proposal for a Regulation of the European Parliament and of the Council on the screening of foreign direct investments in the Union and repealing Regulation (EU) 2019/452 of the European Parliament and of the Council, COM(2024)23 fin., 24.1.2024.

[17] See e.g. M. Nettesheim, 'Screening for What Threat: Preserving Public Order and Security, Securing Reciprocity in International Trade, or Supporting Certain Social, Environmental, or Industrial Policies?', in S. Hindelang and A. Moberg (eds), YSEC Yearbook of Socio-Economic Constitutions 2020: A common European law on investment screening (CELIS), (Cham: Springer 2020).

[18] See e.g. N. Lavranos, 'Enkele kritische kanttekeningen bij het EU-voorstel voor de screening van buitenlandse directe investeringen in de Europese Unie', 9 SEW Tijdschrift voor Europees en economisch recht 2018, at 363 and J. Snell, 'EU foreign direct investment screening: Europa qui protege?' 44 European Law Review 2019, at 138.

[19] OECD Secretariat, *surpa* note 12.

[20] ECA, *supra* note 13.

vital interests of the EU and its Member States. The resulting picture is therefore quite worrying: the Screening Regulation does not do what it is meant to do, i.e. protecting the interests of the EU and its Member States, rather it does what it is not meant to do, i.e. unnecessarily and disproportionately restricting international investments.

Against this background, the purpose of the present paper is twofold. First, it will explain how the above-mentioned observations, i.e. the Screening Regulation does not effectively and efficiently protect but does result in protectionism, are both true. Secondly, it explores the legislative proposal of the Commission to analyze whether, and if so to what extent the above-described problem is addressed, thereby leading to more protection and less protectionism. In order to do so, the next section (section 2) will first of all (briefly) discuss the concerns which led to the adoption of the Screening Regulation and the legal framework established by this Regulation. Attention will be also paid here to the COVID-19 Guidelines, which affected the functioning of the framework. Then in section 3, it will be explained how the Screening Regulation does not entirely, effectively and efficiently protect the interests of the EU and its Member States while at the same it does lead to protectionism. Section 4 will then review the content of the legislative proposal of the Commission and analyze to what extent it may lead to more protection and less protectionism. Finally, the last section (section 5) will conclude.

2. THE SCREENING REGULATION, ITS RATIONALE AND CENTRAL ELEMENTS

2.1 **Concerns leading to the adoption of the Screening Regulation**

The approach towards FDI has changed fundamentally in the last decade. In 2010 for instance, the Commission was very enthusiastic about FDI and eager to attract it. In a communication with respect to the European international investment policy, it noted that '[…] the benefits of inward FDI into the EU are well-established […] [and that] this explains why our Member States, like other nations around the world, make significant efforts to attract foreign investment'.[21] The situation changed however fundamentally from February 2017 onwards, when the governments of Germany, France and Italy sent a letter to the Commission expressing their concerns about the EU investment policy.[22] The letter of these governments was a reaction to a series of Chinese takeovers, in 2016, of EU companies with key technologies. In line with 'Made in China 2025', Chi-

[21] European Commission, Towards a comprehensive European international investment policy, COM(2010)343 final, 7.7.2010, at 3.

[22] Letter of German, French and Italian governments to Commissioner Malmström (February 2017), available at <www.bmwk.de/Redaktion/DE/Downloads/S-T/schreiben-de-fr-it-an-malmstroem.pdf?__blob=publicationFile&v=5>.

nese investors, often backed up by the Chinese government, aimed at taking over EU companies possessing technological knowledge in order to upgrade China's industry.[23]

The concerns of these Member States were twofold: on the one hand, they noted a lack of reciprocity, while, on the other, they feared that European crown jewels in the tech industry would fall into foreign hands. The lack of reciprocity concerns an incongruity in rights: EU investors do not have the same rights in third countries as the investors from those third countries have in the EU. This incongruity manifests itself in several ways. For example, third countries deny EU investors access to (certain sectors of) the economy. And when EU investors do gain access, they often have to operate under more unfavorable conditions than national investors, who are often supported through subsidies. In addition to a lack of reciprocity, they voiced their concerns about 'a possible sell-out of European expertise'.[24] In its reflection paper on harnessing globalization, the Commission acknowledged the concerns of the Member States with regard to '[…] foreign investors, notably state-owned enterprises, taking over European companies with key technologies for strategic reasons'.[25] In order to address these concerns, the Screening Regulation was adopted in March 2019. In the United States, a more or less similar process took place. Owing to Chinese FDI, concerns were voiced, resulting in the adoption of the Foreign Investment Risk Review Modernization Act (FIRRMA) in mid-2018.[26] The EU and the United States are, however, not the only ones that have adopted legislation to screen FDI. The Organization for Economic Cooperation and Development (OECD) has noticed that in recent years, more and more states are adjusting existing FDI screening mechanisms and adopting new policies in order to safeguard their national interests.[27]

2.2 **Central elements of the Screening Regulation**

In the proposal for the Screening Regulation, the Commission argued that even though openness to FDI remains a key principle of the EU, '[v]igorous and appropriate policies to, first, open markets for EU companies in third countries,

[23] See for instance J. Wübbeke et al., 'Made in China 2025: The Making of High-tech Superpower and Consequences for Industrial Countries' (2016), at 52, available at <www.merics.org/sites/default/files/2020-04/Made%20in%20China%202025.pdf>.

[24] Letter of German, French and Italian governments to Commissioner Malmström (February 2017), available at <www.bmwk.de/Redaktion/DE/Downloads/S-T/schreiben-de-fr-it-an-malmstroem.pdf?__blob=publicationFile&v=5>.

[25] European Commission, Reflection Paper on Harnessing Globalization, COM(2017)240 final, 10.5.2017., at 18.

[26] See, inter alia: P. Corcoran, 'Investing in Security: CFIUS and China after FIRRMA', 52 New York University Journal of International Law and Politics 2019, at 7-14 and P. Rose, 'FIRRMA and National Insecurity', 452 Ohio State Public Law Working Paper 2018, at 8-11.

[27] OECD, Research Note on Current and Emerging Trends: Acquisition- and Ownership- Related Policies to Safeguard Essential Security Interests. New Policies to Manage New Threats (12 March 2019), at 4

ensure that everyone plays by the same rules and protect EU investments in third countries, and, second, to protect assets in the EU against takeovers that may be detrimental to the essential interests of the EU or its Member States' are necessary.[28] The Screening Regulation is thus meant to achieve two objectives simultaneously: creating a level playing field and protecting the legitimate interests[29] of the EU and its Member States from the negative effects of FDI.

In order to achieve these objectives, the Screening Regulation establishes a framework for the screening of inward FDI by the Member States on the grounds of security and public order[30], whereby screening is defined as '[…] a procedure allowing to assess, investigate, authorise, condition, prohibit or unwind foreign direct investments'.[31] However, the Screening Regulation does not define security and public order. The lack of definitions, which is present both in international economic law and EU law, is logical from the perspective of ratio of these exception grounds. Defining security and public order at EU and international level, will leave no room for individual states to fit their own needs. While the lack of a definition is logical, it is certainly not desirable since the exact scope and boundaries of the exception grounds remain uncertain. States thus could claim vital interests whereas in reality that claim is unrelated to security and/or public order. In order to provide a point of reference for Member States and prevent potential abuse, Article 4 Screening Regulation provides a non-exhaustive[32] list of factors which Member States may consider in determining whether a FDI is likely to adversely affect security or public order. The first paragraph of Article 4 mentions critical infrastructure, technologies, dual use items, the supply of critical inputs, access to sensitive information and the freedom and pluralism of the media as relevant factors. Pursuant to Recital 13, these factors '[…] are essential for security or the maintenance of public order, the disruption, failure, loss or destruction of which would have a significant impact in a Member State or the Union.' Moreover, Member States may also take into account investor related aspects such as the involvement of foreign governments, previous negative experiences and the risk that the particular investor is engaged in illegal or criminal activities (Article 4(2)(a-c)).

As stated above, security and public order are not defined by the Screening Regulation. Instead, Article 4 provides a non-exhaustive list of factors that Member States can take into account in determining whether a specific FDI is adversely affecting security and/or public order. Analysing closely the factors mentioned

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[28] European Commission, Welcoming foreign direct investments while protection essential interests, COM(2017)494 final 5, 13.9.2017.

[29] 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, COM(2017)487 final, 13.9.2017. See also, inter alia, Recital 8 of the Screening Regulation; European Commission, Reflection Paper on Harnessing Globalization, COM(2017)240 final, 10.5.2017 and European Commission, Joint Communication to the European Parliament and the Council – Elements for a new EU strategy on China, JOIN(2016)30 final, 22.6.2016.

[30] Article 1(1) Screening Regulation.

[31] Article 2(3) Screening Regulation.

[32] See Recital 12 of the Screening Regulation and the wording of Article 4 ('inter alia').

by Article 4 Screening Regulation, it appears as if the approach taken is rather one of listing non-exhaustively sectors wherein the infrastructure, technologies, dual use items and inputs are critical. Hence, additional guidance has to be sought in the supplementary documents to the Screening Regulation and complementary secondary EU legislation. With regard to critical infrastructure, Directive 2008/114[33] provides points of reference. Article 2(a) Directive 2008/114 defines critical infrastructure as '[…] an asset, system or part thereof located in Member States which is essential for the maintenance of vital societal functions, health, safety, security, economic or social well-being of people, and the disruption or destruction of which would have a significant impact in a Member State as a result of the failure to maintain those functions'. Annex I to Directive 2008/114 subsequently lists European critical infrastructure (ECI) sectors which include energy (electricity, oil and gas) and transport (road, rail, air and inland waterways transport as well as ocean and short-sea shipping ports). Moreover, Article 3(1) Directive 2008/114 calls on Member States to identify ECI. In order to do so, it lays down the procedure (in Annex III) for such identification. At the EU level, the Commission had already identified Eurocontrol, Galileo, the electricity transmission grid and the gas transmission network as critical infrastructure.[34]

In October 2023, the Commission published a list of critical technologies, which provides insights into what kind of technologies are considered to be 'critical' to the security of the EU's economy.[35] The list contains ten broad technology areas: advanced semiconductors technologies, artificial intelligence technologies, quantum technologies, biotechnologies, advanced connectivity, navigation and digital technologies, advanced sensing technologies, space and propulsion technologies, energy technologies, robotics and autonomous systems and advanced materials, manufacturing and recycling technologies. For each of these ten areas, the list specifies what kind of technologies are covered by it. For instance, under advanced semiconductors technologies, *inter alia,* high frequency chips are mentioned while under biotechnologies, techniques for genetic modification and gene drive are mentioned. The Commission has also composed a list of raw materials, that are critical because of their economic importance and because the risks and impact associated with a supply shortage are higher than with ordinary raw materials.[36] A first list of critical raw materi-

[33] Directive 2008/114/EC of the Council on the identification and designation of European critical infrastructures and the assessment of the need to improve their protection, *OJ* [2008] L 345/75, 23.12.2008.

[34] European Commission, Staff Working Document on a new approach to the European programme for critical infrastructure protection making European critical infrastructure more secure, SWD(2013)318 final, 28.8.2013, at 3. It is outside the scope of the present article to elaborate on these various identified critical infrastructures. See for a short overview Annexes I-IV to the Staff Working Document of the EC.

[35] European Commission, Annex to the Commission Recommendation on critical technology areas for the EU's economic security for further risk assessment with Member States, COM(2023)6689 final, 3.10.2023.

[36] European Commission, Critical Raw Materials resilience: Charting a path towards greater security and sustainability, COM(2020)474 final, 3.9.2020.

als was composed in 2011.[37] In 2014[38], 2017[39] and 2020[40] the original list was updated and revised.[41] With respect to dual use items, Article 4(1)(b) makes a reference to Article 2(1) of Regulation 428/2009[42], which defines dual use items as 'items, including software and technology, which can be used for both civil and military purposes, and shall include all goods which can be used for both non-explosive uses and assisting in any way in the manufacture of nuclear weapons or other nuclear explosive devices'. Annexed to Regulation 428/2009 is a list of items that are considered as dual use items.

Besides providing a non-exhaustive list of factors, the Screening Regulation contains three other important elements. First of all, Article 3 requires that certain minimum requirements, that serve as safeguards for foreign investors,[43] have to be met by the screening mechanisms that are in place or introduced by the Member States. The rules and procedures of the screening mechanism should be transparent (i.e. which rules and procedures are used and how and when these rules and procedures are used) and must not discriminate between third countries (i.e. not providing favourable treatment to investments from some countries as compared to other third countries).[44] Member States have also to apply time frames,[45] which must be transparent and of non-discriminatory nature.[46] While the Screening Regulation requires that Member States have to apply time frames, it does not specify these time frames. Member States have thus discretion with regard to setting the appropriate time frames. The Screening Regulation requires that sensitive and confidential information that is provided to Member States, should be protected[47] and '[…] used only for the purpose for which it was requested'.[48] Moreover, investors should have the possibility to challenge (conditional and negative) screening decisions of national authorities.[49] Finally, Member States have to prevent

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[37] European Commission, Tackling the challenges in commodity markets and on raw materials, COM(2011)25 final, 2.2.2011.

[38] European Commission, On the review of the list of critical raw materials for the EU and the implementation of the Raw Materials Initiative, COM(2014)297 final, 26.5.2014.

[39] European Commission, On the 2017 list of Critical Raw Materials for the EU, COM(2017)490 final, 13.92017.

[40] European Commission, Critical Raw Materials resilience: Charting a path towards greater security and sustainability, COM(2020)474 final, 13.9.2020.

[41] For background information and the methodology of identifying raw materials as critical, see: European Commission, Study on the EU's list of Critical Raw Materials- Final report (2020).

[42] Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual use items, *OJ* [2009] L 134/1, 29.5.2009.

[43] W. Zwartkruis and B.J. de Jong, 'The EU regulation on screening of foreign direct investment: A game changer?' 31 European Business Law Review 2020, at 466.

[44] Article 3(2) in conjunction with Recital 15 Screening Regulation.

[45] Article 3(3) in conjunction with Recital 15 Screening Regulation.

[46] Article 3(2) in conjunction with recital 15 Screening Regulation.

[47] Article 3(4) Screening Regulation. See also Articles 10 and 14 of the Screening Regulation.

[48] Article 10(1) Screening Regulation.

[49] Article 3(5) in conjunction with Recital 15 Screening Regulation. There is no consensus in the literature with regard to the scope of this possibility. Article 3(5) employs the term 'seek recourse', while the proposal of the Commission employed the term 'judicial redress'. According to W. Zwartkruis and B.J. De Jong, *supra* note 43, at 467 the requirement of 'seeking recourse'

circumvention of their screening mechanisms through artificial arrangements set up by foreign investors.[50]

Second, the Screening Regulation introduces a co-operation mechanism, whereby a distinction is made between FDI that is undergoing screening (Article 6) and FDI that is not subject to screening (Article 7) in a particular Member State. FDI that is undergoing screening in a particular Member State, should be notified by that particular Member State to the Commission and to the other Member States.[51] The notifying Member State must provide in this regard the information referred to in Article 9(2). The notification obligation enables fellow Member States and the Commission to comment[52] and issue opinions[53] respectively on the FDI that is taking place in that particular Member State. Member States that do not have in place a screening mechanism and where thus FDI is not subject to screening, can also receive comments from other Member States[54] and the Commission[55] in cases where the planned or completed FDI is likely of adversely affecting security and public order in other Member States.[56] Other Member States and the EC have to provide these comments and opinions no later than 15 months after the FDI is completed.[57] The co-operation mechanism thus enables Member States and the Commission to voice their concerns with regard to FDI with adverse cross border effects on security and public order. Even though a Member State must give due consideration to the received comments and/or opinions of other Member States[58] and the Commission[59] it is not obliged to act on it.

Finally, in cases wherein according to the Commission a certain FDI is likely of adversely affecting '[…] projects or programmes of EU interests on grounds of security or public order, the Commission may issue an opinion addressed to the Member State where the FDI is planned or has completed'.[60] The receiving Member State is now obliged to 'take utmost account of the Commission's opinion and provide an explanation to the Commission if its opinion is not followed'.[61]

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might be satisfied in case of an administrative, rather than a judicial, appeal. According to Verellen however, 'recourse' should be understood as a judicial rather than an administrative review. See: T. Verellen, 'When integration by stealth meets public security: The EU foreign direct investment screening Regulation' 48 Legal Issues of Economic Integration 2021, at 23-24.

[50] Article 3(6) in conjunction with Recital 10 Screening Regulation.

[51] Article 6(1) Screening Regulation.

[52] Article 6(2) Screening Regulation.

[53] Article 6(3) Screening Regulation.

[54] Article 7(1) Screening Regulation.

[55] Article 7(2) Screening Regulation.

[56] See for a more in-depth discussion of the co-operation mechanism e.g. W. Zwartkruis and B.J. De Jong, *supra* note 42, at 467-470; T. Verellen, *supra* note 49, at 25-28 and S. Hindelang and A. Moberg, 'The art of casting political dissent in EU law: The EU's framework for the screening of foreign direct investment', 57 Common Market Law Review 2020, at 1454-1458.

[57] Article 7(8) Screening Regulation.

[58] Article 6(9) Screening Regulation.

[59] Article 7(7) Screening Regulation.

[60] Article 8(1) Screening Regulation.

[61] Article 8(2)(c) Screening Regulation.

Failure of the obligation of taking 'utmost account' of the EC's opinions can eventually form the basis for an infringement procedure ex Article 258 TFEU.[62]

In addition to these central elements, the Screening Regulation contains also two other interesting aspects which have received relatively less attention. First Article 12 Screening Regulation provides that a group of experts on the screening of FDI into the Union shall be set up by the Commission composed of representatives of the Member States.[63] The task of this expert group is to provide advice and expertise to the Commission by continuing '[…] to discuss issues relating to the screening of foreign direct investments, share best practices and lessons learned, and exchange views on trends and issues of common concern relating to foreign direct investments'. The group of experts provides in this regard the opportunity for peer-learning on the design and implementation of screening mechanisms. This was especially important in the first years of the adoption of the Screening Regulation, since neither the Commission nor the Member States had much experience and expertise in the screening of FDI. The OECD notes, for instance, that many officials and Member States have emphasized the important role of the expert group in advancing the development of FDI screening on national and EU level.[64] The second aspect concerns Article 13 of the Screening Regulation, which provides that Member States and the Commission may cooperate with third countries on issues relating to the screening of FDI. Again, this provision is very broad and quite vague. Nevertheless, as the OECD noted, '[…] the breadth of this authorization or mandate opens a great number of opportunities which may be pursued in bilateral or plurilateral formats, such as the G7 or the OECD'.[65]

2.3 **COVID-19 Guidelines**

On the 25th of March 2020, the Commission issued guidelines[66] providing guidance to Member States concerning the application of The Screening Regulation in the light of the corona pandemic. The COVID-19 Guidelines illustrate the approach of the Commission toward the screening of FDI. The Commission calls upon the Member States to make full use of their existing screening mechanism and, for those Member States who do not have a screening mechanism in place, to set up full-fledged screening mechanisms and use in the meantime all the available options to address the negative effects of FDI on security and public order.[67] According to the Commission, effective screening is necessary since

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[62] T. Verellen, *supra* note 49, at 28-30.

[63] See also Recital 28 Screening Regulation.

[64] OECD Secretariat, *supra* note 12, at 21-22.

[65] OECD Secretariat, *supra* note 12, at 43.

[66] European Commission, 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), COM(2020)1981 final, 25.3.2020.

[67] Ibid., at 2.

'[t]here could be an increased risk of attempts to acquire healthcare capacities (for example for the production of medical or protective equipment) or related industries such as research establishments (for instance developing vaccines) via foreign direct investments'.[68] Pursuant to Article 4(1)(a), critical health infrastructure is one of the factors that Member States may take into account in considering whether a FDI is likely of adversely affecting security or public order. In its guidelines, the Commission seems to have an even broader view than only health considerations, which is quite remarkable given the fact that the guidelines were related to the corona crisis. It argues that 'FDI screening should take into account the impact on the European Union as a whole, in particular with a view to ensuring the continued critical capacity of EU industry, going well beyond the healthcare sector'.[69]

The far-reaching approach of the Commission toward the screening of FDI is also exemplified by two other points mentioned in the COVID-19 Guidelines. First of all, the Commission states that Member States may also screen portfolio investments given that the screening is in compliance with the free movement of capital provisions in the TFEU.[70] It is quite obvious that the screening of portfolio investments does not fall under the scope of the Screening Regulation. Besides the fact that portfolio investments do not fit in the definition of FDI, recital 9 even explicitly rules out this possibility by stating that the Regulation will not cover portfolio investments. The Commission perceives apparently portfolio investments also as threating, despite the fact that portfolio investments do not enable investors to effectively influence the management and/or control of companies. The second point which is exemplary for the far-reaching approach of the Commission toward the screening of FDI, is the suggestion that Member States may retain golden shares in certain companies.[71] This is quite remarkable, given the opposition of the EC in the past toward the golden shares and the rulings of the Court wherein golden shares were considered to be incompatible with EU law.[72]

3. FROM PROTECTING TO PROTECTIONISM: THE SCREENING REGULATION'S (UN)INTENDED CONSEQUENCES

As noted above, the Screening Regulation is meant, *inter alia*, to protect the legitimate interests of the EU and its Member States from adverse effects of FDI into the Union. In the previous section, the legal framework for the screening of FDI was discussed as well as how this framework is supposed to protect the legitimate interests of the EU and its Member States. In the next sub-section, it will be explained why, how and to what extent the Screening Regulation fails in

[68] Ibid., at 1.
[69] Ibid.
[70] Ibid., at 2-3.
[71] Ibid., at 3.
[72] See e.g. ECJ, Case C-283/04, Commission v. Netherlands [2006] ECLI:EU:C:2005:712 and ECJ, Case C-212/09, Commission/Portugal [2011] ECLI:EU:C:2011:717.

this exercise. It is in this regard important to note that the Screening Regulation fails to protect the legitimate interest of the EU and/or its Member States in false negative cases, wherein particular FDI transactions are, despite their adverse effects on security or public order, not screened. In the following sub-section, attention will be turned to the observation of how the Screening Regulation does lead to protectionism. Protectionism occurs in false positive cases, wherein FDI transactions are considered to be adversely affecting security or public order while in reality that is not the case.

3.1 The limitations of the Screening Regulation in protecting the legitimate interests of the EU and its Member States

The objective of the evaluations carried out by both the OECD[73] and the ECA[74] was to assess whether the framework for the screening of FDI into the Union as established by the Screening Regulation is effective and efficient. According to the OECD report, effectiveness '[…] refers to situations where foreign direct investment that likely affects the security or public order of Member States or projects or programmes of Union interest is screened and managed […], [whereas efficiency] refers to situations where effectiveness is achieved while keeping the administrative burden for investors and other stakeholders proportionate to the policy goals and relevant security or public order concerns'.[75] In contrast and quite surprisingly, the ECA report does not define these concepts.

As the OECD report rightly points out,[76] an ineffective framework for the screening of FDI can lead to a situation wherein FDI transactions are not screened, despite their adverse effects on security or public order of the EU and/or its Member States. An inefficient framework in contrast does not result directly in false negative and false positive screening decisions. Rather, the procedures are more time-consuming and costly than necessary for both the parties involved to the transactions and the screening authorities. This in turn can potentially affect, of course, the effectiveness of the framework, since the authorities must make certain choices with the time and resources allocated to them.

As noted above, the Screening Regulation fails to protect the legitimate interest of the EU and/or its Member States if FDI transactions are, despite their adverse effects on security or public order, not or not thoroughly screened. Given the design of the Screening Regulation and the competences of the EU in the field of screening FDI, the current framework faces, as observed by

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[73] OECD Secretariat, *supra* note 12, at 6.

[74] ECA, *supra* note 13, at 16.

[75] OECD Secretariat, *supra* note 12, at 6. It is quite difficult to operationalize the concepts of effectiveness and efficiency as legal scholars. See with respect to effectiveness in this respect e.g. M. Mousmouti, 'Effectiveness as an aspect of quality of EU legislation: is it feasible?', 2 The Theory and Practice of Legislation 2014 and M. Mousmouti, 'The ''effectiveness test'' as a tool for law reform', 2 Institute of Advanced Legal Studies Student Law Review 2014.

[76] OECD Secretariat, *supra* note 12, at 63.

the ECA, '[…] inherent limitations […] that limit its effectiveness at preventing security and public-order risks by allowing for blind spots that compromise the effective protection of the EU as a whole'.[77] These inherent limitations can be categorized into two categories.

The first category contains limitations related to the fact that the Screening Regulation does not oblige Member States to put in place a screening mechanism. Accordingly, there are still a number of Member States which do not have a framework for the screening of FDI.[78] Pursuant to Article 3(7) Screening Regulation, Member States are obliged to notify the Commission of their existing and newly adopted screening mechanisms. On the basis of these notifications, the Commission must publish a list of the notified screening mechanisms and keep this list up to date. The most recent published list shows that out of the 27 Member States, five Member States still do not have a screening mechanism.[79] These five Member States are Bulgaria, Croatia, Cyprus, Greece and Ireland. The absence of a screening mechanism in these Member States is problematic for at least two reasons.[80] First of all, without screening mechanisms these Member States are unable to identify and appropriately address risks to their own security and/or public order, risks to other Member States' security and/or public order and risks related to Union's security and/or public order, which is the whole *raison d'être* of the Screening Regulation. This is especially problematic because countries such as Cyprus, Greece and Ireland are important entry points for foreign capital into the Union.[81] Secondly, Member States which do not have a screening mechanism in place, have neither the institutional infrastructure and capacity for nor practical experience in gathering, sharing, requesting and processing information as mentioned in Article 9 Screening Regulation. This in turn reduces significantly the effectiveness of the cooperation mechanism because the information requirements of Article 9 are necessary for the proper functioning of the cooperation mechanism. Without such information, Member States and the Commission cannot assess and evaluate appropriately FDI transactions in other Member States.[82] Moreover, Member States are not obligated to address the concerns of other Member States with regard to FDI transactions which have cross-border effects. Finally and quite obviously, the Commission cannot block or conditionalize FDI transactions in other Member States if these transactions pose risks to the security or public order of the EU.

The second category contains limitations which are the result of the fact that the

[77] ECA, *supra* note 13, at 19.

[78] This issue was also raised by the ECA and OECD. See ECA, *supra* note 13, at 19 and OECD Secretariat, *supra* note 12, at 52.

[79] European Commission, List of screening mechanisms notified by Member States (last update 5 August 2024).

[80] OECD Secretariat, *supra* note 12, at 52.

[81] OECD Secretariat, *supra* note 12, at 52.

[82] This section is taken from N. Zamani, 'The legislative proposal of the Commission to strengthen FDI Screening: Rising from the ashes of Regulation 2019/452', EU Law Live Weekend Edition 27 April 2024, at 6.

Screening Regulation is enabling rather than harmonizing in nature. The fact that the Screening Regulation does not harmonize the screening of FDI into the Union in turn has far-reaching implications. It first of all means that the screening mechanisms of the Member States' differ significantly from each other.[83] These differences are *inter alia* related to (i) the sectoral scope of the mechanisms, (ii) the definitions of key concepts such as security and public order, (iii) determining the scope for control, (iv) determining the scope of certain transactions[84], (v) the threshold used to indicate the likelihood of risks, (v) possible exemptions from screening for certain acquirers and (vi) the applicable timeframes. While an in-depth discussion of these differences is outside the scope of the present paper, it is noteworthy that these differences do lead to less protection. This holds? even more if one considers the fact that a foreign acquirer who enters legally the market of one of the Member States, in principle can rely on the freedom of establishment and as such can be considered an EU legal person. There is therefore the risk that foreign investors from countries such as China channel their investments into the EU via the most liberal Member States. For instance, due to the lack of harmonization the screening mechanisms of the Member States differ from each other with respect to the sectors that are covered. Some Member States have cross-sectoral screening mechanisms, meaning that they can screen FDI transactions in any sector of the economy, whereas other Member States have limited the scope of their screening mechanisms to particular, narrowly defined list of sectors.[85] These latter Member States are considerably less equipped to address adverse risks arising from FDI transactions in sectors not covered by their screening mechanisms. Moreover, and as correctly pointed out by the OECD, excluding important sectors from the application of screening mechanisms can have spill-over and cross-border effects for the security and public order interests of other Member States and the EU.[86] Similarly, the lack of harmonization has provided the room for Member States to exempt certain acquirers from the scope of their screening mechanisms. Many Member States have exempted acquirers from the EU, the European Economic Area (EEA) and the European Free Trade Association (EFTA).[87] According to the OECD report, Lithuania has also exempted acquirers established or domiciled in NATO or OECD states. The OECD has not only many EU Member States as Members, but also countries such as Costa Rica, Columbia, Japan, Korea and Israel. Not screening FDI from these countries adversely affects the level of protection, especially if one considers the possibility that acquirers from states which are not exempted can structure their FDI transactions through the exempted states. Moreover, it should be noted that such practices violate Article 3(2) Screening Regulation, which provides that rules and procedures related to screening mechanisms must not discriminate between third countries.

[83] OECD Secretariat, *supra* note 12, at 34-40 and at 52-58, ECA, *supra* note 13, at 25-26.
[84] ECA, *supra* note 13, at 25.
[85] ECA, *supra* note 13, at 24.
[86] OECD Secretariat, *supra* note 12, at 66.
[87] OECD Secretariat, *supra* note 12, at 53-56 and Table 5.

Besides these two categories, the ECA also identified problems with the application of the Screening Regulation. It found evidence that certain FDI transactions were carried out by individuals who were on a sanctions list.[88] The Member States concerned did not block these investments despite the fact that Article 4(2)(c) Screening Regulation provides that in determining whether a FDI transaction is likely to affect security or public order, the Member States concerned and the Commission must take into account whether there is a serious risk that the foreign investor engages in illegal or criminal activities.

3.2 The (unintended) protectionist outcome of the Screening Regulation

Before elaborating on how exactly the Screening Regulation leads to, or at least facilitates protectionism, it is important to first (very) briefly reflect on the notion of protectionism itself since it is surrounded by some fuzziness. Broadly speaking, protectionism refers to the application of certain policies and tools by governments to restrict or regulate international trade in such a way that domestic industries are protected from foreign competition. The reasons behind protecting domestic industries from foreign competition are economic in nature. The screening of FDI is in fact a tool through which Member States can conditionalize, prohibit or even unwind FDI transactions.[89] In principle, one can only assess on a case-by-case basis whether the screening of a particular FDI transaction entails protectionism. After all, Member States have the right to screen, and eventually conditionalize, prohibit or unwind FDI transactions which adversely affect security or public order. The screening of FDI can be only qualified as protectionist if in a particular case a FDI transaction is screened and subsequently conditionalized, prohibited or unwound despite the fact that this specific FDI transaction did not adversely affect security or public order.

While it is true that in principle protectionism can be assessed only on a case-by-case basis, it is at the same time possible to consider whether the Screening Regulation contains protectionist features. Considering closely its design and structure, one can indeed conclude that the Screening Regulation facilitates, and may even lead to protectionism due to at least two reasons. First of all, and as mentioned above, the Screening Regulation does not define the concepts of security and public order. Rather, Article 4 Screening Regulation provides a non-exhaustive list of factors that Member States can take into account in determining whether a specific FDI is adversely affecting security and/or public order. The factors mentioned in Article 4 are thus meant to provide guidance to the Member States with regard to the question when security and/or public order interests may be adversely affected by FDI. As argued above however, the list of factors of Article 4 can be considered to be a list of sectors which in turn is formulated very broadly, encompassing almost all important sectors of modern

[88] ECA, *supra* note 13, at 32-33.
[89] Cf. the definition of the term screening in Article 2(3) Screening Regulation.

economies. Accordingly, if '[…] Member States take a wide view of security and public order, economic [and (geo)political[90]] considerations will easily slip into the assessment'[91]. Moreover, it is important to note that the Court has consistently held in its case law that the grounds of public policy and public security, which can be considered to be the equivalents of public order and security, '[…] must […] be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the Community [now Union] institutions'.[92] Given the function of the list provided by Article 4, i.e. providing guidance to the Member States with regard to the question when security and/or public order interests may be adversely affected by FDI, and the fact that the list of Article 4 leaves room for Member States to take a wide view of security and public order, it can be argued that the scope of these grounds (security and public order) is broadened.[93]

This is especially true if the list provided by Article 4 Screening Regulation is reviewed in the light of the interpretation of the security and public order exceptions as laid down in the General Agreement on Trade in Services (GATS) and the numerous Free Trade Agreements (FTAs). The public order and security exceptions ex Articles XIV(a) and XIVbis GATS respectively concern general exceptions and security exceptions that are meant to protect legitimate, non-economic interests.[94] Screening, and eventually conditionalizing, prohibiting or even unwinding of FDI transactions entails in essence a restriction of FDI. However, since the EU is involved in a significant number of FTAs[95] and is party to the GATS, it cannot unilaterally restrict inward FDI, since that would violate *inter alia* the market access and national treatment provisions laid down in these agreements.[96] Pursuant to Article 216(2) TFEU, international agreements concluded by the EU, are binding upon the EU and its Member States. Such agreements become thus an integral part of EU law[97] and are directly applicable.[98] On top

[90] See, for instance, W. Kros, 'De verordening inzake screening van overnames in de EU- de gevolgen voor de M&A praktijk' 27 Onderneming en Financiering 2019, at 55.

[91] J. Snell, *supra* note 18, at 138.

[92] ECJ, Case C-54/99, Église de scientology [2000] ECLI:EU:C:2000:124, para. 17.

[93] This is also the position of the Dutch government. See: Kamerstukken II 2017/18, 29826, 97.

[94] P. Delimatsis and T. Cottier, Article XIVbis GATS: Security exceptions in Wolfrum Rüdiger et al. (eds) Maxplanck commentaries on world trade law, WTO trade in services (Martinus Nijhoff Publishers 2008), at 331.

[95] The EU has concluded 37 FTAs that are fully into force. An additional 43 FTAs are provisionally applied and negotiations are ongoing with 19 other countries. See for an overview: European Commission, Negotiations and Agreements, available at <http://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/#_being-negotiated> and European Commission, Free Trade Agreements, available at <http://trade.ec.europa.eu/tradehelp/free-trade-agreements>. It is important to bear in mind that the FTAs concluded by the EU vary considerably from each other. They for instance do not all include provisions with respect to commercial presence and/or investments.

[96] See for an in depth analysis of the relationship between the Screening Regulation and the GATS: E. Vranes, Investment screening and WTO law: The example of the EU Screening Regulation (Chams: Springer 2023). For the relationship between international investment agreements and EU law, see: T. Fecák, International Investment Agreements and EU Law (Alphen aan den Rijn: Kluwer Law International 2016).

[97] ECJ, Case C-181/73, R. & V. Haegeman v. Belgian State [1974] ECLI:EU:C:1974:41.

[98] It is important to distinguish direct applicability from direct effect. Based on Article 216(2)

of that, it is the duty of the EU to comply with international law. Therefore, the (application of the) Screening Regulation must be consistent with the GATS and the FTAs concluded by the EU. More precisely, this means that the restriction of FDI, which is the result of screening and eventually conditionalizing, prohibiting or unwinding FDI transactions, needs to be justified on the basis of Article XIV and Article XIVbis GATS. Recital 35 Screening Regulation explicitly confirms this by stating that '[t]he implementation of this Regulation […] should comply with the relevant requirements for the imposition of restrictive measures on grounds of security and public order in the WTO agreements, including, in particular, Article XIV(a) and Article XIV bis of the General Agreement on Trade in Services […] [and] with commitments made under other trade and investment agreements'.

Public order and security are interpreted strictly under the GATS. Security under Article XIVbis GATS deals with very specific and well demarked and defined situations whereby a traditional approach toward security is adopted as it covers only hardcore security issues related to military affairs and defence.[99] In interpreting public order, the WTO adjudicating bodies have decided that public order refers to '[…] the preservation of the fundamental interests of a society, as reflected in public policy and law'.[100] These fundamental interests include, as things stand, *inter alia*, the fight against organized crime[101], money laundering[102] and fraud schemes[103] and the security of energy supply.[104] Velten has analysed

TFEU, the EU has a monist system meaning that international agreements are directly applicable in the EU legal order. Direct applicability does not mean, however, that the provisions of international agreements have direct effect; i.e. that the provisions can be invoked by individuals in court. In order to have direct effect, a provision should be sufficiently precise and unconditional and the nature and the structure of the international agreement as a whole must not preclude direct effect. Cf. ECJ, Case C-104/82, Kupferberg [1982] ECLI:EU:C:1982:362, paras. 22-23.

[99] This follows from Panel Report, WT/DS512/R, Russia- Measures concerning traffic in transit [5 April 2019], paras. 7.71-7.76, 7.130 7.259. See for an in-depth analysis of the security exception under Article XIVbis GATS e.g. P. Delimatsis and O. Hrynkiv, 'Security exceptions under the GATS- A legal commentary on Article XIVbis GATS', 1 Tilburg Law and Economic Center Discussion paper 2020 and T. Lacerda Prazeres, 'Trade and national security: rising risks for the WTO', 19 World Trade Review 2020. See in this regard also the ruling of the Panel in Panel Report, WT/DS567/R, Saudi Arabia- Measures concerning the protection of intellectual property rights [16 June 2020], para. 7.280-7.282, wherein it held that the protection against terrorism and extremism qualifies as essential security interests.

[100] Panel Report, WT/DS285/R, United States- Measures affecting the cross-border supply of gambling and betting services [10 November 2004], para. 6.467.

[101] Panel Report, WT/DS285/R, United States- Measures affecting the cross-border supply of gambling and betting services [10 November 2004], para. 6.469.

[102] Panel Report, WT/DS285/R, United States- Measures affecting the cross-border supply of gambling and betting services [10 November 2004], para. 6.469; Panel Report, WT/DS461/R, Columbia- Measures relating to the importation of textiles, apparel and footwear [27 November 2015], paras. 7.338-7.339.

[103] Panel Report, WT/DS285/R, United States- Measures affecting the cross-border supply of gambling and betting services [10 November 2004], para. 6.469.

[104] Panel Report, WT/DS476/R, European Union and its Member States- Certain measures relating to the energy sector [10 August 2018], para. 7.1156. See for an extensive discussion of the case and background information with regard to energy security: A.A. Marhold, 'Unpacking the concept of ''energy security'': Lessons from recent WTO case law' 2 Legal Issues of Economic Integration 2021.

the list provided by Article 4 in the light of the interpretation of the security and public order grounds as laid down in the GATS. He rightly concludes that the Screening Regulation broadens the scope of security and public order, which in turn is not in accordance with the interpretation of these grounds under the GATS.[105] Under the Screening Regulation for instance, software implementation services fall under the scope of security and public order (Article 4(1)(a)). Under the GATS however, the scope of security and public order is limited and does not cover software implementation and data processing services. Accordingly, the Screening Regulation justifies restrictions of the market access and national treatment provisions on the basis of security and/or public order that cannot be justified on the basis of the same grounds as laid down in the GATS.

In conclusion, the Screening Regulation facilitates protectionism because it adopts in Article 4 a broad understanding of security and public order as consequence of which Member States can screen, and eventually conditionalize, prohibit or even unwind FDI transactions on economic grounds. In the literature, it is even argued that the underlying, implicit, objective of the Screening Regulation seems to be the screening of FDI on economic grounds rather than on security and public order grounds[106], since science-technology, which is the overarching term for critical infrastructure, critical technologies, dual use items and critical inputs, is considered as the most important factor for long term sustainable economic growth.[107]

Secondly, it can be even argued that the Screening Regulation not only paves the way for Member States to pursue protectionist policies, but that the Regulation in itself can be considered protectionist, albeit to a certain extent. Article 1(1) Screening Regulation provides that a framework for the screening of FDI is established which is *likely* to affect security or public order. Similarly, Article 4(1) provides that in determining whether a FDI transaction is *likely* to affect security or public order, Member States and the Commission can take into account its *potential* effects on the specified factors. The purpose of the term 'likely' seems to be twofold. First of all, it serves as a nexus between a particular FDI transaction and security or public order concerns. Secondly, likeliness is used as a threshold requirement for determining the probability of a threat that is posed to security or public order by a particular FDI transaction. Hence, if a particular FDI transaction is *unlikely* to affect security or public order, the Member States concerned do not have the power to screen, and eventually conditionalize, prohibit or unwind such a transaction.

The problem with this notion of likeliness is however that it is neither in ac-

[105] J. Velten, 'The investment screening regulation and its screening ground ''security or public order'': How the WTO law understanding undermines the regulation's objectives', 1 Centre for Trade and Economic Integration Working Papers Series 2020.

[106] N. Lavranos, *supra* note 18, at 363.

[107] S. Sener and E. Saridogan, 'The effects of science-technology-innovation on competitiveness and economic growth', 24 Procedia Social and Behavioural sciences 2011, at 821-822 and the literature referred there. See also: W. Zwartkruis and B.J. De Jong, *supra* note 42.

cordance with EU law nor with WTO law.[108] In EU law, the Court has consistently held that in order to restrict the free movement of capital on the grounds of public policy or public security, a 'genuine and sufficiently serious threat' must be posed to a fundamental interest of the society.[109] Similarly, footnote 5 to Article XIV(a) GATS provides that Members may invoke the public order ground only when there is a 'genuine and sufficiently serious threat' to one of the fundamental interests of the society. The requirement of 'genuine and sufficiently serious threat' limits therefore the scope of the security and public order grounds in terms of seriousness of the threat, which must be both actual and severe. A simple linguistic comparison of the phrases 'likely' and 'genuine and sufficiently serious' already reveals that the former phrase (likely) implies a significantly lower threshold than the latter (genuine and sufficiently serious). However, people perceive probability words, such as 'likely' and 'genuine and sufficiently serious', differently.

The ECA observed this also in its evaluation report, where it noted that the '[…] interpretation [of the term likely] currently differs between Member State FDI Screening authorities'.[110] Therefore, in order to fully understand the difference between these two notions, one has to look at the perception of probability words. While an extensive discussion of the probability-words literature is outside the scope of the present paper[111], it provides some guidance. In general, if a threat is likely, people perceive the probability of materializing this threat between 65% and 75%. While the probability-words literature has not assessed, to the best of my knowledge, the probability of 'genuine and sufficiently serious', it is reasonable to argue that the probability of materializing such a threat must be higher. After all, the word 'genuine' indicates already that the threat is real and will materialize while the words 'sufficiently serious' imply that this threat, which is real, must reach a certain level of severity and seriousness. Therefore, by not aligning the definition of 'likely' to the notion of 'genuine and sufficiently serious threat', which is used by both EU law and WTO law, the Screening Regulation itself has to a certain extent protectionist features as it lowers the threshold for Member States to screen, and eventually conditionalize, prohibit or even unwind FDI.

[108] Velten argues on good grounds why the term 'likely' in the Screening Regulation must be interpreted in accordance with WTO law. See: J. Velten, Screening foreign direct investment in the EU. Political rationale, legal limitations and legislative options (Chams: Springer 2022), at 68.

[109] ECJ, Case C-54/99, Église de scientology [2000] ECLI:EU:C:2000:124, para. 17.

[110] ECA, *supra* note 13 , at 21.

[111] See e.g. A. Mauboussin and M.J. Mauboussin, 'If you say something is 'likely', how likely do people think it is?', Business Communication Harvard Business Review (3 July 2018), available at <hbr.org/2018/07/if-you-say-something-is-likely-how-likely-do-people-think-it-is> and the literature referred there and W. Fagen-Ulmschneider, 'Perception of probability words', available at <waf.cs.illinois.edu/visualizations/Perception-of-Probability-Words/> and the literature referred there.

4. PROTECTION VERSUS PROTECTIONISM: EVALUATING THE COMMISSION'S LEGISLATIVE PROPOSAL

The legislative proposal of the Commission is meant to address the key shortcomings identified by *inter alia* the OECD and the ECA in the effectiveness and efficiency of the framework established by the Screening Regulation. In order to do so, it proposes several amendments. An in-depth discussion of the legislative proposal and the proposed amendments is outside the scope of the present paper.[112] Therefore, the discussion below will be focussed on those amendments which will lead to more protection and less protectionism.

4.1 **A step in the right direction: The (limited) gains of the legislative proposal toward more protection**

As explained above, the Screening Regulation is ineffective in protecting the legitimate interests of the EU and its Member States because of two main reasons. The first reason concerns the fact that the Screening Regulation does not obligate Member States to establish screening mechanisms and therefore to screen FDI, as indicated by the word 'may' in Article 3(1). The legislative proposal addresses this shortcoming directly by obliging Member States to establish screening mechanisms as indicated by the word 'shall' in Article 3(1). This means that in contrast to the Screening Regulation, Member States are obliged to screen FDI into the Union under the legislative proposal. Such an obligation solves the current anomaly where some Member States, which are important entry points for foreign capital into the Union, do not have screening mechanisms in place. The second reason which diminishes the effectiveness of the Screening Regulation in protecting the legitimate interests of the EU and its Member States is the lack of harmonization due to which the screening mechanisms of the Member States differ significantly from each other, which in turn creates blind spots. This was also observed by the Commission. In the Explanatory Memorandum, the Commission noted explicitly that a higher degree of harmonization at Union level is important and necessary.[113] Given this awareness and the fact that Article 114 TFEU is included as legal basis, one would expect that the legislative proposal is more harmonizing in nature. A close reading of the legislative proposal reveals however that the harmonizing nature is still not sufficient.

Key concepts such as security and public order are still left undefined. Timeframes are still not harmonized on EU level. Article 11(4) of the legislative proposal only provides that Member States must ensure that '[…] their screening mechanisms give sufficient time and means to assess and give utmost consideration to other Member States' comments and Commission opinions before a

[112] For a short overview of the content of the legislative proposal, see, inter alia N. Zamani, *supra* note 80.

[113] European Commission, Explanatory Memorandum, p. 10.

screening decision is taken'. The legislative proposal also does not specify the threshold to indicate the likelihood of risks to security or public order.

Nevertheless, the legislative proposals does contain various other aspects which can contribute to protecting the legitimate interests of the EU and its Member States more effectively. Firstly, it extends the scope of the screening mechanisms to intra-EU direct investments with as ultimate owners non-EU investors. Article 1(1) of the legislative proposal provides that it is aimed at establishing a Union framework for the screening of foreign investments whereas the scope of the Screening Regulation is limited to the screening of foreign direct investment.[114] The notion of foreign investment is of course broader than the notion of foreign direct investment as the former encompasses the latter. Pursuant to Article 2(1) of the legislative proposal, foreign investment means a foreign direct investment or an investment within the Union with foreign control, which enables effective participation in the management or control of a Union target. According to Article 2(3) of the legislative proposal, an investment within the Union with foreign control means 'an investment of any kind carried out by a foreign investor through the foreign investor's subsidiary in the Union, that aims to establish or to maintain lasting and direct links between the foreign investor and a Union target that exists or is to be established, and to which target the foreign investor makes capital available in order to carry out an economic activity in a Member State'. Article 2(7) of the legislative proposal defines the term 'foreign investor's subsidiary in the Union'. Accordingly, on the basis of Article 2(3) and (7), Member States can screen intra-EU direct investments provided that the ultimate owner is a foreign, i.e. non-EU, investor. Article 2(6) of the legislative proposal defines a foreign investor as a natural person of a third country or an undertaking or entity which is established or otherwise organized under the laws of a third country. Under the current Screening Regulation, intra-EU direct investments can be screened only in cases of artificial arrangements that do not reflect the economic reality and are, therefore, meant to circumvent the screening mechanisms of the Member States.[115]

Secondly and in contrast to the regime of the current Screening Regulation, the Commission encourages Member States to also screen greenfield investments, which refers to the setup of new facilities or undertakings in the EU by foreign investors or the foreign investor's subsidiaries in the Union.[116] Extending the scope of the screening mechanism to intra-EU direct investments with non-EU investors as ultimate owners and to greenfield investments is a wise move from the perspective of protecting the legitimate interests of the EU and its Member States, and in line with the recommendation of the ECA[117], as it prevents foreign investors from circumventing screening by channeling their FDI transactions through intra-EU acquisitions and their EU subsidiaries.

[114] Article 1(1) Screening Regulation.

[115] Article 3(6) in conjunction with Recital 10 Screening Regulation. See also ECJ, Case C-106/22, Xella Magyarország [2023] ECLI:EU:C:2023:568, para. 32 where the Court confirmed this.

[116] Recital 17 of the legislative proposal.

[117] ECA, *supra* note 13, at 27 (recommendation 1c).

Thirdly, even though Article 13 of the legislative proposal resembles to a great extent the list of factors in Article 4 of the Screening Regulation, it introduces two important changes. First of all, on the basis of the legislative proposal Member States and the Commission are obliged, as indicated by the use of the word 'shall', to take into account at least the factors provided by Article 13(3) and (4) in their assessment of whether a particular FDI is adversely affecting security or public order. Under the Screening Regulation, no such obligation exists because Article 4(1) and (2) employ the word 'may'. If one believes that the factors provided are of paramount importance to the security or public order of the EU and its Member States, then it is indeed better that Member States and the Commission are obliged to take them into account since this assures that at least a possible threat is assessed. Secondly, the legislative proposal extends the scope of the investor-related screening factors. The factors mentioned in Article 4(2)(a-c) Screening Regulation are only dealing with the behavior of the foreign investors. For instance, Article 4(2)(c) Screening Regulation provides that the Member States and the Commission may take into account whether the foreign investor is directly or indirectly controlled by the government of a third country. The corresponding provision in Article 13(4)(e) of the legislative proposal provides that the Member States and the Commission must take into account whether the foreign investor, a natural person or entity controlling the foreign investor, the beneficial owner of the foreign investor, any of the subsidiaries of the foreign investor, or any other party owned or controlled by, or acting on behalf or at the direction of the foreign investor is likely to pursue a third country's policy objectives, or facilitate the development of a third country's military capabilities. Hence, under the legislative proposal the investor-related factors are extended to other persons and entities associated with the foreign investor. This again is a positive development since it prevents circumvention of screening by foreign investors through 'hiding' behind other entities.

Finally, the legislative proposal requires that Member States must screen foreign investments in EU companies that participate in projects or programmes of Union interest[118] or are economically active in specific areas of the economy.[119] Article 2(18) of the legislative proposal provides that projects or programmes of Union interests are those projects and programmes that provide for the development, maintenance or acquisition of critical infrastructure, critical technologies or critical inputs which are essential for security or public order. Annex I contains a list of these projects and programmes and includes, inter alia, the Space Programme, Euratom Research and Training Programme 2021-25 and the Digital Europe Programme. The specific areas of the economy referred to in Article 4(4)(b) of the legislative proposal are listed in Annex II and include, besides military and dual use items, inter alia, advanced semiconductors, artificial intelligence and autonomous systems. Under the current Screening Regulation, Member States are not obliged to screen FDI which is likely to affect projects or programmes of Union interest. The Commission can issue only an opinion on the basis of

[118] Article 4(4)(a) and Recitals 11 and 20 of the legislative proposal.
[119] Article 4(2)(g) in conjunction with Article 4(4)(b) of the legislative proposal.

Article 8(1) Screening Regulation to Member States were the FDI is planned or completed. Even though Member States must 'take utmost account' of the opinion of the Commission and provide an explanation if the opinion is not followed,[120] the final screening decision is their own.[121] Accordingly, The Screening Regulation does not oblige Member States to screen FDI transactions likely of affecting projects or programmes of the Union interest. Obliging Member States to screen when foreign investments in EU companies that participate in projects or programmes of Union interest or are economically active in specific areas of the economy is really a step in the right direction in protecting the legitimate interests of the EU. As said, currently Member States can in principle more or less ignore the opinions of the Commission and decide not to act in accordance with it. Under the legislative proposal, this is no longer possible.

While all of the aspects discussed above can contribute to more protection, the legislative proposal also contains one specific aspect which might be a bit problematic. Article 13(3)(a-c) of the legislative proposal limits, in contrast to Article 4(1)(a-c) Screening Regulation, the aspects which the Member States and the Commission may take into account when assessing whether an investment negatively affects critical infrastructure, critical technologies and the supply of critical inputs. When determining whether a particular investment negatively affects critical infrastructure, Member States are under Article 13(3)(a) of the legislative proposal only allowed to consider its effects on the *security, integrity* and *functioning* of critical infrastructure. Similarly, with regard to critical technologies Member States and the Commission may only consider whether particular investments negatively impacts its *availability*. And with regard to the supply of critical inputs, Article 13(3)(c) of the legislative proposal provides that Member States and the Commission only can consider the negative effects of a particular investment on its *continuity*. Such limitations can have far-reaching implications. One can for instance argue *a contrario* that Member States and the Commission are not allowed to assess whether a particular investment negatively affects the security of critical technologies, since Article 13(3)(b) of the legislative proposal only refers to the availability of critical technologies. From the perspective of preventing Member States from screening investment transactions for protectionist reasons, limiting the aspects of critical infrastructure, critical technologies and the supply of critical inputs to which a threat may be posed by foreign investments is desirable. The aspects mentioned, i.e. security, integrity and functioning in case of critical infrastructure, availability in case of critical technologies and continuity in of supply of critical inputs are apparently the most important. At the same time however, one can question the effects of such a limitation on the protection aspect of the legislative proposal. For instance, critical technologies include *inter alia* high frequency chips. Suppose now that a Chinese investor intends to acquire a Dutch manufacturer of high frequency chips. Article 13(3)(b) of the legislative proposal provides that the Netherlands, when determining whether this acquisition is likely to negatively

[120] Article 8(1)(c) Screening Regulation.
[121] Article 6(9) Screening Regulation

affect security or public order, must consider whether this investment is likely to negatively affect the availability of critical high frequency chips, which fall under the scope of critical technologies. If assessment shows that the availability of the high frequency chips is not at stake because the Chinese investor makes concessions, then in principle there is no ground to further investigate the acquisition or potentially prohibit it. Reaching such a conclusion can be however unsatisfactory if for instance it turns out that the acquisition will result in the production of lower quality of high frequency chips.

4.2 **Continuing protectionist design**

At first sight, it appears that the legislative proposal has the same level of protectionism in it as the Screening Regulation. The screening grounds of security and public order are still left undefined and the term 'likely' is still used as a nexus and threshold for assessing whether a particular investment transaction poses risks to the security or public order of the EU and/or its Member States. On closer inspection however, Article 13(3)(a-c) of the legislative proposal seems to provide even more room for Member States to screen, and eventually conditionalize, prohibit or unwind foreign investments on the basis of protectionist reasons. Article 13(3)(a-c) of the legislative proposal does not provide examples of critical infrastructure, critical technologies and the supply of critical inputs or the areas or sectors of the economy wherein they are considered relevant as is done by Article 4(1)(a-c) Screening Regulation. Article 4(1)(a) Screening Regulation provides that Member States and the Commission may consider the potential effects of a particular FDI transaction on critical infrastructure, '[…] whether physical or virtual, including energy, transport, water, health, commu financial infrastructure, and sensitive facilities, as well as land and real estate crucial for the use of such infrastructure'. Similarly, Article 4(1)(b) Screening Regulation refers to critical technologies and dual use items in the field of, *inter alia,* artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies as well as nanotechnologies and biotechnologies. Also, Article 4(1)(c) Screening Regulation provides an indication of what should be understood by the supply of critical inputs by referring to energy or raw materials, as well as food security. Not elaborating further on the notions of critical infrastructure, critical technologies and the supply of critical inputs is undesirable from the perspective of reducing and preventing protectionism as it provides no guidance at all to the Member States and the Commission. Member States aiming for protectionism can more easily claim that a particular FDI is endangering critical infrastructure, critical technologies or critical inputs.

5. CONCLUSION

In the Dutch language there is a saying stating: *er is een dunne lijn tussen gekte en genialiteit*. Translated into English, it means that there is a fine line between genius and madness or insanity. This saying is meant to express the idea that often the difference between being extraordinarily brilliant (i.e. genius) and being irrational and mentally unstable (i.e. madness) is often very small and/or difficult to distinguish. Likewise, the difference between protection and protectionism is at times very small. It is often very difficult, if not impossible, to assess whether the screening of a particular FDI transaction by a Member State is meant to protect its legitimate interests or whether it serves as a covert form of protectionism. Nevertheless, this paper showed that the design and structure of the Screening Regulation leads to unintended consequences. More precisely, the Screening Regulation fails, albeit to a certain extent, to do what it is meant to do, i.e. protecting the legitimate interests of the EU and its Member States whilst at the same time it does, albeit again to a certain extent, what it is not meant to do, i.e. facilitating protectionism. In order to address this and other issues identified by the OECD and the ECA in their evaluations, the Commission proposed a legislative proposal meant to amend the Screening Regulation. The second part of this paper analyzed to what extent the legislative proposal leads to more protection and less protectionism. Based on the analyses, it can be concluded that the legislative proposal takes important steps in the right direction with regard to the protection element. The most important and most noteworthy step is the fact that under the legislative proposal, if adopted in its current form, Member States would be obliged to screen FDI. Such an obligation addresses the blind spots under the current regime which are the result of the fact that Member States are free to decide for themselves whether or not they adopt screening mechanisms. In contrast, the design features of the Screening Regulation which facilitate protectionism, are not addressed by the legislative proposal. In fact, the legislative proposal introduces additional elements which may contribute to protectionism. While such a conclusion is certainly undesirable, it is at the same time unavoidable. After all, as Aristotle (supposedly) said: 'there is no genius without some touch of madness'. One can argue that there is no protection without some touch of protectionism.

EXPORT CONTROLS AS TECHNOLOGICAL RINGFENCING – LEGAL DYNAMICS IN EU GOVERNANCE OVER CRITICAL AND EMERGING TECHNOLOGIES SUPPLY CHAINS

Anh Nguyen*

1. INTRODUCTION: EXPORT CONTROLS AS A 'GO-TO' LEGAL INSTRUMENT FOR TECHNOLOGICAL RINGFENCING?

Chips have been crowned the new oil.[1] Control over global semiconductor supply chains under the banner of 'supply chain governance'[2] has become the backbone of states' economic security strategies. In two rounds of restrictions on 7 October 2022[3] and 17 October 2023,[4] the US imposed sweeping (extraterritorial) export controls on semiconductors and semiconductor manufacturing equipment (SME) to China. Furthermore, it successfully mobilised its allies, Japan and the Netherlands, to institute similar measures in their respective jurisdictions.[5] In response China imposed export restrictions on graphite, gallium and germanium. [6]

Within this US-China 'GeoTech War'[7] states are scrambling to devise their own national strategies to play the geopolitics of tech supply chain governance[8] to

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[1] Chris Miller, *Chip War: The Fight for the World's Most Critical Technology* (New York City, Simon & Schuster 2022), 25.

[2] European Commission, *European Chips Act: Security of Supply and Resilience* (21 February 2024) available at <digital-strategy.ec.europa.eu/en/factpages/european-chips-act-security-supply-and-resilience>

[3] Bureau of Industry and Security, *Commerce Implements New Export Controls on Advanced Computing and Semiconductor Manufacturing Items to the People's Republic of China (PRC)* (Press Release, 7 October 2022) available at <www.bis.doc.gov/index.php/documents/about-bis/newsroom/press-releases/3158-2022-10-07-bis-press-release-advanced-computing-and-semiconductor-manufacturing-controls-final/file>.

[4] Bureau of Industry and Security, *Commerce Strengthens Restrictions on Advanced Computing Semiconductors, Semiconductor Manufacturing Equipment, and Supercomputing Items to Countries of Concern* (Press Release, 17 October 2023) available at <www.bis.doc.gov/index.php/documents/about-bis/newsroom/press-releases/3355-2023-10-17-bis-press-release-acs-and-sme-rules-final-js/file>.

[5] Alexandra Alper and David Shepardson, 'U.S. official acknowledges Japan, Netherlands deal to curb chipmaking exports to China' *Reuters*, 1 February 2023, available at <www.reuters.com/technology/us-official-acknowledges-japan-netherlands-deal-curb-chipmaking-exports-china-2023-02-01/>.

[6] Siyi Liu, Dominique Patton, 'China, world's top graphite producer, tightens exports of key battery material', *Reuters*, 20 October 2023, available at <www.reuters.com/world/china/china-require-export-permits-some-graphite-products-dec-1-2023-10-20/>.

[7] GeoTech Wars – CSIS Podcast, available at <www.csis.org/podcasts/geotech-wars>.

[8] Julian Ringhof, José Ignacio Torreblanca, 'The geopolitics of technology: How the EU can become a global player', *ECFR*, 17 May 2022, available at <ecfr.eu/publication/the-geopolitics-of-

identify, safeguard, and control supply chain 'chokepoints.'[9] Control over tech champions who occupy such 'chokepoints' in the semiconductor industry, such as Nvidia[10] (design), ASML[11] (manufacturing equipment), and TSMC[12] (fabrication), is viewed as indispensable to global tech leadership of states, and the economic alliances they form.

Supply chain resilience does not only encompass industrial value chains of critical technologies, such as semiconductors, but also nascent R&D value chains of emerging technologies, such as quantum technologies (QT).[13] The saliency of QT cuts across all domains of science, industry, and state. As such, states' involvement in QT innovation to reach 'quantum supremacy'[14] seems like a foregone conclusion. In this light the export control dynamics seen in the US-China 'Chip War' are expected to rhyme themselves in a race to control the transfer of QT and the supply of components, devices and equipment feeding into innovation efforts in quantum research labs and facilities. In fact, between 2023 and 2024, the Spanish, French, Danish, Italian, Germany, Finish, Norwegian, Dutch,[15] UK,[16] Canadian,[17] and US,[18] governments have announced virtually identical export controls on quantum computers (QCs) operating from 34 to 2000 qubits and beyond. These parameters were reportedly negotiated within the Wassenaar Arrangement.[19]

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technology-how-the-eu-can-become-a-global-player/>.

[9] Henry Farrell, Abraham L. Newman 'Weak links in finance and supply chains are easily weaponized' *Nature*, 9 May 2022, available at <www.nature.com/articles/d41586-022-01254-5>.

[10] Demetri Sevastopulo, Qianer Liu, 'US tightens rules on AI chip sales to China in blow to Nvidia' *Financial Times*, 17 October 2023, available at <www.ft.com/content/be680102-5543-4867-9996-6fc071cb9212>.

[11] Diksha Madhok, 'ASML force to suspend some China exports after US excalates tech battle', *CNN*, 2 January 2024, available at <edition.cnn.com/2024/01/02/tech/asml-china-exports-suspension-intl-hnk/index.html>.

[12] 'TSMC is making the best of a bad geopolitical situation', *The Economist*, 19 January 2023, available at <www.economist.com/business/2023/01/19/tsmc-is-making-the-best-of-a-bad-geopolitical-situation>.

[13] Georg E. Riekeles, 'Quantum Technologies and value chains: Why and how Europe must act now' *EPC*, 23 March 2023, available at <www.epc.eu/content/PDF/2023/Quantum_Technologies_DP.pdf>.

[14] Ethan Siegel, 'Quantum supremacy explained' *BigThink*, 30 August 2023, available at <bigthink.com/starts-with-a-bang/quantum-supremacy-explained/>

[15] See further below in Section 4.2.1.

[16] UK Export Control (Amendment) Regulations 2024 (SI 2024 No. 346) (1 April 2024)

[17] Canadian Order Amending the Export Control List: SOR/2024-112 (31 May 2024)

[18] US Department of Commerce, 'Quantum Computing-Related Export Controls: Interim Final Rule' (Federal Register, 6 September 2024), available at <www.bis.doc.gov/index.php/documents/federal-register-notices-1/3521-89-fr-72926-quantum-c-1-ifr-0694-aj60-9-6-2024/file>; Commerce Implements New Export Controls on Advanced Computing and Semiconductor Manufacturing Items to the People's Republic of China (PRC)(*Bureau of Industry and Security – Press Release*, 7 October 2022) available at <www.bis.doc.gov/index.php/documents/about-bis/newsroom/press-releases/3158-2022-10-07-bis-press-release-advanced-computing-and-semiconductor-manufacturing-controls-final/file>; Commerce Strengthens Restrictions on Advanced Computing Semiconductors, Semiconductor Manufacturing Equipment, and Supercomputing Items to Countries of Concern (*Bureau of Industry and Security – Press Release*, 17 October 2023) available at <www.bis.doc.gov/index.php/documents/about-bis/newsroom/press-releases/3355-2023-10-17-bis-press-release-acs-and-sme-rules-final-js/file>.

[19] Matthew Sparkes, 'Multiple nations enact mysterious export controls on quantum comput-

Amidst this flurry of export controls, the EU had also thrown its hat in the ring by attempting to position itself as a global actor in tech supply chain governance. As such, the regulatory fervour around export controls over critical and emerging technologies (CET) has pervaded the EU's (economic) security agenda. Despite the EU's lack of competence on matters of member states' national security, which encompasses export control legislation, calls have been made for a more coordinated EU-level approach to achieve a critical mass to resist economic pressure imposed through both US and Chinese export controls or similar securitised legislation.[20] However, given the disparate levels of industrial and R&D capability across the tech industries in the EU, member states have also explored different ways of 'European' coordination to side-step the challenge of achieving EU harmonisation on export controls. For instance, the Netherlands, Germany, France, and Spain have discussed forming a partnership of technology holders with an eye to coordinate and work towards an export control treaty.[21]

This paper explores EU's ambition of employing export controls as a tool for tech supply chain governance. It asks how the EU's self-perception as a 'GeoTech' player going up against the US and China shapes the legal dynamics surrounding export controls and the economic, technology and supply chain security policies driving such legislation.

The paper begins with a historical account on the non-proliferation roots of export controls legislation (Section 2). This is followed by an overview of current rationales for export controls on critical and emerging technologies (CET), particularly how the traditional (military) security driven rationale has evolved and interacted with economic security considerations (Section 3). The paper will then discuss the legal nature of export controls by looking at the EU Dual-Use Regulation and national export controls implemented according to Article 9 of the Regulation (Section 4). Next, this export control legislation will be contextualised within the EU's economic security policy on export controls, critical technologies and supply chain resilience (Section 5). Finally, the paper will consider how overarching geopolitical and geoeconomics narratives have shaped its law and policy on export controls (Section 6).

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ers', New Scientist, 3 July 2024, available at <www.newscientist.com/article/2436023-multiple-nations-enact-mysterious-export-controls-on-quantum-computers/ >; These rules on QC have not been updated in the most recent 2023 Wassenaar Dual-Use List but rather imposed by states individually without explicitly reference to Wassenaar rules, compare here <www.wassenaar.org/app/uploads/2023/12/List-of-Dual-Use-Goods-and-Technologies-Munitions-List-2023-1.pdf>.

[20] European Commission, 'White Paper on Export Controls' Brussels, COM(2024) 25 final, 8; Jorge Valero, 'Netherlands Proposes Stronger EU Export Control Coordination After ASML Episode', *Bloomberg*, 7 March 2024, available at <www.bloomberg.com/news/articles/2024-03-07/netherlands-proposes-stronger-eu-export-control-coordination-after-asml-episode?embedded-checkout=true>

[21] Joint declaration – Government Consultations Netherlands - France, 12 April 2023 (Government of the Netherlands, Diplomatic Statement, 12 April 2023) available at <www.government.nl/documents/diplomatic-statements/2023/04/12/joint-declaration---government-consultations-netherlands---france-12-april-2023>.

The paper reflects on the EU's legal-political struggle to make good on 'technological sovereignty' agenda to craft its own export controls policy and emerge as a credible player in the global arena of tech supply chain governance. Strategic imposition of export controls to protect select classes of critical technologies from being transferred to hostile actors for undesirable end-uses have been deemed the 'small yard, high fence' approach.[22] A crucial question in contemporary law and policy of EU export controls is whether these efforts focus too much on building the 'fence' whilst lacking sufficient critical reflection over what technological 'yard' is being actually being protected.

2. HISTORICAL BACKGROUND: EXPORT CONTROLS' NON-PROLIFERATION ROOTS

The terms 'export controls' and 'export restrictions' are often used interchangeably, though nuances between those terminology exist.[23] 'Export controls' tend to be used within the context of public international law non-proliferation regimes,[24] the Wassenaar Arrangement, and US domestic export legislation. These measures are instituted to control the hardware, software or technology/data (the 'controlled good') from leaving their respective territory for primarily security reasons but also broadly technology protection.[25] 'Export restrictions' (or 'export prohibition') tend to be used within the WTO context, which refers to a measure with a limiting effect on exportation, or sale for export, of any product. This definition is broader than 'export controls' as it can be interpreted to capture all measures directly or indirectly limiting exports. This paper will limit its analysis to 'export controls.'

The conventional and traditional understanding of export controls is tied to their purpose for non-proliferation of weapons of mass destruction (WMD), conventional military items, and the bespoke material supplies, technologies and software which were necessary for their development, production, or use. The rationale for imposing export controls was to limit the transfer of military equipment, technology and knowledge to 'hostile' states that pose a threat to national security and international peace and security.[26]

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[22] Cameron Cavanaugh, 'U.S. Economic Restrictions on China: Small Yard, High Fence', *Georgetown Security Studies Review*, 26 December 2023, available at <georgetownsecuritystudiesreview.org/2023/12/26/u-s-economic-restrictions-on-china-small-yard-high-fence/>.

[23] Chien-Huei Wu, *Law and Politics on Export Restrictions* (Cambridge: Cambridge University Press 2021), 16-17

[24] e.g. the Treaty on the Non-Proliferation of Nuclear Weapons, the Arms Trade Treaty, the Chemical Weapon Convention or Biological Weapon Conventions.

[25] Yann Aubin and Arnaud Idiart, *Export Control Law and Regulation Handbook: A Practical Guide to Military and Dual-Use Goods Trade Restrictions and Compliance* (The Hague: Kluwer Law International 2016) 5.

[26] Bert Chapman, *Export Controls – A Contemporary History* (Lanham: Rowman & Littlefield 2013)

Whilst it may seem that the current export control discourse within the US-China context has newly zoned in on the rationale of 'economic security', i.e. strengthening national economic competitiveness as a matter of national security, historically, export controls have not been exclusively a matter of non-proliferation and have encompassed dimensions of economic security. In fact, US export control legislation during the Cold War was initially driven by economic considerations before non-proliferation became the dominant rationale for export controls during the Cold War.[27]

Between 1945-1947 the need for scrutiny over industrial and military materials and technologies shipped to the Sino-Soviet bloc was perceived as a subsidiary reason for maintaining those export controls, which the US imposed as wartime emergency measures during WWII. During the transition to a 'peacetime' economy post-WWII there was a worldwide shortage of critical materials, such as steel, chemicals, drugs and building materials. As such, export controls were imposed to retain these supplies within the US. Furthermore, US aid to Western Europe's post-war recovery meant that the flow of these critical goods was controlled through export controls such that these goods were guaranteed to US allies.

Historians have noted a link between Congressional approval of Marshall Plan aid to Western Europe in 1947–53, and US allies' alignment and cooperation with US export controls against the Sino-Soviet bloc.[28] In this light the current US-China GeoTech War is not the first time Europe has been caught in the crossfire of the US imposition of export controls along geopolitical fault lines with a rival superpower. At the start of the Cold War the US invested concerted efforts to limit technology transfers either through trade or scientific collaboration between its allies and the Soviet bloc. For instance, the US maintained tight control over the sales of computers from British firms to the Eastern bloc. Similar to current US semiconductor export control policies, this US Cold War embargo policy contained elements of extraterritoriality as well as informal agreements with the Netherlands, Italy, Luxembourg to limit their technology exports to the Soviet bloc.[29]

This need for US-Western Europe alignment and cooperation to prevent the technology and knowledge transfer of weapons systems to the Eastern bloc crystalised into the establishment of the Coordinating Committee for Multilateral Export Controls (CoCom). After its termination in 1994 CoCom was eventually replaced by currently existing multilateral export control regimes such as the Wassenaar Arrangement, Nuclear Suppliers Group, Australia Group (for the control of chemical and biological military technologies) and Missile Technology

[27] Frank Cain, 'Computers and the Cold War: United States Restrictions on the Export of Computers to the Soviet Union and Communist China' (2005) 40(1) *Journal of Contemporary History* 131-147.

[28] Hélène Seppain, 'The Marshall Plan and US Embargo Policy, 1947–53' in *Contrasting US and German Attitudes to Soviet Trade, 1917–91* (London: Palgrave Macmillan 1992).

[29] *ibid*.

Control Regime. Building upon this multilateralism on export controls for non-proliferation purposes, current calls for cooperation on export controls, e.g. the EU-US Trade and Technology Council (TTC), propose that these multilateral regimes are expanded to also include economic security dimensions within its governance framework over dual-use technologies, esp. CET such as semi-conductor and quantum technologies.[30]

3. THE RATIONALES OF EXPORT CONTROLS ON CRITICAL AND EMERGING TECHNOLOGIES

Given export controls' non-proliferation roots a common understanding of export controls relates to their national-military security rationale. They are imposed on certain advanced technologies because of their presumed dual-use nature (for military and/or civilian applications) to protect the national security of the export control imposing state. This is tied to the rationales of international peace and security and the protection of human rights from violations enabled by such military, surveillance or dual-use technologies ('human security' rationale).[31]

The rationales of national military as well as international peace and security are not merely politically driven but also explicitly set out in export control legislation.[32] Further, they are also embedded under 'national security' exceptions in international investment[33] and trade law, particularly Article XXI GATT, which allow for export controls to override free trade commitments between WTO members.[34] Since these military and public or human security rationales are grounded in exceptions to international legal obligations, their invocation carry normative implications.

More recently the 'economic security' rationale has been dominant in the current geopoliticised discourse centred around US-China 'GeoTech' competition. Export controls are imposed on certain advanced technologies to safeguard and preserve a state's economic and technological competitiveness. By doing so this undercuts the competitive advantage of the rival state which is the presumed target of such export controls. Further, export controls are imposed as a matter of alliance politics as some states in favour of export control attempt to obtain

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[30] Emily Benson, Catherine Mouradian, 'Establishing a New Multilateral Export Control Regime' *CSIS*, 2 November 2023, available at <www.csis.org/analysis/establishing-new-multilateral-export-control-regime>, 13.

[31] See for instance Article 5 or 9 of the EU Dual-Use Regulation.

[32] See for instance pre-amble of the EU Dual-Use Regulation or pre-amble of recent US Export Controls on Semiconductors on 7th October 2022*, supra* note 3, and 17th October 2023, *supra* note 4.

[33] Caroline Henckels, 'Whither security? The concept of "essential security interests" in investment treaties' security exceptions' (2024) 27(1) *Journal of International Economic Law* 114–129.

[34] 'International Export Regulations and Controls: Navigating the global framework beyond WTO rules' (*WTO* 2023) available at <www.wto.org/english/res_e/publications_e/international_exp_regs_e.htm>.

'policy buy-ins' from other (allied) states.[35] Thus, coordinated export control policies amongst coalition of technology holding states would be necessary to withhold crucial technology from a rival, close loopholes, and avoid risks of re-exports through a third state.

The notion of 'economic security' in relation to sensitive or advanced technology is not new. Within in the international relations, geopolitics and security studies discourse 'economic security' has been a point of discussion since the beginning of the Cold War (between US-Soviet competition) as well as the US-Japan trade war throughout the 1970s-1980s.[36] As such, economic security should be seen as 're-entering' the current policy discourse.

Within policy discourse surrounding export controls and critical technologies, economic security is often (not unjustifiably so) equated with national security. However, a particular unresolved point of contention is whether economic security rationales can, in a legal sense, be subsumed under the rationale of 'national security.' It is still unsettled whether economic security has found either explicit or implicit legal grounding in the legal notion of national security. This is particularly evident in the international economic law discourse, particularly WTO law, where scholars have expressed reservations that the legal notion of national security extends to economic security.[37]

Further, export controls could also be imposed as part of 'policy theatre' with a performative rationale – a means of policy posturing – such that states are 'seen' to be pursuing a goal, be it for national security or economic security purposes regardless of whether export controls are effective or fit for purpose. Nonetheless CET also represent technological potentialities and gains in material and symbolic geopolitical power. This may be crucial for the rationale behind the imposition of export controls to ringfence the critical material resources and scientific talent necessary for a state's quest towards new technological 'Sputnik moments.'

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[35] Benson/Mouradian, *supra* note 33, 8.

[36] See F. Cain, *supra* note 30, 131-147; H. Seppain, *supra* note 31; Kristi Govella, 'Economic rivals, security allies: the US-Japan trade war,' in Ka Zeng, Wei Liang (ed.), *Research Handbook on Trade Wars* (Cheltenham: Edward Elgar 2022) 209-229.

[37] Trisha Rajput,' Restricting International Trade through Export Control Laws: National Security in Perspective.' in: Abhinayan Basu Bal, Trisha Rajput, Gabriela Argüello, David Langlet (eds) *Regulation of Risk* (Leiden: Brill Nijhoff 2022), p. 603; Cindy Whang, 'Undermining the Consensus-Building and List-Based Standards in Export Controls: What the US Export Controls Act Means to the Global Export Control Regime' (2019) 22(4) *Journal of International Economic Law* 579.; See C, Wu, *supra* note 26, 172-178; Hongyong Zhang, 'The US–China Trade War: Implications for Japan's Global Value Chains.' In Etol Solingen (ed) *Geopolitics, Supply Chains, and International Relations in East Asia* (Cambridge: Cambridge University Press 2021), p. 41-59; Olga Hrynkiv and Saskia Lavrijsen, 'Not trading with the enemy: The case of computer chips' (2024) 58(1) *Journal of World Trade* 63ff.; Olga Hrynkiv, 'Legal and policy responses to national security measures in international economic law' (2023) 54(2) *Georgetown Journal of International Law* 169; Mona Paulsen, 'The Past, Present, and Potential of Economic Security' (2025) *Yale Journal of International Law* 50 (forthcoming) 10-11.

The following table shows the different rationales for imposing export controls on CET as well as the different factors that could influence whether a certain rationale may prevail or be invoked when export controls are imposed:

Rationales for export controls on advanced technologies

'Traditional' (military) security driven rationale		**Economic security rationale, i.e. securing economic/technological competitiveness**		**Performativity of policy making**
Internal / domestic perspective Protection of national security due to ~~the dual-use nature~~ of advanced technologies	*International / multilateral perspective* Protection of international peace and ~~security – relatedly~~ also the protection of human security/ rights	*Internal / domestic perspective* Preservation and safeguarding of ~~competitiveness in~~ terms of economic, technological and know-how factors → the drive and symbolic pay-off to be 'the first' *(Sputnik moment)* – regardless of immediate economic/commercial application	*International / multilateral perspective* Alliance politics on export controls ~~to close loopholes~~ and avoid risks of re-exports	States are 'seen' to be pursuing a security goal – regardless of export controls being effective or fit for purpose 'Innovation marketing' through export controls

These rationales could be driven by three sets of factors…

Internal factors related to the domestic politics as well as industrial and R&D capabilities of the state imposing export controls	**Geopolitical relationship** between the export control imposing state and the perceived rival state and the perceived industrial and R&D capabilities of the rival	Factors relating to the controlled technology:
		
		• The **type of technology**
		• The economic, scientific, political **value at stake**
		• The **socio-technical imaginaries** connected to the controlled technology, relating to its:
		  ○ Technological promise
		  ○ (Geo)economic promise
		  ○ (Geo)political promise

Figure 1. Rationales for export controls and factors driving them.

4. THE LAW OF EXPORT CONTROLS

4.1 **The EU Dual-Use Regulation**

The EU trade control system has been around two decades in the making, starting with the first set of legislation comprised of various legally binding acts and political recommendations under a Council Regulation[38] and Joint Action[39]

[38] Council Regulation (EC) No 3381/94 of 19 December 1994 setting up a Community regime for the control of exports of dual-use goods.

[39] Council Decision (94/942/CFSP) of 19 December 1994 on the Joint Action adopted by the Council.

in 1994. There was a wish to consolidate export control regulation within the EU, as member states were individual signatories to various multilateral export control regimes. Given that this did not lead to a common trade control system concentrated in one single Union authority, EU export control legislation attempts to achieve a common understanding and implementation by Member States' licensing authorities.[40] Currently within the EU member states' export control implementation is regulated by the Council Regulation (EC) No 428/2009[41] which was updated by Regulation (EU) 2021/821.[42] Unless explicitly indicated otherwise the term '(EU) Dual-Use Regulation' in this paper refers to the 2021 Recast.

According to Article 1 Dual-Use Regulation it 'establishes a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items', which is defined as:

> 'items, including software and technology, which can be used for both civil and military purposes, and includes items which can be used for the design, development, production or use of nuclear, chemical or biological weapons or their means of delivery, including all items which can be used for both non-explosive uses and assisting in any way in the manufacture of nuclear weapons or other nuclear explosive devices.'[43]

Thus, restrictions on the export of these 'dual-use' goods explicitly serve the purpose of non-proliferation and prevention of weapons transfer and related technology transfers. There is a rich scholarship on the notion of 'dual-use.'[44] Scholars underline that the term is used in the two frameworks of the Wassenaar Arrangement and the Nuclear Suppliers Group.[45] The dichotomy referred to could be understood to be items (mis)used for 'non-peaceful' and 'peaceful' means, e.g. in the Treaty on the Non-Proliferation of Nuclear Weapons, the Chemical Weapon Convention or Biological Weapon Conventions. In this context 'non-peaceful' is anchored in the misuse of these items for purposes relating to the weapons regulated by these conventions. The dichotomy can also be understood as a distinction between 'military' or 'civilian' use as found in Regulation's Article 2(1) definition as well as the Wassenaar Arrangement. This distinction, however, could be fraught as it implicates a normative judgement on the (foreign) 'military' use of the controlled item to be hostile and illegitimate and 'civil' use to be acceptable and legitimate.

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[40] Quentin Michel et al, 'A decade of evolution of dual-use trade control concepts: strengthening or weakening non-proliferation of WMD' (ESU, Liège Université) available at <orbi.uliege.be/bitstream/2268/246711/1/full.pdf> 3 ff.

[41] Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items (hereinafter Dual-Use Regulation)

[42] European Commission, 'Proposal for a Regulation of the European Parliament and of the Council Setting up a Union Regime for the Control of Exports, Transfer, Brokering, Technical Assistance and Transit of Dual-Use Items (recast)' COM (2016) 616 final.

[43] Article 2 (1) Dual-Use Regulation.

[44] See Q. Michel, *supra* note 43; Machiko Kanetake, 'The EU's dual-use export control and human rights risks: the case of cyber surveillance technology' (2019) 3(1) *Europe and the World*.

[45] See Q. Michel, *supra* note 43, 11.

Article 3 Dual-Use Regulation provides that the export of dual-use items listed in Annex I shall require an authorisation. The list of controlled items in Annex I is comprehensive and compulsory for member states' licencing authorities. As such, there is no room for discretion and national appreciation concerning authorisation requirements for dual-use items in Annex I. The list implements internationally agreed upon dual-use controls, including the Australia Group, the Missile Technology Control Regime, the Nuclear Suppliers Group, the Wassenaar Arrangement and the Chemical Weapons Convention.

Article 9(1) allows member states to 'prohibit or impose an authorisation requirement on the export of dual-use items not listed in Annex I for reasons of public security, including the prevention of acts of terrorism, or for human rights considerations.' Whilst the Regulation does not give member states discretion to deviate from the Annex I list it does give member states some leeway on which items to be declared as dual-use with 'public security' implications.

4.2 **Typologies of export controls**

4.2.1 *Export controls imposed on the technology as such*

Export controls can be placed on a technology *as such*, i.e. as an end product, according to specific technical specifications or parameters. For example, Spain,[46] France,[47] Denmark,[48] Italy,[49] Germany,[50] Finland,[51] Norway,[52] and the Netherlands,[53] made use of Article 9 EU Dual-Use Regulation,[54] and added quantum computers (QC) with virtually identical technical specifications regarding the number of quantum bits (qubits) and the error rate. The UK, Canada, and US have also adopted the exact same technical parameters for their export controls.[55] Broadly speaking these parameters are representative of the QC's technical capacity, with the qubits representing computational capacity and the error rate accounting for the quality of those qubit operations.

[46] Spanish Order ICT/534/2023 (26 May 2023).
[47] French Order ECOI2401482A (2 February 2024).
[48] Amendment to the Danish Export Control Act by Act No. 641(11 June 2024).
[49] Italian Decree establishing the National Control List for dual-use goods and technology not listed in Annex I to Regulation (EU) 2021/821 (1 July 2024).
[50] Amendment to the German Foreign Trade Ordinance, Federal Law Gazette 2024, No. 243 (22 July 2024).
[51] Finnish Act on the Export Control of Dual-Use Items (500/2024) (16 August 2024)
[52] Amendment to the Norwegian Export Control Regulations (3 October 2024).
[53] Regulation of the Netherlands Minister for Foreign Trade and Development Aid of 11 October 2024, nr. BZ2405833.
[54] Dual-Use Regulation (EU) 2021/821
[55] See *supra* notes 19, 20, 21.

Side-by-Side Comparison of Select National Export Controls

Spanish restrictions	French restrictions	Italian restrictions	English translation
Computadoras cuánticas y ensamblajes electrónicos relacionados y sus componentes, como sigue:	Ordinateurs quantiques, “ensembles électroniques” et composants qui leur sont destinés, comme suit:	Computer quantistici e relativi “assiemi elettronici” e loro componenti, come segue:	Quantum computers and related electronic assemblies and components therefor, as follows:
a) Computadoras cuánticas, de acuerdo a los siguientes requisitos;	a) Ordinateurs quantiques, comme suit	a) Computer quantistici, come segue:	a) Quantum computers, in accordance with the following requirements:
1. Computadoras cuánticas que admiten **34 o más cúbits físicos**, **pero menos de 100**, totalmente controlados, conectados y funcionando, y tener un error C-NOT menor o igual a 10^{-4};	1. Ordinateurs quantiques supportant **34 ou plus, mais moins de 100, ‘qubits physiques’** ‘entièrement contrôlés’, ‘connectés’ et ‘fonctionnels’, et ayant une ‘erreur C-NOT’ inférieure ou égale à 10-4 ;	1. Computer quantistici che supportano **34 o più, ma meno di 100, ‘qubit fisici’** ‘completamente controllati’, ‘connessi’ ‘funzionanti’, e aventi un ‘errore C-NOT’ inferiore o uguale a 104;	1. Quantum computers supporting **34 or more, but fewer than 100**, fully controlled, connected and working **physical qubits**, and having a C-NOT error of less than or equal to 10-4;
2. Computadoras cuánticas que admiten **100 o más cúbits físicos, pero menos de 200,** totalmente controlados, conectados y funcionando, y tener un error C-NOT menor o igual a 10^{-3};	2. Ordinateurs quantiques supportant **100 ou plus, mais moins de 200, ‘qubits physiques’** ‘entièrement contrôlés’, ‘connectés’ et ‘fonctionnels’, et ayant une ‘erreur C-NOT’ inférieure ou égale à 10-3 ;	2. Computer quantistici che supportano **100 o più, ma meno di 200, ‘qubit fisici’** ‘completamente controllati’, ‘connessi’ ‘funzionanti’, e aventi un ‘errore C-NOT’ inferiore o uguale a 10;	2. Quantum computers supporting **100 or more, but fewer than 200**, fully controlled, connected and working **physical qubits**, and having a C-NOT error of less than or equal to 10-3;
3. Computadoras cuánticas que admiten **200 o más cúbits físicos, pero menos de 350**, totalmente controlados, conectados y funcionando, y tener un error C-NOT menor o igual a $2x10^{-3}$;	3. Ordinateurs quantiques supportant **200 ou plus, mais moins de 350, ‘qubits physiques’** ‘entièrement contrôlés’, ‘connectés’ et ‘fonctionnels’, et ayant une ‘erreur C-NOT’ inférieure ou égale à 2 × 10-3 ;	3. Computer quantistici che supportano **200 o più, ma meno di 350, ‘qubit fisici’** ‘completamente controllati’, ‘connessi’ e ‘funzionanti’, e aventi un ‘errore C-NOT’ inferiore o uguale a 2 x 103;	3. Quantum computers supporting **200 or more, but fewer than 350**, fully controlled, connected and working **physical qubits**, and having a C-NOT error of less than or equal to 2x10-3;
4. Computadoras cuánticas que admiten **350 o más cúbits físicos, pero menos de 500**, totalmente controlados, conectados y funcionando, y tener un error C-NOT menor o igual a $3x10^{-3}$;	4. Ordinateurs quantiques supportant **350 ou plus, mais moins de 500, ‘qubits physiques’** ‘entièrement contrôlés’, ‘connectés’ et ‘fonctionnels’, et ayant une ‘erreur C-NOT’ inférieure ou égale à 3 × 10-3 ;	4. Computer quantistici che supportano **350 o più, ma meno di 500, ‘qubit fisici’** ‘completamente controllati’, ‘connessi’ “funzionanti’, e aventi un ‘errore C-NOT’ inferiore o uguale a 3 × 10-3.	4. Quantum computers supporting **350 or more, but fewer than 500**, fully controlled, connected and working **physical qubits**, and having a C-NOT error of less than or equal to 3x10-3;
5. Computadoras cuánticas que admiten **500 o más cúbits físicos, pero menos de 700**, totalmente controlados, conectados y funcionando, y tener un error C-NOT menor o igual a 4×10^{-3};	5. Ordinateurs quantiques supportant **500 ou plus, mais moins de 700, ‘qubits physiques’** ‘entièrement contrôlés’, ‘connectés’ et ‘fonctionnels’, et ayant une ‘erreur C-NOT’ inférieure ou égale à 4 × 10-3 ;	5. Computer quantistici che supportano **500 o più, ma meno di 700, ‘qubit fisici’** ‘completamente controllati’, ‘connessi’ ‘funzionanti’, e aventi un ‘erroreC-NOT’ inferiore ouguale a 4 × 103.	5. Quantum computers supporting **500 or more, but fewer than 700**, fully controlled, connected and working **physical qubits**, and having a C-NOT error of less than or equal to 4x-10-3;
6. Computadoras cuánticas que admiten **700 o más cúbits físicos, pero menos de 1.100**, totalmente controlados, conectados y funcionando, y tener un error C-NOT menor o igual a 5×10^{-3};	6. Ordinateurs quantiques supportant **700 ou plus, mais moins de 1 100, ‘qubits physiques’** ‘entièrement contrôlés’, ‘connectés’ et ‘fonctionnels’, et ayant une ‘erreur C-NOT’ inférieure ou égale à 5 × 10-3 ;	6. Computer quantistici che supportano **700 o più, ma meno di 1 100, ‘qubit fisici’** ‘completamente controllati’, ‘connessi’ e ‘funzionanti’, e aventi un ‘erroreC-NOT’ inferiore o uguale a5 × 103,	6. Quantum computers supporting **700 or more, but fewer than 1 100,** fully controlled, connected and working **physical qubits**, and having a C-NOT error of less than or equal to 5x10-3;
7. Computadoras cuánticas que admiten **1.100 o más cúbits físicos, pero menos de 2.000**, totalmente controlados, conectados y funcionando, y tener un error C-NOT menor o igual a 6×10^{-3};	7. Ordinateurs quantiques supportant **1 100 ou plus, mais moins de 2 000, ‘qubits physiques’** ‘entièrement contrôlés’, ‘connectés’ et ‘fonctionnels’, et ayant une ‘erreur C-NOT’ inférieure ou égale à 6 × 10-3 ;	7. Computer quantistici che supportano **1 100 o più, ma meno di 2 000, ‘qubit fisici’** ‘completamente controllati’, ‘connessi’ e “funzionanti’, e aventi un ‘errore C-NOT’ inferiore o uguale a 6 x 103;	7. Quantum computers supporting **1 100 or more, but fewer than 2 000, fully controlled**, connected and working **physical qubits**, and having a C-NOT error of less than or equal to 6x10-3;
8. Computadoras cuánticas que admiten **2.000 cúbits físicos o más** totalmente controlados, conectados y en funcionamiento;	8. Ordinateurs quantiques supportant au **moins 2 000 ‘qubits physiques’** ‘entièrement contrôlés’, ‘connectés’ et ‘fonctionnels’ ;	8. Computer quantistici che supportano **2000 o più ‘qubit fisici’** ‘completamente controllati’, ‘connessi’ e ‘funzionanti’;	8. Quantum computers supporting **2 000 or more** fully controlled, connected and working **physical qubits;**

Figure 2. Side-by-Side Comparison of Spanish, French and Italian Export Controls (with English Translation)

4.2.2 *Export controls imposed on the technology components, devices and equipment*

Beyond the restrictions on a technology *as such*, restrictions can also be placed on equipment, devices and components which make up industrial or R&D supply chain. The above-mentioned QC export restrictions aim to regulate these supply chains, as reflected in the inclusion of 'Qubit devices and qubit circuits containing or supporting arrays of physical qubits,' 'Quantum control components and quantum measurement devices,' and technology for the 'development' or 'production' of QC and their devices.[56] Finland has imposed export controls on cryogenics,[57] which are essential to the QT R&D supply chain. The Finish company Bluefors is an industry leader in cryogenics, supplying to major QC players such as IBM and burgeoning QC start-ups such as Alice & Bob.[58]

The Dutch Regulation of the Minister for Foreign Trade and Development Cooperation of 23 June 2023[59] made use of Article 9 of the Dual-Use Regulation and imposed export controls on photolithography equipment, which are essential to semiconductor manufacturing process and constitute a chokepoint in the semiconductor supply chain. The Dutch firm ASML is a market leader in photolithography, which is the crucial process of 'printing' of nano-level circuitry on the silicon wafer for (advanced) semiconductor, i.e. computer/AI chips.[60]

4.2.3 *Export controls on 'intangibles' and knowledge exchange*

It has been noted that export controls on the technology *as such* and their supply chains of equipment, devices and components may not be enough to effectively hamper the indigenisation of controlled technologies in the rival state. For instance, only three weeks after the US blacklisted Chinese QT actors, a Chinese research team announced a breakthrough, achieving the largest ever quantum computation with trapped-ion qubits. This breakthrough was achieved by US-trained Chinese scientist, which further adds to the sensationalization of fears over technology leakage from open international scientific collaboration.[61]

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[56] See for instance 4A906.b. and 4A906.c and 4E901 in the French Order ECOI2401482A.

[57] See *supra* n (54).

[58] Blufors Homepage available at <bluefors.com>; IBM Quantum, 'IBM scientists'; Blufors, 'Cat in fridge?'.

[59] Regulation of the Minister for Foreign Trade and Development Cooperation of 23 June 2023, No. MinBuza.2023.15246-27 introducing an obligation to authorise the export of advanced production equipment for semiconductors not listed in Annex I to Regulation 2021/821 (Regulation on advanced production equipment for semiconductors).

[60] See M. Hijnk, *infra* note 84.

[61] Danie Peng, 'US-Returned Chinese Physicist Duan Luming and Team Build World's Most Powerful Ion-Based Quantum Computing Machine,' *South China Morning Post*, May 31, 2024. <www.scmp.com/news/china/science/article/3264742/us-returned-chinese-physicist-duan-luming-and-team-build-worlds-most-powerful-ion-based-quantum>; Sandra Petersmann Esther Felden, 'China's quantum leap — Made in Germany' (Deutsche Welle, 13 June 2023) <www.dw.com/en/chinas-quantum-leap-made-in-germany/a-65890662>.

To effectively prevent such technology leakages, 'intangible' aspects (e.g. intellectual property, expertise and know-how) related to the R&D and manufacturing of a controlled technology must also be stemmed. [62]

Within US export control regime Daniels and Krige have (re)considered technology export restrictions as a means of 'knowledge regulation.' Natural persons working in cross-border scientific research would be constitute 'data exporters' of not only 'technical data' but also their general expertise, know-how and implicit knowledge gained by virtue of contact with US-based technology holders.[63] In this light US export controls implementation is carried out according to the 'mosaic theory,' which assumes that export controls should extend to 'knowledge' related to the material technology because unrelated and innocuous pieces of information could in combination yield a bigger picture.[64] This is a line of reasoning that the US export control authorities have adopted to characterise any comingling of foreign technical data or knowledge with US-origin data or knowledge as a 'deemed export' under the ambit of US export control administration.[65] The US' broad approach to using export controls as regulating data transfer and knowledge exchange may also lead to the exercise of extraterritorial application of US export controls over US-origin technologies, data or information which as 'co-mingled' with EU-based ones.[66]

The extension of export controls to regulating any form of knowledge exchange is also reflected in Article 2 (2) of the EU Dual-Use Regulation. In addition to defining '(re)export' as the movement of goods from the Union customs territory into that of third states, it also covers various means of 'knowledge exchange':

> '(d). transmission of software or technology by electronic media, including by fax, telephone, electronic mail or any other electronic means to a destination […] making available in an electronic form […] oral transmission of technology when the technology is described over a voice transmission medium.'[67]

Furthermore Article 8 provides that member states must require authorisation for such providers of 'technical assistance', which is defined in Article 2(9) as:

> 'any technical support related to repairs, development, manufacture, assembly, testing, maintenance, or any other technical service, and may take forms such as instruction, advice, training, transmission of working knowledge or skills or consulting services, including by electronic means as well as by telephone or any other verbal forms of assistance.'

Article 2(10) defines widely the scope of 'technical assistance', which encom-

[62] Ian Stewart, 'The Contribution of Intangible Technology Controls in Controlling the Spread of Strategic Technologies' (2015) 1(1) *Journal of Strategic Technologies* 48-55.

[63] Mario Daniels and John Krige, *Knowledge Regulation and National Security in Postwar America* (Chicago: University of Chicago Press, 2022) 11-13.

[64] *ibid*, 3.

[65] 'Hydrocarbon Research Inc., et al: Consent Denial and Probation Order,' 12487.

[66] See A. Nguyen, *infra* note 86.

[67] Article 2 (2) Dual-Use Regulation (emphasis added).

passes transfers from natural or legal person or partnership 'from' or 'resident' or 'established' in the EU 'into' or 'within' the territory of a third state or 'to a resident of a third state temporarily present' in the EU customs territory. This last case covers instances of third-country citizens following courses at universities, research centres or participating in industry research and development programs in the EU. Previously such cases were neither covered by Article 7 of the 2009 Dual-Use Regulation nor Article 1 Joint Action CFSP/401/2000.[68]

Given that the main challenge of obtaining a technological lead time in cutting-edge innovation is one of acquisition and bringing together of engineering ingenuity for a collectively skilled workforce, export controls will critically serve as a tool of knowledge regulation. This could have major implications for open international technological and scientific exchange in CET, such as advanced semiconductors and quantum, with institutions, entities as well as scientists, engineers, and technicians from rival (non-Western) states, who constitute a sizable part of the pool of talent of the high-tech sector.

5. THE POLICY CONTEXT OF EU EXPORT CONTROL LEGAL FRAMEWORK

5.1 **The EU Export Control White Paper**

On 24th January 2024 as part of the EU's Economic Security Package the EU published its Export Control White Paper. It explicitly states that EU export controls on dual-use items are 'key tool for international peace and security as well as the protection of human rights.' The export control framework derives from the Union and its member states' obligations set out in non-proliferation agreements and multilateral export controls regimes.[69] The paper cites that the 2021 Recast 'takes into account rapid technological developments and the increasing militarisation of emerging technologies.'[70]

The White Paper highlights a 'multiplication of new national controls on emerging and advanced sensitive technologies', which brings about 'patchwork developments,' risking the fragmentation of the Single Market. It points out the lack of a common EU approach and international voice on security trade objectives in the area of export controls, particularly over emerging technologies which have not yet been controlled at the multilateral level. As such, the Union and its member states are exposed to 'geopolitical pressure' from third states.[71] The paper references recent developments on unilateral and extraterritorial export

[68] See Q. Michel, *supra* note 43, 21-22.
[69] See White Paper, *supra* note 23, 2.
[70] *ibid.*
[71] *ibid*.

controls imposed by the US and China on semiconductors and semiconductor manufacturing equipment (SME). These pressures have ramifications on global value chains and could potentially impact EU businesses' export of key cutting-edge technologies and components.

The White Paper's main proposal for future export control legislation is to achieve coordination and harmonisation. It proposes better coordination of national measures adopted according to Article 9 Dual-Use Regulation by providing Commission recommendations and a forum for political consultation between member states. In the long-term it proposes amending the controlled items list Annex I through a Commission legislative proposal under the ordinary legislative procedure or a Commission delegated act, which is set out in Article 17 and 18 Dual-Use Regulation.

Russia's war of aggression on Ukraine is explicitly foregrounded to drive home the importance of the export control framework in the Dual-Use Regulation's military security rationale, particularly the Regulation's human rights consideration in light of the EU member states' international peace and security obligations in arms transfers and non-proliferation regimes. However, it becomes evident that the EU's export control policy is not solely a matter of military security. The White Paper's focus on harmonisation and coordination in order to form a counterweight against geopolitical tensions from the US-China 'Chip War' and preparation for potential ramifications on supply chains makes it evident that there is an economic shadow looming over the EU's imperative to fashion a firm and coherent export control policy to safeguard EU and member states' efforts in high-tech industry and research.

The EU's Economic Security Strategy aims to address risks to the resilience of supply chains, physical and cyber security of critical infrastructure, technology security and technology leakage, and weaponisation of economic dependencies or economic coercion. One of the strategy's proposals to mitigate these risks is by promoting the EU's competitiveness through investment in its research, technological and industrial base. Within this framework the EU laid out new action steps, which included *inter alia* establishing a list and risk assessment of critical technologies (which include advanced semiconductors and quantum technologies), supporting EU technological sovereignty and value chain resilience, including through the Strategic Technologies for Europe Platform (STEP), increasing support for dual-use technologies R&D, fully implementing the Dual-Use Regulation, and proposing measures to improve research security.

The White Paper thus follows up on some of these action steps. The EU's Economic Security Package makes it evident that 'economic security' goes beyond a matter of securing the EU and international (military) security environment as a necessary condition for economic resilience and prosperity. In this light the EU's export controls policy serves to regulate the transfer of 'critical' technologies, i.e. those of vital importance for the EU's supply chains, public infrastructure, industrial and research base, and economic and technological

competitiveness. The policy rationale for strengthening export control policy and coordination seems better understood as securing 'economic competitiveness' instead of merely 'economic security.' In certain export controls, for example those placed on semiconductors and semiconductor manufacturing materials, there is an intertwined rationale of both military and economic security rationales because of the dual-use nature of semiconductors. Computer chips are inherently all-purpose technologies, whose use in advanced data centre or AI chips can power both commercial enterprises and weapons systems.

Whilst most of the hype surrounding QT is focused on QC because of their cybersecurity and military risks,[72] scientists agree that we are still decades away from building a QC that can break existing quantum encryption.[73] The QC R&D efforts are driven by general economic and technological competition to 'be the first.' As such, the rationale of economic security, i.e. competitiveness, is particularly foregrounded in member states' imposition of export controls only on QC and equipment and devices part of their supply chain. It is also worth noting that QT export controls do not include other quantum technologies such as quantum sensing (QST) and quantum communication technologies (QCT) even though these have been a fixture of defence technology strategies[74] of all leading 'quantum' state players and NATO,[75] particularly because of the sensors' application in anti-drone surveillance radar, anti-stealth technology, detection of submarines or underwater mines, and surveillance technology. Furthermore, QST have a higher degree of technological maturity for real life applications compared to quantum computers (QC).

Given the major military and cybersecurity implications of both QST and QCT, it is peculiar why export legislation included lengthy technical specifications for QC but make no mention of QST or QCT. Given the Dual-Use Regulation's explicit provisions on authorisation requirements for the transfer of dual-use cybersurveillance items contravening human rights in Article 3 and Article 5, it remains to be seen whether QST will be included explicitly in future QT export controls. The recent QT export controls may reflect more strongly the economic security drivers in the field of QT R&D. These considerations to protect techno-

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[72] Emily Conover, 'Quantum Computers Could Break the Internet. Here's How to Save It', *Science News,* 28 June 2023, available at <www.sciencenews.org/article/quantum-computers-break-internet-save>; Sankar Das Sarma, 'Quantum Computing Has a Hype Problem', *MIT Technology Review*, 28 March 2022, available at <www.technologyreview.com/2022/03/28/1048355/quantum-computing-has-a-hype-problem/>

[73] Michael Brooks, 'Quantum Computers: What Are They Good For?', *Nature Spotlight*, 24 May 2023, available at <www.nature.com/articles/d41586-023-01692-9#ref-CR3>.

[74] *Defense Primer: Quantum Technology* (Congressional Research Service, 25 October 2023) available at <crsreports.congress.gov/product/pdf/IF/IF11836.>; Michal Krelina, 'Quantum Technology for Military Applications' (2021) 8(24) *EPJ Quantum Technology*, available at <doi.org/10.1140/epjqt/s40507-021-00113-y.>; Sam Howell, 'To Restrict, or Not to Restrict, That is the Quantum Question', *Lawfare*, 1 May 2023, available at <www.lawfaremedia.org/article/to-restrict-or-not-to-restrict-that-is-the-quantum-question>.

[75] 'Summary of NATO's Quantum Technologies Strategy' *NATO*, 16 January 2024, available at <www.nato.int/cps/en/natohq/official_texts_221777.htm>.

logical competitiveness in quantum computing have thus far outpaced a more comprehensive approach to include other QT such as QST, which may have more mature technological applications with significant military and human security risks.

5.2 **EU Critical Technologies List**

The rationale of 'economic security' as 'economic competitiveness' is also evident in the European Commission's proposed Critical Technologies List,[76] which could be a probable basis how the Dual-Use Regulation's Annex I list would be amended as well as how member states will amend their own national lists according to Article 9. The Commission set out three criteria for the selection of critical technologies: (1). cutting-edge nature, i.e. significant increase in performance and efficient ('enabling' capabilities) and/or radical changes for sectors ('transformative' capabilities), (2). risk of civil and military fusion, (3). the risk of human rights violations.

Whilst EU export controls on critical technologies have a military security dimension linked to the ongoing Russia-Ukraine War, the proposed efforts to harmonise and coordinate on export controls seem to be primarily aimed at withstanding the ramifications from the economic and technological competition between the US and China. Safeguarding and boosting economic competitiveness relating to the criterion of cutting-edge technologies in the Commission's Critical Technology List seem to be a driver for member states, who have relied on Article 9 Dual-Use Regulation to adopt national export controls on semiconductor lithography machines and quantum computers.

In the case of the Netherlands' export controls on semiconductor lithography equipment it has been widely covered by news outlets that Dutch export controls were economically driven.[77] These lithography technologies are produced by Dutch 'tech champion' ASML which has virtually a monopoly on the global lithography market.[78] Simply put ASML's lithography business is the global lithography industry. As such, ASML being the sole manufacturer of lithography SME for advanced chips, sits at a chokepoint in the semiconductor GVC.[79] The Dutch government faced significant pressure from the US to impose national

[76] 'Commission recommends carrying out risk assessments on four critical technology areas' (European Commission – Press Release, 3 October 2023) available at <ec.europa.eu/commission/presscorner/detail/en/ip_23_4735>.

[77] 'ASML says geopolitics, new export restrictions remain risk' *Reuters*, 14 February 2024, available at <www.reuters.com/technology/asml-says-geopolitics-new-export-restrictions-remain-risks-2024-02-14/>; Pieter Haeck, Barbara Moens,' Dutch cozy up to US with controls on exporting microchip kit to China' *Politico*, 1 September 2023, available at <www.politico.eu/article/the-netherlands-limits-chinese-access-to-chips-tools-asml/>; Pieter Haeck, 'Top tech boss tells EU: Tool up for global trade fight' *Politico*, 25 January 2024, available at <www.politico.eu/article/eu-common-trade-defense-dutch-tech-ceo-asml-peter-wennink/>.

[78] Marc Hijnk, *Focus: De Wereld van ASML* (Amsterdam: Balans 2023)

[79] See C. Miller, *supra* note 1, 189.

export controls on SME in alignment with US export control policy and was further confronted with additional (unilateral) extraterritorial US export controls.[80] In this light, ASML's strategic importance has been amplified by its co-option into the US goals of aligning important global players in the semiconductor supply chain with its own national interests. Whilst risks of dual-use by the Chinese military was a pretext to both Dutch and US export controls,[81] at the heart of the matter is economic competitiveness of states and alliances they form.

In the case of export controls on QC, the global race to innovate and build a QC is still mired by engineering challenges.[82] QC have not been proven to be a fully functioning technology yet, thus the imminent risk in the quantum race is economical, i.e. losing out on the technological innovation race, instead of a military proliferation or cybersecurity risk.[83] The EU policy discourse has lamented how the EU was too slow to move, particularly being sidelined in the US-China Chip War and by extension the AI race. As such, the EU and its member states see the QT boom as a new chance for the EU to be a technology and regulatory leader in the quantum innovation race.

Looking at export controls on QC, it is peculiar how QC with the capacity to reach 2000 qubits are export controlled, The largest amount of qubits ever reached was by IBM at 1121 qubits.[84] In fact, France and Spain only have goals to build QC prototypes to surpass the 2000 qubit milestone in the next ten years.[85] As discussed above,[86] if the race to control quantum technologies is one that is also military and human security driven, the omission of QST given their applications in weapons and cybersurveillance systems should be more scrutinised. So, what

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[80] Alper/Shepardson (n 5); Anh Nguyen, 'The Discomfort of Extraterritoriality: US Semiconductor Export Controls and Why Their Chokehold on Dutch Photolithography Machines Matter' *EJIL: Talk*!, 1 December 2023, available at <www.ejiltalk.org/the-discomfort-of-extraterritoriality-us-semiconductor-export-controls-and-why-their-chokehold-on-dutch-photolithography-machines-matter/>.

[81] See Regulation, *supra* note 65; see BIS Press Releases, *supra* note 3 and 4.

[82] Engineering challenges of creating (error-free) qubits, interacting with them, scaling them up, and designing algorithms to obtain the correct answers from their calculations, see Scott Aaronson, 'What Makes Quantum Computing So Hard to Explain?', *Quanta*, 8 June 2021, available at <www.quantamagazine.org/why-is-quantum-computing-so-hard-to-explain-20210608/>; Olivier Ezratty, *Understanding Quantum Technologies* (2023) v <arxiv.org/pdf/2111.15352> p. 164, 226.

[83] Pieter Haeck, 'Europe is ring-fencing the next critical tech: Quantum', *Politico*, 27 February 2024, available at <www.politico.eu/article/how-europe-ring-fencing-quantum-computing-technology-defense/>.

[84] Larry Greenemeier, '5 Things to Know About the IBM Roadmap to Scaling Quantum Technology' (IBM Research) available at <newsroom.ibm.com/archive-IBM-research?item=32425>.

[85] Spain's leading QC start-up Qilimanjaro is aiming to reach 30 logical (i.e. useful) qubits by 2025, see 'Successful first delivery for the Quantum Spain project to build the first Spanish quantum computer'*Qilimanjaro*, 10 July 2023, available at <www.qilimanjaro.tech/successful-first-delivery-for-the-quantum-spain-project-to-build-the-first-spanish-quantum-computer/>; the French national QC programme 'PROQCIMA' involving five of the most promising QC start-up aims to reach 128 logical qubits by 2032 and 2048 qubits by 20235, see 'France 2030 : Point d'étapes trois ans après le lancement de la stratégie nationale des technologies quantiques et lancement du programme Proqcima' (French Government Press Release, 6 March 2024) available at <www.info.gouv.fr/actualite/france-2030-point-detapes-trois-ans-apres-le-lancement-de-la-strategie-nationale-des-technologiques-quantiques-et-lancement-du-programme-proqcima>.

[86] See Section 5.1.

is there beyond the potential 'performative' elements to technological ringfencing around a hypothetical QC which is believed to possess ground-breaking above the 2000-qubit threshold? Are they merely pre-emptive for a future disruptive breakthrough QC milestone? The US Bureau of Industry and Security, which has adopted identical technical parameters, explained QC reaching these thresholds as having 'high level of technological sophistication warranting national security, regional stability, and antiterrorism controls.'[87]

If the national control lists were to be read in conjunction with Article 3 (1) and Article 2(9) Dual-Use Regulation, it may become evident that whilst export controls on a QC of hypothetical 2000 qubits (the technology *as such*) may be legally moot (for now), equipment, devices and components as well as 'intangibles,' including IP, software and the knowledge exchange, which are key to the development, production, and use of QC, are also subject to restrictions. We may be led to think that imposing export controls on a hypothetical QC with 2000-qubits is a matter of geoeconomic posturing, driven perhaps by a sense of techno-optimism. However, looking closely just because the 2000-qubits QC are not 'real,' it does not mean that the impact of export controls and the ringfencing performed by them is not. In fact, these export controls could have significant repercussions on European QC efforts to reach the 2000-qubit breakthrough, for which material and knowledge exchange and technological collaborations with non-EU states and individuals may not be easily dispensable.

Consequently, export controls could be seen an instrument of technological ringfencing of industrial and research innovation capabilities in terms of both material resources (technology, and devices and equipment part of their supply chain) and human resources (through information sharing, knowledge exchange and scientific collaboration). This approach seems to have been adopted such that technology holding EU member states can become first movers in the export controls regulatory space.

5.3 **EU Supply Chain Governance**

The EU's imperative to ensure supply chain resilience policy was triggered by disruptions caused by the Covid-19 pandemic as well as the Russia-Ukraine war, which have highlighted the EU's 'strategic dependence' on 'some foreign inputs.'[88] These strategic dependencies relate to 'sensitive ecosystems' and 'critical supply chains', which the Commission identifies in its New Industrial Strategy as active pharmaceutical ingredients, batteries, hydrogen, raw materials, semiconductors, and cloud and edge technologies. Of particular importance

[87] US Department of Commerce, 'Quantum Computing-Related Export Controls: Interim Final Rule' (Federal Register, 6 September 2024) available at <www.bis.doc.gov/index.php/documents/federal-register-notices-1/3521-89-fr-72926-quantum-c-1-ifr-0694-aj60-9-6-2024/file> p. 72935

[88] 'Resilience of global supply chains' (European Parliament Briefing, 2021) available at <www.europarl.europa.eu/RegData/etudes/BRIE/2021/698815/EPRS_BRI(2021)698815_EN.pdf >.

are materials needed for the 'green and digital' transition, where dependencies vis-à-vis China have been deemed as particularly concerning. As such, emphasis is placed on the EU to 'pool resources and build stronger and more diverse alternative supply chains with our closest allies and partners.'

At the heart of supply chain resilience discourse is the question of governance of these supply chains. Whilst the EU policy paper on supply chain resilience acknowledged that 'global supply chains are hard to reconfigure, and increasing their resilience is a time-consuming and costly process' with experts predicting reshoring or nearshoring to 'closest allies and partners' will be of limited importance, such initiatives are nonetheless pursued in an effort to increase the EU's capacity to act independently within the international trade and strengthen its position in global value chains.

In the current policy discourse the notion of 'governance' over a tech supply chain is often considered paramount to governing technological capabilities of tech industries and ecosystems in a strategically favourable manner. As such, the EU-US TTC has a Secure Supply Chains working group tasked with mapping supply chains and therein existing sectoral capabilities.[89] Looking at the supply chain of a technology indeed lends insight into how the technology is produced and how the industry around that technology is structured. Thus, this becomes an act of inquiring into the material reality of the technology and the industry or ecosystem producing and innovating such technologies. This lays the groundwork for how legal or other governance instruments shall be implemented to increase the EU's capacity and position with global value chains of critical technologies.

Against these considerations export controls thus emerge as a go-to legal instrument to control technology transfers and flow of goods across their supply chains. The global value chain that encompasses those material supply chains and the commercial and innovative activities creating 'value' (economic and beyond) have come to represent the organisational structure that should be regulated, i.e. 'regulatable,' by the available and appropriate legal instruments.

Export controls do not merely regulate a tangible 'controlled item' (the critical technology), but also intangible elements facilitated through technology and knowledge transferring activities (e.g. discussions over e-mail or telephone under Article 2(2) or anything constituting 'technical assistance' under Article 2(9) and (10)). These contribute to industrial or R&D activities of the controlled item; they are in essence 'value adding' activities within a (global) value chain of critical technologies.

In this light we can also understand that a tangible item might be export controlled not because that item has already been innovated (e.g. a QC with 2000 qubits)

[89] Working Group 3 - Secure Supply Chains (European Commission) available at <futurium.ec.europa.eu/en/EU-US-TTC/wg3 >.

or that the transfer of that item *per se* poses a military or economic security risk. Rather the imposition of export controls on a tangible item also entails restrictions on any information sharing, technical assistance or related knowledge exchange about that tangible item (be it a technology, component, device, equipment) with third states. Thus, export controls again morph into an instrument of knowledge security, in particular in technological innovation, where the technological advantage of the respective national industry or ecosystem lies not necessarily in the possession of material component, device, equipment but rather in the hands, experience and expertise of engineers, technicians and scientists. This is the kind of knowledge that cannot be captured onto a blueprint or any explicit tangible medium but rather materialises in the implicit knowledge and intuition necessary to make the desired technology, its equipment and systems work.[90]

Whilst on the surface the legal instrument of export controls may just be understood as controlling the tangible critical technology and their material supply chains, they can be used and invoked as an instrument to govern or at least shape the governance of value-adding activities of research, engineering and know-how in tech value chains. This by extension means that export controls function as a legal instrument to control a critical technology's industry and R&D ecosystem. The legal dynamics in the law and policy of export controls may play out differently depending on the industry scale, technological maturity and the locality (with attendant geopolitical risks) of the supply chain within regulatory purview. It would be imprudent to adopt supply chain governance strategies from a trillion-dollar globalised industry such as semiconductors to the governance of a nascent industry like QT. As such, the export control law and policy of building a 'high fence' around a 'small yard' of designated critical technologies means a discerning and granular approach must be taken in weighing the efficacy of the proposed export control, i.e. 'ringfencing' strategy.

6. THE NARRATIVE OF A 'GEOPOLITICAL COMMISSION' DRIVING THE EU'S EXPORT CONTROL DYNAMICS

In 2019 Ursula van den Leyen, the European Commission's President, declared that she will lead a 'geopolitical Commission'[91] with plans to strengthen the EU's role on the world stage.[92] Beyond the rhetoric in an operational sense this entails an increase in policy work and stronger co-ordination on 'strategic and security-related' external actions going beyond Commission's traditional single-market-related policies, such as trade, investment, competition, technology, or

[90] Ian Stewart, 'The Contribution of Intangible Technology Controls in Controlling the Spread of Strategic Technologies' (2015) 1(1) *Strategic Trade Review* 48-55.

[91] Lily Bayer, 'Meet von der Leyen's 'geopolitical Commission' *Politico*, 4 December 2019, available at <www.politico.eu/article/meet-ursula-von-der-leyen-geopolitical-commission/>.

[92] Tibor Desswffy, 'Get realist: How the EU can secure its position amid great power rivalry', *ECFR*, 7 February 2024, available at <ecfr.eu/article/get-realist-how-the-eu-can-secure-its-position-amid-great-power-rivalry/>.

finance.[93] These efforts have raised discussions and contestations within the EU on whether the Commission has the mandate to take up such issues and particularly how to square economic security issues within EU competences on issues with national security implications for its member states.[94]

This turn to geopolitical signalling stems from 'intensification of global power competition and the rise of geoeconomic strategies,'[95] which refers to the wielding of states' political power through tools of 'economic statecraft,'[96] e.g. export controls, sanctions, tariffs, foreign aid, foreign investment screening, intellectual property, antitrust and tax regulation, to achieve the state's strategic objectives and advance its geopolitical standing.[97] A *Foreign Affairs* article pointedly held: 'Like much of the rest of the world, EU policymakers and politicians now pray at the altar of geoeconomics.'[98]

The law and policy of EU export controls along with its policy on critical technologies and supply chain governance have an underlying geoeconomic logic. Recognising that the crossfire of export controls imposed by the US and China on the flow of goods for the global semiconductor supply chain signals the use of economic instrument for geopolitical dominance, the EU understandably concludes that it must accordingly also play the game of geoeconomics in order to maintain its own autonomy in charting its own export control policy. However, being caught in between US-China competition has potentially led to band wagoning onto the export control policy train. The default thinking of following the imperative to develop an autonomous EU export control policy overshadows the fundamental question of the soundness of the 'geoeconomic' logic behind export controls, particularly their long-term adverse impact on lost market shares for domestic technology industries.[99] The answer to a proliferation of US-China

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[93] Pierre Haroche, 'What is a "geopolitical Commission"? The European Commission's expanding role in international security affairs' (ECPR General Conference, Virtual Event, 30 August – 3 September 2021) available at <ecpr.eu/Events/Event/PaperDetails/59497>

[94] These questions are beyond the scope of this paper, for further discussions on scope of the EC's mandate see Pierre Haroche, 'A 'Geopolitical Commission': Supranationalism Meets Global Power Competition' (2022) 61(4) *Journal of Common Market Studies* 970-987.; for discussions on conflicting competence between the Union and its member states see Mathieu Duchâtel, 'Europe in the New World of Export Controls', *Institut Montaigne*, 15 February 2023) available at <www.institutmontaigne.org/en/expressions/europe-new-world-export-controls>.

[95] See P. Harroche, *supra* note 100.

[96] See 'Geo-economics' word cloud and its relation to other concepts, 'economic coercion', 'resilience and supply chain security', 'decoupling', 'securing economies', 'technological containment', 'technological and localization sovereignty', 'economic and technological power transition' (World Economic Forum 2023) available at <intelligence.weforum.org/topics/a1Gb0000000LHOoEAO >

[97] Edward N. Luttwak, 'From Geopolitics to Geo-Economics: Logic of Conflict, Grammar of Commerce' (1990) 20 *The National Interest* 17–23.; Mikael Wigel, Sören Scholvin, Mika Aaltola, *Geo-Economics and Power Politics in the 21st Century: The Revival of Economic Statecraft* (Oxofrdshore: Routledge 2019).

[98] Matthias Matthijs, Sophia Meiner, 'Europe's Geoeconomic Revolution: How the EU Learned to Wield Its Real Power', *Foreign Affairs*, 22 August 2023, available at <www.foreignaffairs.com/europe/european-union-geoeconomic-revolution>.

[99] Matteo Crosignani, Lina Han, Marco Macchiavelli, and André F. Silva, 'Geopolitical Risk and Decoupling: Evidence from U.S. Export Controls' (Federal Reserve Bank of New York *Staff Reports*,

export controls perhaps should be to resist the knee-jerk impulse to impose the EU's own export controls.

The initial US geoeconomic informed strategy of 'small yard and high fence' on export controls has recently come under scrutiny. Increasing voices are questioning how far and wide US export controls must stretch to catch up with the rapid technological development of the semiconductor industry. There are also concerns about the ability of and perverse incentive for its own US industry workforce to 'design out', i.e. circumvent export controls, given that China is still considered 'big business' for these companies.[100] Further, some have pointed out that the Chinese tech industry could be able to design workarounds to achieve unexpected engineering breakthroughs.[101] Whilst it may be prudent policy goal to build a high fence, the larger the yard, i.e. the wider the net is cast to not just niche advanced semiconductors for AI and data centres but also ubiquitous legacy chips in e.g. digital infrastructures, electronics and automotive industry, the more roadblocks export control frameworks would encounter.

Critically, the EU and its member states' industrial and R&D capability is not comparable with the US tech industry's strategic position in the tech supply chain. Whilst the US encompasses up 38% of activities the semiconductor GVC (with those activities mainly R&D thus accounting for 50% value added in the GVC), Europe's activities makes up only 10% (with China at 9%, Taiwan 9%, South Korea at 16% and Japan at 14%).[102] As such, the EU's tech industry might not be able to absorb the negative economic shocks, i.e. 'take a hit', as well as its US counterpart may be prepared to do. Further, the EU seems rather to be a 'taker'[103] and 'follower' of geoeconomic policy culture brought about by US-China Competition, esp. due to US pressure on its EU (along with Japan, South Korea and Taiwan) partners to cooperate. The EU's Economic Security Strategy has been seen in US think-tank and policy circles as a successful EU

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no. 1096, April 2024) available at <doi.org/10.59576/sr.1096>; Ansgar Baums 'The Chokepoint Fallacy of Tech Export Controls', *Stimson Center*, 6 February 2024, available at <www.stimson.org/2024/the-chokepoint-fallacy-of-tech-export-controls/>; Meghan Harris, 'America needs a better strategy on semiconductors', *Financial Times*, 16 September 2024, available at <bitly.cx/RpQR9>.

[100] Douglas Fuller, 'Tech War or Phony War? China's Response to America's Controls on Semiconductor Fabrication Equipment', *China Leadership Monitor*, 30 November 2023, available at <www.prcleader.org/post/tech-war-or-phony-war-america-s-porous-controls-on-semiconductor-equipment-and-china-s-response >; Kirti Gupta, Chris Borges, Andrea Leonard Palazzi, 'Collateral Damage: The Domestic Impact of US Semiconductor Export Controls', *CSIS*, 13 July 2023, available at <www.csis.org/analysis/collateral-damage-domestic-impact-us-semiconductor-export-controls>.

[101] Sujai Shivakumar, Charles Wessner, Thomas Howell, 'Balancing the Ledger: Export Controls on U.S. Chip Technology to China '*CSIS,* 21 February 2024, available at <www.csis.org/analysis/balancing-ledger-export-controls-us-chip-technology-china >.

[102] Strengthening the Global Semiconductor Supply Chain in an Uncertain Era (Semiconductor Industry Association, 2021) available at <www.semiconductors.org/wp-content/uploads/2021/05/BCG-x-SIA-Strengthening-the-Global-Semiconductor-Value-Chain-April-2021_1.pdf > 31.

[103] Tobias Gehkre, 'A Maker, Not a Taker: Why Europe Needs an Economic Security Mechanism', *ECFR*, 9 November 2023, available at <ecfr.eu/article/a-maker-not-a-taker-why-europe-needs-an-economic-security-mechanism/>.

'buy-in' of US-led economic security policy.[104] This particularly plays into US efforts to 'multilateralise' its export control legislation as the more diplomatic corollary to extraterritorial application of US export controls. Thus, catering to the US' strategic goals of obtaining EU cooperation (without which its China policy would be complicated, as US policy makers have often underlined) and being a taker of export control policy risks constructing a high fence without asking *what* yard is there to protect and *whose* yard is being protected – that of the EU and its member states or that of its bigger more powerful ally?

Export controls on critical technologies have often been touted as a means to achieve the EU's 'technological sovereignty', i.e. for the Union to '[avoid] situations where the EU is reliant on a sole, or limited number of, third country suppliers for technologies which are critical to startups and to the EU's economic and societal wellbeing.'[105] So, is the drive to impose export controls – to build a high fence – an effort to protect the 'yard' that is 'technological sovereignty'? Within this line of thinking does 'technological sovereignty' mean the EU and its member states must be in possession of all items in the Critical Technologies List? The prized technologies such as cutting-edge state of the art quantum computer or photolithography equipment that is crucial for the global supply chain of the most important technology in the world. Regardless of whether export controls are in fact fit for purpose or whether their technical parameters are adequate for effective enforcement, export controls, even just the invocation of such, lend the EU the air of regulatory authority over such critical and prized technologies. The veneer of control over critical technologies goes hand in hand with the imaginaries of what these technologies, their capabilities and their possession mean for the entity attempting to assert regulatory control over them.

'Socio-technical imaginaries' means the 'the collectively held, institutionally stabilised, and publicly performed visions of desirable futures, animated by shared understandings of forms of social life and social order attainable through, and supportive of, advances in science and technology.'[106] Borrowing this conceptual framework of the socio-technical imaginary, fostering, safeguarding and controlling the imaginaries' of Critical Technologies lends meaning to the EU's identity, value and ambition of being 'technologically sovereign.' In this light the spectre of 'innovation', the innovative capabilities and potentials of Critical Technologies as socio-technical imaginaries become the leitmotif[107] of the EU's economic security policy and the driving force for why export controls must be implemented – to protect these Critical Technologies not only for their actual

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[104] See Benson/Mouradian (n 33)

[105] Statement on Technological Sovereignty of the European Pilot Advisory Board at the Launch of the European Innovation Council *EIC*, 18 March 2021, available at <eic.ec.europa.eu/system/files/2021-03/EIC%20Advisory%20Board%20statement%20at%20launch%20of%20EIC_1.pdf> 6.

[106] Sheila Jasanoff, Sang-Hyun Kim, *Dreamscapes of Modernity – Sociotechnical Imaginaries and the Fabrication of Power* (Chicago: Chicago University Press 2015) 4

[107] Sebastian Pfotenhauer and Sheila Jasanoff, 'Panacea or diagnosis? Imaginaries of innovation and the "MIT model" in three political cultures' (2017) 47(6) *Social Studies of Science* 783, 784.

economic and technological value or potential but more importantly for what they represent, the EU's technological sovereignty.

EU policymakers have recognised the Europe has lost out on the semiconductor GVC market share and the attendant export control race. Thus, there has been increased emphasis for the EU and its member states to facilitate 'first movers' in the quantum technology supply chains. Consequently, if any 'technological sovereignty' is to be gained here and if genuine geoeconomic thinking for EU interests is to be applied, the EU should critically consider the risks of pre-mature imposition of export controls on nascent emerging technologies such as the QT supply chain. Whilst it may be easy to impose export controls on any prized critical technology in the name of 'technological sovereignty', policy posturing only goes so far. Even if export controls do not effectively contribute to lofty policy goals such a 'technological sovereignty' they should be scrutinised such that they at least do not impede the innovation of critical technologies. Investments in and facilitation of cross-border R&D and knowledge exchange must be closely considered in how these could in fact contribute to building a yard worth protecting before a too high fence is constructed. This could result in an innovation culture fractured along geopolitical fault lines, thus keeping out vital such flows of know-how between the EU and potential collaborators and talents.

7. CONCLUSION: WHAT YARD OF TECHNOLOGIES IS THERE TO RINGFENCE WITH EXPORT CONTROLS?

The US-China 'GeoTech War' has forced the EU to position itself within a tight race of technological ringfencing along geopolitical fault lines.[108] These efforts are tied into the entrenched narrative of US-China 'Great Power Competition,' and the securitisation of economic competition.[109] In this context the EU's 'trusted ally' as well as 'systematic rival' both resort to the exercise of extraterritoriality and economic coercion when wielding export controls to gain control over tech supply chains. This reveals the EU's legal-political struggle to make good on its 'technological sovereignty' agendas to craft its own law and policy on export controls in order to emerge as a credible player in the global arena of tech supply chain governance.

The EU and its member states' export control regulatory efforts have taken place against the backdrop of the EU's economic security policy framework also covering critical technology and supply chain resilience. As the notion of 'economic security' is innately tied to the goal to secure a state's economic standing as a matter of national security, this notion can be understood as securing 'economic competitiveness.' Export controls go beyond the restriction on transfer of mate-

[108] 'Techno-nationalism and its impact on geopolitics and trade', *Hinrich Foundation*, 21 February 2023, available at <www.hinrichfoundation.com/research/article/tech/techno-nationalism-impact-on-geopolitics-and-trade/>.

[109] See P. Harroche, *supra* n 100.

rial supplies but also knowledge exchange for the development, production and use of such technologies. These restrictions have become the means through which not only and technology leakage can be prevented but also through which innovation ecosystem and industry activities can be shaped. As such, export controls can be understood as efforts to ringfence not only material supplies but also knowledge exchange for critical technologies innovation in industrial global value chains of semiconductor or nascent innovation value chains of quantum technologies.

Narratives imploring the EU to become a geopolitical actor in order to position itself between US and China economic and technological competition have been accompanied by the employment of geoeconomic tools. Export controls have been imposed according to the geoeconomic logic that these are trade control instruments that should be placed on critical technologies supply chains, which are touted as being of strategic importance. However, this carries with it the risk of band wagoning onto the conventional wisdom that export controls are an inevitability of the geoeconomic game.

Current legal dynamics mobilising export controls as instruments of governance over critical technology supply chains have more focused on building a '(high) fence' instead of lending more scrutiny over what 'yard' should necessarily be protected or whether they should necessarily be ringfenced. This shrouds the more fundamental question on whether export controls are fit for purpose within the specific reality of EU interests. Particularly when the pressure to impose export controls emanate from the US in an effort to have their EU partners fall in line, i.e. along geopolitical fault lines, in their Great Powers Competition against China, the rush to join the export controls geoeconomic game leaves little room to critically and thoroughly reflect on whether these measures may in the long run undermine the EU's ambitions and capabilities to foster innovation in critical technology industries and ecosystems.

THE CRITICAL RAW MATERIALS ACT AND STRATEGIC PARTNERSHIPS: A SOUND FOUNDATION FOR AN ENHANCED GEOPOLITICAL ROLE OF THE EUROPEAN UNION?

Cecilia Nota*

1. INTRODUCTION

Recent geopolitical developments have revealed the vulnerabilities of global supply chains,[1] with disruptions manifesting in shortages of critical medical equipment,[2] semiconductors,[3] and energy resources.[4] The focus is now placed on enhancing resilience to potential disruptions in supply chains, especially in the energy sector, and diversifying security measures. The European Union (EU), in its commitment to decarbonisation, has recognised the importance of comprehensively examining alternative energy sources and the supply chains that support clean energy technologies. The Critical Raw Materials Act (CRMA)[5] emerges as a response to these challenges, aiming to ensure secure and sustainable access to affordable critical raw materials (CRMs), indispensable for renewable energy technologies such as, *inter alia*, wind turbines, solar panels and electric vehicle batteries. CRMs, often referred to as the 'oil of the new century,'[6] are vital in reducing dependency on fossil fuels and achieving the EU's

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[1] European Commission, 'Critical Raw Materials Resilience: Charting a Path towards greater Security and Sustainability', (Communication) COM(2020) 474 final.

[2] European Commission, 'Addressing medicine shortages in the EU', (Communication) COM(2023) 672 final.

[3] Recently addressed by Regulation (EU) 2023/1781 of the European Parliament and of the Council of 13 September 2034 establishing a framework of measures for strengthening Europe's semiconductor ecosystem and amending Regulation (EU) 2021/694, *OJ* [2023] L 2023/1781.

[4] *Inter alia*, European Commission, 'Energy Emergency – preparing, purchasing and protecting the EU together', (Communication) COM(2022) 553 final.

[5] In March 2023, the European Commission announced a proposal for the so-called Critical Raw Materials Act, see: European Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing a framework for ensuring a secure and sustainable supply of critical raw materials and amending Regulations (EU) 168/2013, (EU) 2018/858, 2018/1724 and (EU) 2019/1020'. The new regulation was signed in April 2024 and entered into force in May 2024 as 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* [2024] L 2024/1252 (hereinafter the "CRMA").

[6] While CRMs play a pivotal role across several critical sectors, including defence, digital technology, and advanced manufacturing, the decision to focus this analysis on energy security stems from its centrality to the EU's green transition and decarbonisation objectives. Renewable energy technologies, such as wind turbines, solar panels, and electric vehicle batteries, are heavily reliant on CRMs, making their secure and sustainable supply foundational to achieving climate neutrality and broader strategic goals. See: State of the Union Address by President von der

green transition objectives. This link underscores their critical role in enabling sustainable energy systems while addressing supply chain vulnerabilities.[7] However, the reliance on CRMs introduces its own vulnerabilities,[8] particularly their concentration and sourcing limited to specific regions[9] and the economic interdependencies.[10]

This article focuses on the CRMA, which operates within two dimensions: an internal dimension aimed at enhancing domestic resilience and production capacity, and an external dimension dedicated to securing diversified and stable supply chains through international cooperation. Specifically, this analysis focuses on the external dimension, where the CRMA relies almost exclusively on the pre-existing, albeit almost forgotten, instrument of Strategic Partnerships to pursue its objectives. These partnerships are tasked with diversifying supply sources, mitigating vulnerabilities, and promoting sustainable practices, but their effectiveness as non-binding instruments raises important questions. The EU is well aware of the legal constraints arising from WTO law, including provisions on non-discrimination, export restrictions, and multilateral commitments,[11] which necessarily shape the CRMA's external dimension.

The context for this focus is provided in the second paragraph, which situates the CRMA within the framework of the EU's pursuit of 'open' strategic autonomy.

Leyen at the European Parliament Plenary, 13 September 2023; M. Grohol and C. Veeh, *Study on the critical raw materials for the EU 2023*, Final Report (Luxembourg: Publications Office of the European Union 2023), 1-158, at 1; 'Critical Raw Materials Act: securing the new gas & oil at the heart of our economy. Blog of Commissioner Thierry Breton' (Brussels, 14 September 2022), available at <ec.europa.eu/commission/presscorner/detail/en/STATEMENT_22_5523>. For a detailed discussion on whether CRMs truly deserve to be labelled as the 'oil of the new century,' refer to: I. Overland, 'The geopolitics of renewable energy: Debunking four emerging myths', 49 *Energy Research & Social Science* 2019, 36–40, at 38.

[7] European Commission, 'A secure and sustainable supply of critical raw materials in support of the twin transition', (Communication) COM(2023) 165 final.

[8] The EU's energy transition increasingly depends on secure and dependable access to CRMs, as these materials are indispensable for technologies that enable decarbonisation. Lithium, cobalt, and rare earth elements are essential for batteries, wind turbines, and solar panels, highlighting their role as the 'oil of the new century'. While CRMs are critical to reducing dependency on fossil fuels, this shift risks replacing reliance on oil with a new dependency on geographically concentrated CRM supply chains, particularly from countries like China, which dominates refining and processing stages. For more on this, see: M. Grohol and C. Veeh, *supra* note 7, at 1. It must be noted, however, that the dependence on raw materials is systematically different from that on fossil fuels. The latter are consumed extensively across various sectors of the economy, while the former play a crucial role in various manufacturing processes, where their need arises in relatively small volumes but with significant importance. See: C. Crochet and W. Zhou, 'Critical insecurities? The European Union's strategy for a stable supply of minerals', 27 (1) *Journal of International Economic Law* 2024, 147-165, at 147; M. Le Mouel and N. Poitiers, 'Why Europe's critical raw materials strategy has to be international', Bruegel (5 April 2023).

[9] S. Gstöhl and J. Schnock, 'Towards a Coherent Trade-Environment Nexus? The EU's Critical Raw Materials Policy', 58 (1) *Journal of World Trade* 2024, 35-60, at 36.

[10] *Inter alia*: T. Gehrke, 'EU Open Strategic Autonomy and the Trappings of Geoeconomics', 27 *European Foreign Affairs Review* 2022, 61-78; C. Crochet and W. Zhou, *supra* note 9; S. Gstöhl and J. Schnock, *supra* note 10.

[11] European Commission, *supra* note 8, at 9, 14 and 16.

This concept underlines the CRMA's broader significance, aligning the EU's CRM governance with its strategic objectives of reducing dependencies and ensuring resilience. The third paragraph investigates the contents of the CRMA, exploring its internal and external dimensions and their respective contributions to addressing CRM supply vulnerabilities. The fourth paragraph shifts to a specific aspect of the external dimension, examining the Strategic Partnerships framework as an instrument of EU's external action. Using the EU-Ukraine Strategic Partnership on Raw Materials as a case study, it evaluates the challenges and limitations of these non-binding agreements in achieving the CRMA's goals.

Ultimately, this article critiques the exclusive reliance on Strategic Partnerships, highlighting the need for complementary measures such as stricter enforcement mechanisms, enhanced domestic production capabilities, and diversified sourcing strategies. The analysis underscores the importance of these additional efforts in strengthening the CRMA's effectiveness in addressing vulnerabilities and achieving the EU's energy security[12] and decarbonisation goals.

2. THE STRATEGIC AUTONOMY OF A 'GEOPOLITICAL' EUROPEAN UNION: THE ROLE OF CRITICAL RAW MATERIALS AND THE EU APPROACH

The geopolitical evolution of the European Union (EU) has been deeply intertwined with the pursuit of strategic autonomy.[13] The latter, which was initially

[12] The EU's energy security strategy, as outlined in the 2014 European Energy Security Strategy (COM(2014) 330 final), reflects the Union's commitment to ensuring a stable, affordable, and sustainable energy supply. Rooted in Art. 194 TFEU, which establishes energy security as a core EU objective, the strategy encompasses measures to diversify energy sources, enhance infrastructure resilience, and reduce external dependencies, particularly on fossil fuels. These efforts have been further reinforced, *inter alia*, in the electricity sector (Regulation (EU) 2019/941 of the European Parliament and of the Council of 5 June 2019 on risk-preparedness in the electricity sector and repealing Directive 2005/89/EC, *OJ* [2019] L 2019/941), by the Oil Stocks Directive (Council Directive 2009/119/EC of 14 September 2009 imposing an obligation on Member States to maintain minimum stocks of crude oil and/or petroleum products, *OJ* [2009] L 2009/119), and by the Security of Gas Supply Regulation (Regulation (EU) 2017/1938 of the European Parliament and of the Council of 25 October 2017 concerning measures to safeguard the security of gas supply and repealing Regulation (EU) No 994/2010, *OJ* [2017] L 2017/1938).

[13] The geopolitical evolution of the EU reflects a transformative shift from an economic-centric framework to one where geopolitical considerations play a critical role in shaping its strategies and objectives. This evolution has been catalysed by pivotal global events, including Russia's invasion of Ukraine, which has spurred a reorientation of EU foreign and security policies towards greater unity and strategic assertiveness, though debates persist on the depth and implications of these changes. The concept of strategic autonomy, embedded in this transformation, emphasises the EU's aspiration to safeguard its sovereignty and reduce dependencies while balancing internal resilience with external geopolitical engagement. For more on this, see: R. Youngs, 'The Awakening of Geopolitical Europe?', *Carnegie Europe* (28 July 2022), available at <carnegieeurope.eu/2022/07/28/awakening-of-geopolitical-europe-pub-87580>; N. Helwig and V. Sinkonnen, 'Strategic Autonomy and the EU as a Global Actor: The Evolution, Debate and Theory of a Contested Term', 27 *European Foreign Affairs Review* 2022, 1-20; R. Balfour and S. Ülgen (eds), 'Geopolitics and Economic Statecraft in the European Union', *Carnegie Europe* (19 November 2024), avail-

rooted in defence, has now expanded to encompass broader economic, technological, and energy domains. This evolution reflects the EU's aspiration to reduce external dependencies and enhance its capacity for independent action – a commitment that has been particularly evident in its response to recent geopolitical crises. In light of the compounded challenges posed by the COVID-19 pandemic and the Russian invasion of Ukraine, the EU has intensified efforts to safeguard its energy security, recognising, in the process, the critical role of raw materials in advancing its sustainability agenda.

Originating from geopolitical shifts triggered by events such as the Russian invasion of Ukraine, the COVID-19 pandemic, and the growing tensions between the U.S. and China, strategic autonomy has evolved from a first notion primarily focused on defence to a broader EU strategy encompassing economic and technological domains.[14] The EU's pursuit of 'open' strategic autonomy entails enhancing its capacity for independent action in security, defence, and foreign policy. It aims to reduce external dependencies and safeguard the sovereignty within the EU across various sectors, including trade and energy.

However, this ambition faces challenges related to economic interdependency and supply chain vulnerabilities. The EU's strategy to address these vulnerabilities involves comprehensive measures outlined in the CRMA to secure a sustainable supply of CRMs vital for renewable energy and other sectors.

2.1 **Defining EU's Strategic Autonomy and Critical Raw Materials: a Tale of Supply and Dependency**

The concept of strategic autonomy has been a focal point for the EU, particularly under the leadership of President Ursula von der Leyen. In her 2019 speech to the European Parliament on the occasion of the presentation of the programme of the Commission, she emphasised the need for Europe to 'invest in alliances and coalitions to advance our values' and to 'be a force for peace and for positive change.'[15] The Russian invasion of Ukraine in 2022 served as a catalyst, accelerating the EU's efforts toward strategic autonomy.[16] This event underscored the urgency for the EU to enhance its capacity for independent action in security, defence, and foreign policy, thereby broadening the scope of strategic autonomy to encompass economic and technological domains.

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able at <carnegieendowment.org/research/2024/11/geopolitics-and-economic-statecraft-in-the-european-union?lang=en>.

[14] European Commission, 'First biennial report on the implementation of the Global Approach to research and innovation', (Communication) COM(2023) 356 final.

[15] U. von der Leyen, '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', available at <ec.europa.eu/commission/presscorner/detail/hr/speech_19_6408>.

[16] R. Youngs, *supra* note 14; J. Borrell, 'Putin's War Has Given Birth to Geopolitical Europe', *Project Syndicate* (3 May 2022), available at <www.project-syndicate.org/commentary/geopolitical-europe-responds-to-russias-war-by-josep-borrell-2022-03>.

Therefore, while the pursuit of strategic autonomy was already in motion, the geopolitical shifts resulting from the Russian invasion of Ukraine have expedited the process reinforcing the EU's commitment to becoming a more self-reliant and assertive global actor.

Strategic autonomy, originally introduced in France in 1950 to emphasise the importance of the country's independent ability to act in defence, gradually evolved into a broader European dimension.[17] By 1994, it officially appeared in the French White Paper on Defence, which acknowledged that France's strategic autonomy could not be fully realised without a collective European effort.[18] This marked a shift in focus from a national framework to one that recognised the necessity of integrating Member State's capabilities. The concept transcended its initial French origins, becoming gradually 'Europeanised' as it encapsulated a vision of shared strategic responsibility within the Union.[19]

Despite its original application being specific to the defence sector, its contents have always suffered a general vagueness, so much so that even defining it is difficult. The 1998 British-French St Malo declaration institutionalised it, stating that 'the 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' to be able to play its full role as a geopolitical actor and to respond to international crises. The most recent geopolitical developments arising from the COVID-19 pandemic have led academics to focus on the EU's geopolitical role, accompanied by an evolution of the concept of strategic autonomy to include more than just defence and security;[20] currently, the economic and technological sectors may be those in which the concept of strategic autonomy is most present.[21] Due to uncertainties relating to the terminology, von der Leyen's 'geopolitical' Commission[22] began to use the term 'open' strategic autonomy, defined as the 'capacity to act autonomously when and where necessary and with partners whenever possible';[23] this was codified when the new 'open, sustainable and assertive' trade strategy was presented.[24]

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[17] E. Ryon, 'European strategic autonomy: Energy at the heart of European security?', 19 (2) *European View* 2020, 238-244, at 239.

[18] Livre Blanc sur la Défense (1994), at 50.

[19] E. Ryon, *supra* note 18, at 239.

[20] C. Beaucillon, 'Strategic Autonomy: A New Identify for the EU as a Global Actor', 8 (2) *European Papers* 2023, 417-428.

[21] L. Mola, 'Fostering "European Technological Sovereignty" Through the CSDP: Conceptual and Legal Challenges. First Reflections Around the 2022 Strategic Compass', 8 (2) *European Papers* 2022, 459-474; T. Gehrke, *supra* note 11, at 61; 'Why European strategic autonomy matters. Blog of High Representative of the European Union for Foreign Affairs and Security Policy/ Vice-President of the European Commission Josep Borrell' (Brussels, 3 December 2020), available at <www.eeas.europa.eu/eeas/why-european-strategic-autonomy-matters_en>.

[22] S. Gstöhl and J. Schnock, *supra* note 10, at 40; P. Haroche, 'A 'Geopolitical Commission': Supranationalism Meets Global Power Competition', 61 (4) *Journal of Common Market Studies* 2022, 970-987.

[23] Council of the EU, 'Implementing the EU Global Strategy in the area of Security and Defence', (Conclusions) 14149/16.

[24] T. Gehrke, *supra* note 11, at 62; European Commission, 'Trade Policy Review – An Open,

Therefore, the 'open' strategic autonomy of the EU is to be understood as the aspiration to strengthen its capacity to act independently in the realms of security, defence, and foreign policy, also encompassing the will to reduce dependence on external actors while enhancing its ability to make autonomous decisions. By cultivating its 'open' strategic autonomy, the EU should position itself as an assertive and self-reliant geopolitical actor, strengthening resilience against external pressures, safeguarding its sovereignty, and upholding its interests in expanded domains, including trade, technology and energy. To do so, the EU should employ 'all policies and levers – which remain mainly economic and regulatory in nature – as instruments of power.'[25]

Consequently, there is a growing acknowledgement of the risks connected to economic interdependency and how it might be weaponised,[26] as we have seen with the 2022 energy crisis.[27] Since the COVID-19 pandemic, protecting critical infrastructure and supply-chain resilience has become increasingly important.[28]

In its 2021 assessment of strategic dependencies within its supply chains, the European Commission identified 137 products in six sectors as precarious.[29] Notably, this classification also encompassed the CRMs essential for advancing strategic technologies. The Commission underscored the risk associated with their supply due to concentration or scarcity.[30] An accompanying Action Plan outlining measures to address these vulnerabilities and dependencies has been proposed.[31] As such, the 'open' strategic autonomy is 'meant to guide the EU to find a balance between the opportunities generated by international trade and the risks of economic (inter)dependence which geopolitical rivalries have exacerbated.'[32]

The evolution of the concept of strategic autonomy within the EU reflects its dynamic geopolitical positioning and its response to emerging challenges. As the EU seeks to strengthen its capacity for independent action across various sectors, CRMs emerge as a crucial component of its strategic agenda. The proposed Action Plan underscores the EU's commitment to addressing vulnerabilities in its supply chains, highlighting the importance of securing access to CRMs for advancing strategic technologies.

Sustainable and Assertive Trade Policy', (Communication) COM(2021) 66 final.

[25] J. Borrell, *supra* note 21.

[26] J. Borrell, *supra* note 21.

[27] M. Carnegie LaBelle, 'Energy as a weapon of war: Lessons from 50 years of energy interdependence', 14 (3) *Global Policy* 2023, 531-547.

[28] E. Righetti and V. Rizos, 'The EU's quest for Strategic Raw Materials: What Role for Mining and Recycling?', 58 (2) *Intereconomics* 2023, 69-73, at 69; T. Gehrke, *supra* note 11, at 73.

[29] European Commission, 'Updating the 2020 New Industrial Strategy: Building a stronger Single Market for Europe's recovery', (Communication) COM(2021) 350 final.

[30] S. Bobba et al., *Critical Raw Materials for Strategic Technologies and Sectors in the EU*, Foresight Study (Luxembourg: Publications Office of the European Union 2020).

[31] European Commission, *supra* note 2. The Action Plan recurrently employs the term 'open strategic autonomy' in eleven instances across eighteen pages.

[32] S. Gstöhl and J. Schnock, *supra* note 9, at 39.

Achieving sustainable development pivots on the development of new energy-efficient and carbon-neutral technologies. However, the production of these technologies relies on raw materials, encompassing substances vital for primary production or manufacturing processes. While some raw materials are abundant, sourcing others can present challenges. Rare earth elements, precious metals, and certain high-demand minerals are designated as CRMs when they hold substantial economic and strategic importance for a wide range of industrial ecosystems,[33] and yet their supply is vulnerable to high-risk factors.[34] Fundamentally, raw materials are critical when they lack viable alternatives, necessitating importation by most consumer countries, and when a limited number of producers controls them.[35]

There has been a notable surge in systematic discussions surrounding CRMs in recent years, primarily fuelled by escalating geopolitical concerns regarding vulnerabilities in the supply chains.[36] The import of such products is significantly shaped by resource extraction practices and trade regulations established by governments. As a result, most strategies aimed at addressing CRM supply fall under the jurisdiction of governments and national industries, with various regulatory governance options available.[37]

The growing recognition of potential disruptive effects stemming from materials bottlenecks in nations reliant on resource-based industries has catalysed the development of numerous national or regional CRM strategies.[38] These initiatives often entail compiling lists of CRMs. Yet, these national CRM lists might not always align with EU priorities, creating a potential gap between national objectives and the broader strategic goals of the Union. The CRMA seeks to bridge this gap by fostering coordination and promoting a unified approach to CRMs governance, but it also raises questions about how pre-existing national regulations will be reconciled with Union law. This tension underscores the need for ongoing dialogue between Member States and EU institutions to ensure that both levels of governance can effectively address the challenges posed by CRM dependencies without undermining each other's efforts.[39]

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[33] European Commission, *supra* note 2.

[34] M. David, 'Critical Raw Materials', in M. David et al. (eds.), *Future-Proofing Fuel Cells* (London: Palgrave Macmillan 2021), 15-33, at 15; P. Ferro and F. Bonollo, 'Materials selection in a critical raw materials perspective', 177 *Materials and Design* 2019.

[35] I. Overland, *supra* note 7, at 37.

[36] I. Overland, *supra* note 7, at 38.

[37] M. David, *supra* note 35, at 16.

[38] M. David, *supra* note 35, at 17.

[39] This interplay between national competence and EU-level initiatives highlights the complex relationship between Union law and pre-existing national regulations. The EU's efforts to create a harmonised framework, such as through the CRMA, aim to establish a coherent strategy for CRM governance while respecting the division of competences. Notably, Art. 4 TFEU outlines shared competence in areas such as energy and environmental policy, meaning that both the EU and the Member States have a role in regulating and implementing measures related to CRMs. This dual responsibility can lead to tensions, especially when pre-existing national strategies or regulatory frameworks diverge from EU initiatives.

In the context of the objectives of the present contribution, it is relevant to refer to the list proposed by the European Commission, recently updated in 2024.[40] This list undergoes periodic revisions to adapt to the constantly evolving industrial, geopolitical, and economic factors impacting CRMs supply. It is reviewed every three years, with earlier versions available since 2011.

The CRMA, which entered into force in 2024,[41] presented the fifth and, at the time of writing, the most recent list.[42] The list was informed by the study's findings on the CRMs for the EU[43] and it supports EU policy development, as the Commission considers it when negotiating trade agreements. The periodic table attached at the end of this article summarises it, considering critical and strategic raw materials presented in Annex II and Annex I of the Regulation.

The secure and sustainable supply of CRMs serves as indispensable input across various sectors,[44] encompassing renewable energy, the digital industry, space and defence,[45] and the health industry.[46] Access to resources such as the CRMs has rapidly become a 'strategic security question for Europe's ambition to deliver the Green Deal.'[47] Nonetheless, awareness has emerged regarding the potential shortcomings of ostensibly green renewable energy technologies,

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[40] Other relevant lists are those compiled by the U.S. Department of Energy and the OECD. On this, see: U. S. Department of Energy, '2023 DOE Critical Materials List', Federal Register (8 April 2023), available at <www.federalregister.gov/documents/2023/08/04/2023-16611/notice-of-final-determination-on-2023-doe-critical-materials-list>; P. Kowalski and C. Legendre, (2023) 'Raw materials critical for the green transition: Production, international trade and export restrictions', 269 *OECD Trade Policy Papers*.

[41] European Commission, *supra* note 2.

[42] The methodology for establishing the EU lists, developed by the European Commission and the *Ad hoc* Working group on Defining Critical Raw Materials (AHWG), is based on specific criteria, as explained in Annex I and Annex II of the CRMA. The strategic importance of a raw materials is evaluated on the basis of its role in critical technologies and the broader economic landscape; afterwards, the demand growth is forecasted, and the difficulty of increasing production is assessed. The economic importance and the supply risk are calculated to assess the vulnerability and significance of raw materials, and the import reliance is calculated to determine how dependent the EU is on external sources for a particular raw material, together with a substitution index. For more on this, see: D. Pennington et al., *Methodology for establishing the EU list of critical raw materials*, Guidelines (Luxembourg: Publications Office of the European Union 2017), 1-30.

[43] The assessment encompassed the evaluation of 70 candidate raw materials, consisting of 67 individual materials and three material groups: ten heavy rare earth elements (HREEs), five light rare earth elements (LREEs), and five platinum group metals (PGMs). See also: M. Grohol and C. Veeh, *supra* note 3.

[44] 'Commission announces actions to make Europe's raw materials supply more secure and sustainable' (Brussels, 3 September 2020), available at <ec.europa.eu/commission/presscorner/detail/en/ip_20_1542>.

[45] B. Girardi et al., 'Strategic raw materials for defence: Mapping European industry needs', *The Hague Centre for Strategic Studies* 2023.

[46] The present contribution does not allow for a comprehensive analysis of the second side of this issue, namely the extraction and processing of CRMs, which can also have negative environmental impacts, depending on the methods and processes used; for more on this, see: E. Righetti and V. Rizos, *supra* note 23. European Commission, *supra* note 6.

[47] European Commission, *supra* note 2; European Commission, 'The European Green Deal', (Communication) COM(2019) 640 final.

which may exhibit a form of 'fossilisation' that challenges sustainability.[48] The manufacturing processes of such technologies necessitate significant quantities of CRMs, further underscoring the complexity of achieving true sustainability in the renewable energy sector.

In any case, the published lists of CRMs are predominantly reactive and lack a predictive capacity to anticipate future trends and disruptions;[49] as such, they cannot be the sole instruments to base any supply strategy.[50]

2.2 The EU's Strategy and the Commission's Action Plan: Energy Security and Resilience

The International Energy Agency (IEA) defines energy security as the uninterrupted availability of energy sources at an affordable price,[51] encompassing four dimensions: availability, accessibility, affordability and acceptability.[52] Over time, the concept of energy security has evolved,[53] reflecting changing geopolitical landscapes and the need for resilient supply chains, particularly during energy transitions.[54] The IEA's recent World Energy Outlooks[55] emphasise the importance of supply chain resilience, as concentrated supply chains can be 'vulnerable to individual country policy choices, company decisions, natural disasters or technical failures.'[56] Therefore, if we understand resilience to signify 'the adaptive capacity of improving performance, as a result of learning and adaptation, informed by continuous change,'[57] then the resilience of not only energy systems but of supply chains is an essential element of energy security, which it can ensure and enhance.[58]

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[48] S. Raman, 'Fossilizing renewable energies', 22 (2) *Science as Culture* 2013.

[49] M. David, *supra* note 34, at 18.

[50] C. Crochet and W. Zhou, *supra* note 9, at 150.

[51] International Energy Agency, 'World Energy Outlook 2024', October 2024, at 197 available at <www.iea.org/reports/world-energy-outlook-2024>.

[52] B. Kruyt et al., 'Indicators for energy security', 37 (6) *Energy Policy* 2009, 2166–2181.

[53] Yergin discusses up to seven elements making up the concept of energy security, see: D. Yergin, 'Ensuring Energy Security', 85 (2) *Foreign Affairs* 2006, 69–82. See also: C. Ayoo, 'Towards Energy Security for the Twenty-First Century', in T. Taner, *Energy Policy* (London: IntechOpen 2020); A. Azzuni and C. Breyer, 'Definitions and dimensions of energy security: a literature review', 7 (1) *WIREs Energy and Environment* 2018.

[54] J. Jasiūnas et al., 'Energy system resilience – A review', 150 *Renewable and Sustainable Energy Reviews* 2021.

[55] International Energy Agency, (2022) 'World Energy Outlook 2022', (November 2022), available at <www.iea.org/reports/world-energy-outlook-2022>; International Energy Agency, (2023) 'World Energy Outlook 2023', (October 2023), available at <www.iea.org/reports/world-energy-outlook-2023>.

[56] International Energy Agency, *supra* note 52, at 179; European Commission, *supra* note 2.

[57] A. Gatto and C. Drago, 'A taxonomy of energy resilience', 136 *Energy Policy* 2020.

[58] N. Srivastava, 'Strengthening European Energy Security and Resilience through Minerals', 1 *European Energy and Environmental Law Review* 2024, 35–45, at 36. However, CRMs have applications that extend beyond energy security, including in defence, digital technologies, and advanced manufacturing. While these sectors are equally reliant on the secure supply of CRMs, this article focuses specifically on the EU's energy security strategy because of the pivotal role

The European Commission also highlights resilience as the ability to sustainably withstand and adapt to challenges.[59] As the EU shifts focus from fossil fuels to clean energy, aiming to become the first carbon-neutral continent, measures such as the European Green Deal[60] and the 'Fit for 55%' package have been introduced, comprising policy proposals to reduce greenhouse gas emissions by at least 55% by 2030.[61] This transition necessitates a comprehensive approach to building resilient energy systems that can endure crises while advancing emission reduction goals.[62]

The EU's increasing reliance on CRMs reveals vulnerabilities in its supply chains, mainly due to the role of raw materials in clean energy technologies.[63] In 2020, the European Commission Joint Research Centre conducted a foresight study that identified significant risks related to CRM supply,[64] including import dependency and vulnerability to supply disruptions.[65] Subsequently, the European Commission released a Communication on Critical Raw Materials Resilience,[66] addressing the need for a secure and sustainable supply to enhance resilience against potential future shocks and strengthen strategic autonomy. The Communication proposed an action plan to develop resilient value chains for EU industries, reduce dependency on primary CRMs through circular resource use and sustainable innovation, strengthen domestic sourcing and processing, and diversify supply through sustainable international trade practices.[67] These measures form a comprehensive strategy to address the inherent challenges within

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CRMs play in enabling the clean energy transition – a cornerstone of the EU's broader climate and strategic objectives.

[59] European Commission, '2020 Strategic Foresight Report, Charting the Course towards a more Resilient Europe', (Communication) COM(2020) 493 final. P. Benczur et al., *Building a scientific narrative towards a more resilient EU society. Part 1, A conceptual framework*, (Luxembourg: Publications Office of the European Union 2017).

[60] European Commission, *supra* note 48.

[61] This fifth legislative package was tabled in July 2021 to respond to the requirements of the so-called European Climate Law, namely Regulation (EU) No 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999, *OJ* [2021] L 243/1, 9.7.2021. The package was updated after the Russian invasion of Ukraine and it is currently consisting of the following legislative acts: Directive (EU) No 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast), *OJ* [2018] L 328/82, 21.12.2018; Directive (EU) No 2023/1791 of the European Parliament and of the Council of 13 September 2023 on energy efficiency and amending Regulation (EU) No 2023/955 (recast), *OJ* [2023] L 231/1, 20.9.2023; and Regulation (EU) No 2023/857 of the European Parliament and of the Council of 19 April 2023 amending Regulation (EU) No 2018/842 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement, and Regulation (EU) No 2018/1999, *OJ* [2023] L111/1, 26.4.2023.

[62] N. Srivastava, *supra* note 59, at 38.

[63] *Inter alia*, International Energy Agency, 'The Role of Critical Minerals in Clean Energy Transitions', *World Energy Outlook Special Report*, 2021, available at <www.iea.org/reports/the-role-of-critical-minerals-in-clean-energy-transitions/executive-summary>.

[64] S. Bobba et al., *supra* note 30.

[65] S. Bobba et al., *supra* note 30, at 75.

[66] European Commission, *supra* note 2.

[67] European Commission, *supra* note 2, at 6.

CRM supply chains, including the establishment of the European Raw Materials Alliance and sustainable financing criteria for CRMs mining and extraction.[68]

The Communication was followed in November 2021 by a Resolution of the European Parliament on a European strategy for CRMs.[69] Following the Russian invasion of Ukraine in February 2022, the European Council's Versailles Declaration further underscored, *inter alia*, the significance of CRMs in reducing the EU's strategic dependencies.[70] This highlights the close relationship between energy security and resilience and underlines the intricate nexus between CRMs supply chains and geopolitical dynamics. As the EU transitions to 'green' energy systems, securing resilient CRM supply chains becomes essential, and this emphasis is reflected in the CRMA.

The European Commission's 2023 Study on CRMs[71] projects an imperative for increased supplies to meet the escalating demand for CRMs-intensive technologies.[72] However, the distribution of CRMs exhibits significant disparities, with a pronounced concentration of sourcing in select regions. The Study confirms that, as far as global suppliers are concerned, China is the largest supplier of several CRMs (66,67%).[73] Scholarly literature mostly concurs that China's role in the supply chain of CRMs poses a multi-faceted risk.[74] This highly skewed distribution, where limited geographical areas dominate the production of specific CRMs, engenders considerable vulnerabilities within the supply chain. The apprehension regarding the long-term supply security of CRMs is fundamental

[68] *Inter alia*, M. David, *supra* note 35, at 25.

[69] European Parliament resolution of 24 November 2021 on a European strategy for critical raw materials, *OJ* [2022] C 224/22, 8.6.2022.

[70] European Council, 'Versailles Declaration', 10/11 March 2022.

[71] M. Grohol and C. Veeh, *supra* note 6.

[72] M. Grohol and C. Veeh, *supra* note 6, at 1.

[73] M. Grohol and C. Veeh, *supra* note 6, at 7.

[74] China's near monopoly in the production and processing of rare earth elements and other critical materials, accounting for up to 97% of global production, gives it significant leverage over global supply chains. This dominance has been used strategically, as demonstrated by the 2010 embargo on rare earth elements exports to Japan during a territorial dispute, showcasing China's ability to weaponise its control over these materials. Additionally, China's cost advantages, stemming from lower labour costs and less stringent environmental regulations, have marginalised other global producers, leading to a dependence that is difficult to reverse. This reliance is further compounded by the increasing demand for CRMs driven by the energy transition, which requires minerals like lithium, cobalt, and neodymium for renewable technologies such as wind turbines, solar panels, and electric vehicle batteries. Scholars also highlight vulnerabilities in global supply chains, including the geopolitical risks of concentrated production, potential supply disruptions, and the environmental and social costs associated with mining in China. This situation raises concerns about economic and national security for CRM-dependent nations, emphasising the need for diversification of supply chains and increased investment in domestic production and recycling efforts. For more on this, see, *inter alia*: S. Gstöhl and J. Schnock, *supra* note 10, at 36. E. Righetti and V. Rizos, *supra* note 29, at 69; M. David, *supra* note 35, at 23; E. Gholz, (2014) 'Rare Earth Elements and National Security', *Council on Foreign Relations Energy Report*; M. de Ridder, (2013) 'The Geopolitics of Mineral Resources for Renewable Energy Technologies', *The Hague Centre for Strategic Studies*; B. Achzet and C. Helbig, 'How to evaluate raw material supply risks – an overview', 38 *Resources Policy* 2013. World Trade Organization, 'WTO Dispute Settlement: One-Page Case Summaries', 2023 edition, at 187.

to shaping policy within the EU. This progression is essential to facilitate the deployment of clean technologies to mitigate environmental impact and promote sustainability.[75]

The EU's recognition of the strategic importance of CRMs, as evident in its periodic assessments and the CRMA, underscores the critical role these materials play in achieving sustainability and resilience. Nevertheless, challenges persist, notably the concentration of CRMs sourcing in select regions and the imperative for predictive supply strategies in the face of evolving global trends. Given the widespread adoption of energy technologies like solar photovoltaics or onshore wind turbines in international markets, the imperative for internal and external strategies to ensure a stable future supply of CRMs is increasingly apparent.[76] The next section will explore the CRMA's regulatory framework and role in the EU's external energy security strategy.

3. THE CRITICAL RAW MATERIALS ACT

The CRMA, adopted in response to the EU's increasing reliance on imported raw materials and the concentration of supply sources, encompasses both internal and external measures aimed at ensuring a secure and sustainable supply of CRMs. It serves as a key pillar of the EU's 'predominantly energy security strategy.[77]

3.1 **Contextualising the Critical Raw Materials Act in the EU's Energy Security Strategy**

In March 2023, the European Commission announced a proposal for a Regulation establishing a framework for ensuring a secure and sustainable supply of CRMs, which entered into force in May 2024.[78]

The EU's 'open' strategic autonomy necessitates an augmented supply of CRMs sourced from third countries and domestically.[79] Therefore, the CRMA, whose legal basis is Article 114 of the Treaty on the Functioning of the European Union (TFEU), delineates internal and external measures, distinguishing between critical and strategic raw materials based on their significance in green and digital transitions,[80] focusing on 'non-energy, non-agricultural raw materials.'[81] This

[75] European Commission, 'Report on EU policy initiatives for the promotion of investments in clean technologies', (Communication) COM(2023) 684 final.
[76] M. David, *supra* note 35, at 25.
[77] C. Crochet and W. Zhou, *supra* note 9, at 150.
[78] European Commission, *supra* note 2.
[79] S. Gstöhl and J. Schnock, *supra* note 10, at 49.
[80] Arts. 3 and 4, CRMA.
[81] European Commission, *supra* note 2.

determination considers the number of technologies reliant on these materials, input volume, and projected global demand.[82]

Internally, the Regulation seeks to fortify various stages of the raw materials lifecycle within the EU, augmenting extraction, processing, and recycling capacities while upholding environmental, circularity, and sustainability standards.[83] Externally, given the EU's reliance on imported raw materials and the concentration of supply sources, it strives to diversify imports – with a cap of 65% dependence on any single country – and enhance capabilities to monitor and mitigate supply risks.[84]

The CRMA sets targets for domestic CRMs value chain improvement, aiming to supply 10% of the EU's needs[85] and process 40% domestically by 2030,[86] with an additional 25% of demand met through recycling.[87] However, considering the current domestic production and processing levels, these objectives appear too ambitious.[88] Furthermore, the non-binding nature of these benchmarks leaves their achievement to the discretion of Member States, potentially challenging the realisation of these ambitious goals.[89]

Nonetheless, the CRMA marks a significant stride towards fortifying the EU's raw materials supply chain and enhancing its strategic autonomy. Building upon the latter, the CRMA delineates internal and external measures, which will be discussed in the following paragraphs.

3.2 Strengthening the Domestic Supply Chain and Sustainability Measures

The Regulation introduces a framework to fortify the domestic supply chain by incentivising investments, risk-sharing mechanisms, and adherence to stringent environmental and sustainability standards. It outlines criteria for designating strategic projects within the Member States and third countries based on their substantial contribution to the EU's supply security, technical feasibility, and sustainable execution.[90] Each Member State must designate a national competent authority[91] to streamline the issuance of mining and processing permits,[92] with a mandate to ensure timely approvals within specific timeframes while maintain-

[82] Art. 20 (1), CRMA.
[83] Art. 1 (2) (a), CRMA.
[84] Art. 1 (2) (b), CRMA.
[85] Art. 5 (1) (a) (i), CRMA.
[86] Art. 5 (1) (a) (ii), CRMA.
[87] Art. 5 (1) (a) (iii), CRMA.
[88] See: M. Grohol and C. Veeh, *supra* note 7.
[89] P. Leon et al., 'EU Critical Raw Minerals Act Highlights Intensifying Competition in Race to Net Zero', 4 (1-2) *Global Energy Law and Sustainability* 2023, 138–158, at 145.
[90] Art. 6 (1), CRMA.
[91] Art. 9, CRMA.
[92] Art. 9 (3), CRMA.

ing due process integrity.[93] Member States are tasked with providing extensive support to strategic projects, including assistance with reporting obligations, public acceptance,[94] financing options, and off-take agreements.[95]

In addressing the challenges of investment and finance amid the escalating demand for critical materials,[96] the Regulation proposes the establishment of a finance sub-group under the Critical Materials Board. This sub-group aims to provide advisory services to strategic projects seeking financing from private finance, European or international banks, national institutions, or EU programs.[97]

Additionally, the Regulation underscores the role of exploration in assessing extraction feasibility and enhancing supply.[98] Member States are urged to develop national exploration programs[99] and to report stocks to the European Commission,[100] which will determine safe levels.[101] Additionally, it proposes a framework for joint procurement of unprocessed and processed strategic raw materials, fostering collaboration to enhance CRMs supply chain resilience.[102]

In pursuit of sustainability and circularity objectives, the Regulation adopts a dual approach, integrating circularity and environmental footprint mitigation provisions. Member States are mandated to develop national circularity programs encompassing, *inter alia*, waste management strategies and enhanced product and component reusability.[103] The European Commission is tasked with issuing implementation acts and identifying products and streams with significant potential for CRMs recovery to support national efforts.[104] The Regulation grants Member States autonomy in devising detailed strategies, focusing on extractive waste recovery and permanent magnet recycling.[105] Product labelling indicating the presence of permanent magnets will be required by 2027.[106] Moreover, the European Commission is empowered to introduce a delegated supplementary Regulation after 2030, establishing minimum recycled CRMs quotas for products incorporating permanent magnets.[107] The Regulation also recognises existing

[93] Art. 11 (1), CRMA.
[94] Art. 15, CRMA.
[95] Arts. 16 and 17, CRMA.
[96] European Commission, *supra* note 2; International Energy Agency, *supra* note 64.
[97] Art. 16, CRMA.
[98] Indeed, despite rising demand for critical minerals, exploration remains underserved, with budget allocations lower than for other minerals. See: E. Castillo et al., 'Critical minerals versus major minerals: a comparative study of exploration budgets', *Mineral Economics* 2023, 1-12, at 8. Also, 'knowledge of mineral deposits often dates back to a time when CRMs where not the sought-after resources that they are today'; see: European Commission, *supra* note 2.
[99] Art. 19, CRMA.
[100] Art. 30, CRMA.
[101] Art. 22, CRMA.
[102] Art. 23, CRMA.
[103] Art. 26 (1), CRMA.
[104] Art. 26 (7), CRMA.
[105] Art. 27, CRMA.
[106] Art. 28 (1), CRMA.
[107] Art. 29 (3), CRMA.

sustainability certification schemes for critical minerals and metals, allowing for their recognition by the European Commission if they meet stringent criteria such as transparency and environmental sustainability.[108] While specific measures for environmental footprint measurement or verification are not delineated presently, the European Commission retains the authority to adopt delegated acts for such purposes in the future.[109]

The CRMA has adopted a comprehensive approach to address the supply risks associated with critical minerals essential for facilitating the green energy transition. While these strategies are multi-faceted in principle, their effectiveness remains to be thoroughly evaluated. However, given the complexities of the global supply chain, including substantial indirect exposure, reliance solely on EU-based mining may only partially resolve supply vulnerabilities. Moreover, the concentration of global processing facilities poses additional challenges to the supply chain. Nonetheless, even incremental increases in domestic reliance are beneficial, contingent upon adequate financial and administrative support from governments.

Given the resource-intensive nature of mining, meticulous strategic planning is imperative to ensure that sustainable exploration, extraction, and processing practices effectively meet demand.

3.3 **Securing External Supply and International Cooperation**

At the international level, the Regulation emphasises the necessity of diversifying imports and investing in projects in resource-rich countries. The CRMA delineates a comprehensive framework for collaboration with non-EU countries through Strategic Partnerships, defined as 'commitment between the Union and a third country or an overseas country or territory to increase cooperation related to the raw materials value chain that is established through a non-binding instrument setting out actions of mutual interest, which facilitate beneficial outcomes for both the Union and the relevant third country or overseas countries or territories.'[110]

In addition to incorporating minerals and raw materials provisions into trade agreements, the CRMA advocates for elevating minerals as a focal point in international governmental organisation meetings[111] and fostering critical mineral-specific partnerships and alliances.[112]

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[108] Art. 30, CRMA.
[109] Art. 31, CRMA.
[110] Art. 2 (65), CRMA.
[111] International Energy Agency, 'IEA Summit on Critical Minerals and Clean Energy: key takeaways', 28 September 2023, available at <www.iea.org/news/iea-summit-on-critical-minerals-and-clean-energy-key-takeaways>.
[112] U. S. Department of State, 'Minerals Security Partnership', available at <www.state.gov/minerals-security-partnership>.

Hence, using Strategic Partnerships to enhance the supply of critical minerals, whose supply chain is presently concentrated in a few countries, provides a pragmatic approach towards greater resilience, security, and sustainability. The CRMA mandated the CRM Board to consistently evaluate the contribution of Strategic Partnerships in enhancing supply security, attaining reduced dependency targets, and strengthening partnerships along CRMs value chains.[113] Priority is designated to countries endowed with abundant reserves, robust value chains, stringent regulatory frameworks, and existing partnerships with the EU.[114]

Furthermore, the CRMA underscores the potential deployment of Global Gateway investment projects as a criterion for partnership prioritisation, albeit necessitating further elaboration on the alignment between raw materials security and Global Gateway objectives. By facilitating mutually beneficial partnerships with resource-endowed nations, the CRMA aims to ensure the security of CRM supply chains for consumers and promotes the development of CRM extraction and value-added industries, advancing economic and developmental objectives.[115]

4. STRATEGIC PARTNERSHIPS AS AN INSTRUMENT OF THE EU'S EXTERNAL RELATIONS: SHOOTING OR RISING STAR?

The EU aims to engage in proactive CRMs diplomacy to foster international cooperation in multilateral fora, such as the World Trade Organisation (WTO), and bilateral relations. The WTO provides the general framework guaranteeing transparency, predictability, and legal certainty through provisions on tariffs, non-discrimination, and the prohibition of export restrictions.[116] The recently concluded plurilateral agreement on Investment Facilitation for Development under the WTO marks a significant milestone in boosting investments in developing countries, including the CRM sector, by improving access to information on investment rules and reducing procedural delays.[117] The EU has also used the WTO dispute settlement mechanisms to address export restrictions, notably in the case against China on rare earths[118] and Indonesia on nickel,[119] reinforcing its commitment to ensuring equitable global CRM trade. This strategic approach seeks to diversify market access and reduce dependencies on a few suppliers by establishing partnerships and policy dialogues with third countries to ensure EU access to raw materials.[120]

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[113] Art. 37 (1) (a), CRMA.

[114] Art. 37 (1) (c), CRMA.

[115] N. Srivastava, *supra* note 59.

[116] European Commission, *supra* note 8, at 9.

[117] The text of the agreement and the latest requests for incorporation into the WTO Agreement can be found at <www.wto.org/english/tratop_e/invfac_public_e/invfac_documentation_e.htm>.

[118] WTO DS431 China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum, available at <www.wto.org/english/tratop_e/dispu_e/cases_e/ds431_e.htm>-

[119] WTO DS592 Indonesia – Measures Relating to Raw Materials available at <www.wto.org/english/tratop_e/dispu_e/cases_e/ds592_e.htm>.

[120] European Commission, 'Report on the implementation of the Raw Materials Initiative', (Communication) COM(2013) 442 final, at 7-9. S. Gstöhl and J. Schnock, *supra* note 10, at 52.

In line with the 2015 'Trade for All' strategy, the European Commission has integrated an 'energy and raw materials' chapter into new Free Trade Agreements (FTAs),[121] incorporating provisions to prohibit export monopolies and taxes,[122] as highlighted in the 2021 Trade Policy Review.[123] Moreover, the recent Communication on Raw Material Commodity market challenges reaffirmed the significance of raw materials diplomacy, stressing the EU's imperative to actively secure CRM access through Strategic Partnerships and policy dialogues. [124]

The concept of 'friend-shoring' emerges as a strategy to strengthen supply relations with like-minded countries, including geographically closer nations, thereby mitigating logistical risks.[125] As part of the CRM Action Plan,[126] the European Raw Materials Alliance aims to strengthen EU resilience in rare earths and magnets value chains, with plans for expansion to address other CRMs over time.[127] Comprising stakeholders from various industries along the value chain, Member States, third countries, trade unions, civil society, research and technology organisations, investors, and non-governmental organisations, this initiative underscores the commitment to achieving more secure and sustainable CRM access. Additionally, the Green Deal Industrial Plan advocates for the establishment of a Critical Raw Materials Club with like-minded partners, intended to facilitate cooperation between raw material consumers and resource-rich countries to enable the latter to ascend the value chain.[128] The EU has also established Strategic Partnerships with resource-rich countries, such as Kazakhstan,[129] aiming to deepen the integration of value chains and collaboration on environmental, social, and governance criteria.[130]

The EU has embraced an extensively proactive external supply strategy to supply CRMs, leveraging international trade mechanisms and investment instruments. Moreover, the EU is actively pursuing cooperation with third countries, forging new partnerships, or fostering existing ones.[131]

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[121] European Commission, 'Trade for All. Towards a more responsible trade and investment policy', (Communication) COM(2015) 497 final, at 9.

[122] C. Crochet and W. Zhou, *supra* note 9, at 156.

[123] European Commission, *supra* note 25, at 5 and 12.

[124] European Commission, 'Tackling the challenges in commodity markets and on raw materials', (Communication) COM(2011) 25 final.

[125] European Commission, *supra* note 25, at 7. S. Gstöhl and J. Schnock, *supra* note 10, at 53; A. A. Román et al., 'Future Shocks 2023. Anticipating and weathering the next storms', European Parliamentary Research Service, (July 2023), available at <www.europarl.europa.eu/RegData/etudes/STUD/2023/751428/EPRS_STU(2023)751428_EN.pdf>, at 92.

[126] European Commission, *supra* note 2.

[127] European Commission, *supra* note 2, at 8.

[128] European Commission, *supra* note 8; A. A. Román et al., *supra* note 118, at 201.

[129] 'COP27: European Union concludes a strategic partnership with Kazakhstan on raw materials, batteries and renewable hydrogen' (Brussels, 7 November 2022), available at <ec.europa.eu/commission/presscorner/detail/en/ip_22_6585>.

[130] At the time of writing, the Strategic Partnerships in the field of CRMs are fourteen: Canada, Ukraine, Kazakhstan, Namibia, Argentina, Chile, DRC, Zambia, Greenland, Rwanda, Norway, Uzbekistan, Australia, and Serbia. For more on this, see: <single-market-economy.ec.europa.eu/sectors/raw-materials/areas-specific-interest/raw-materials-diplomacy_en>.

[131] C. Crochet and W. Zhou, *supra* note 9, at 148.

Strategic Partnerships serve as instruments of EU external relations, grounded in Articles 21 and 22 of the Treaty on the European Union (TEU). However, the legal nature of these partnerships remains a subject of debate. The ambiguity arises from the fact that neither the Treaties nor any other EU document delineates whether these partnerships even possess a legal character. The doctrine is divided: some scholars regard Strategic Partnerships as primarily political agreements, while others view them as soft law instruments.[132] To bridge this divide, it is helpful to consider Strategic Partnerships as possessing a para-legal nature, given their role in advancing economic and trade relations, sectoral cooperation, and political dialogue.[133] Furthermore, they may also be seen as having a pre-legal nature since they often pave the way for the conclusion of legally binding agreements[134] – though this is not universally the case, as evidenced by the EU-Ukraine Strategic Partnership, as shown below.

Moreover, no comprehensive public EU document addresses Strategic Partnerships collectively or lists them exhaustively. Nonetheless, recent doctrine generally recognises the existence of five regional Strategic Partnerships with a group of countries and international organisations – specifically with Africa and the African Union, the Mediterranean and Middle East, Latin America and the Caribbean, the UN, and NATO) and at least ten bilateral Strategic Partnerships with individual countries (including Brazil, Canada, China, India, Japan, South Korea, Mexico, South Africa, Ukraine, and the United States). These attempts at classification underscore the heterogeneity of bilateral Strategic Partnerships, reflecting unclear EU criteria for partner selection, inconsistent procedures for establishing Strategic Partnerships, and varying scopes of cooperation across different partnerships.[135]

4.1 **Strategic Partnerships according to the Critical Raw Materials Act**

The CRMA positions Strategic Partnerships as a cornerstone of its external dimension, emphasising their critical role in securing a stable and sustainable supply of raw materials essential for the EU's strategic autonomy and energy transition. Article 2 (63) of the CRMA defines Strategic Partnerships as commitments between the EU and a third country or Overseas Countries and Territories to enhance the raw materials value chain cooperation. These commitments are established through non-binding instruments that set out concrete actions of mutual interest, facilitating beneficial outcomes for both partners.

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[132] C-C. Cîrlig, 'EU Strategic Partnerships with third countries', European Parliament Library Briefing 2012, 1-7, at 2; T. Renard, 'The Treachery of Strategies: A Call for True EU Strategic Partnerships', 45 *Egmont Papers* 2011, available at <www.egmontinstitute.be/app/uploads/2013/09/ep45.pdf?type=pdf>; D. Schade, 'Institutional Perspectives on the EU's Strategic Partnerships: Where Is the Focus and Authority?', in L. C. Ferreira-Pereira and M. Smith (eds), *The European Union's Strategic Partnerships. Global Diplomacy in a Contested World*, Palgrave Macmillan 2021, at 51.

[133] C-C. Cîrlig, *supra* note 132, at 2.

[134] C-C. Cîrlig, *supra* note 132, at 2.

[135] For an in-depth analysis, see: D. Schade, *supra* note 132, at 54.

The role and scope of Strategic Partnerships have been adjusted between the European Commission's initial proposal and the final version of the CRMA. In the original proposal, an entire chapter was dedicated to Strategic Partnerships, albeit a brief one. However, in the final version, the provisions concerning Strategic Partnerships are primarily addressed in Article 35. This article outlines the responsibilities of the EU Critical Raw Materials Board in relation to the regular review of Strategic Partnerships.

The Board, introduced in Article 34, comprises representatives from EU Member States and the European Commission. Its mandate is to advise on and coordinate the implementation of the measures specified in the CRMA and to discuss the EU's Strategic Partnerships with third countries. In carrying out its responsibilities, the Board regularly reviews several key aspects related to Strategic Partnerships. These include the impact of Strategic Partnerships on enhancing the security of supply and fostering international cooperation along the CRMs value chain with partner countries, promoting capacity building, technology transfer for circularity, and economic development. The Board also evaluates the alignment and potential synergies with relevant third countries within the context of Strategic Partnerships. Additionally, it prioritises criteria for the establishment of new Strategic Partnerships, considering factors such as their contribution to supply security and resilience, the potential for enhancing environmental protection, existing cooperation agreements, and the potential for Global Gateway investment projects. Moreover, the Board assesses the coherence between Strategic Partnerships and broader EU policies.

These actions by the Board are undertaken without prejudice to the Council's prerogatives. Furthermore, EU Member States have specific duties under the CRMA, including notifying the Commission of any bilateral agreements involving CRMs and, optionally, assisting the Commission in executing cooperation measures within the framework of Strategic Partnerships.

Finally, the CRMA mandates annual reporting by the Commission to the European Parliament and the Council, as specified in Article 44 CRMA. This report must include, among other things, a list of Strategic Partnerships related to CRMs.

4.2 Establishing the Effectiveness of Strategic Partnerships: The EU-Ukraine Strategic Partnership on Raw Materials

The EU's approach to Strategic Partnerships, particularly in the context of CRMs, is gaining increased significance due to ongoing geopolitical crises. As delineated in the CRMA, these partnerships are instrumental in enhancing cooperation with third countries to secure the supply of CRMs. The EU-Ukraine Strategic Partnership is a pertinent example of how a Strategic Partnership signed before the entry into force of the CRMA can still effectively align with its purposes and objectives and respect its obligations.

The Association Agreement between the EU and Ukraine,[136] which entered into force provisionally in 2014, aims to deepen political and economic ties between the two parties. It covers a wide range of areas, including trade and economic cooperation. To operationalise and implement specific provisions of the Association Agreement, the Memorandum of Understanding (MoU) between the EU and Ukraine on a Strategic Partnership on Raw Materials[137] was signed in July 2021, underscoring the shared commitment to enhancing cooperation in raw materials and batteries.

This partnership aims to integrate CRMs value chains and batteries, crucial for the EU's green and digital transitions. Recognising the significance of secure raw materials supply, particularly CRMs like lithium and rare earth elements, the partnership aligns with the EU's goal of maintaining 'open' strategic autonomy. Ukraine's ambition to contribute to climate action and energy transition aligns well with the EU's objectives. The partnership focuses on various aspects, including regulatory alignment, investment facilitation, and research collaboration, to foster sustainable development and resilience in raw materials supply chains. This MoU seeks to enhance political ties and economic cooperation between the EU and Ukraine, leveraging existing frameworks like the EU-Ukraine Association Agreement and the Strategic Energy Partnership.[138] The partnership's implementation will be monitored through regular meetings and collaboration, ensuring transparency and accountability. While this MoU does not create legal obligations, it signifies a significant step towards strengthening EU-Ukraine relations and addressing shared challenges in raw materials supply.

The MoU aligns well with the obligations set forth by the CRMA. Firstly, the MoU reflects the EU's commitment to diversifying imports and investing in projects in developing countries, consistent with the Regulation's emphasis on strategic projects to enhance raw materials supply security. By formalising a partnership with Ukraine, the EU aims to integrate CRMs value chains and strengthen cooperation. This partnership exemplifies the type of strategic collaboration advocated by the Regulation, fostering closer ties between the EU and a non-EU country to improve raw materials supply.

Furthermore, the MoU embodies the CRMA's call for elevating minerals as a focal point in international governmental organisation meetings and fostering

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[136] Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, *OJ* [2014] L 161/3, 29.05.2014.

[137] Memorandum of Understanding between the European Union and Ukraine on a Strategic Partnership on Raw Materials (2021), available at <ec.europa.eu/docsroom/documents/46300>; 'EU and Ukraine kick-start strategic partnership on raw materials' (Brussels, 13 July 2021), available at <single-market-economy.ec.europa.eu/news/eu-and-ukraine-kick-start-strategic-partnership-raw-materials-2021-07-13_en>; International Energy Agency, 'Ukraine-EU Strategic Partnership on Raw Materials' (11 December 2023), available at <www.iea.org/policies/18056-ukraine-eu-strategic-partnership-on-raw-materials>.

[138] Memorandum of Understanding on a Strategic Energy Partnership between the European Union together with the European Atomic Energy Community and Ukraine (2016), available at <energy.ec.europa.eu/system/files/2017-11/mou_strategic_energy_partnership_en_signed_0.pdf>.

critical mineral-specific partnerships and alliances. By prioritising collaboration in areas such as regulatory alignment, investment facilitation, and research co-operation, the MoU addresses the objectives outlined in the CRMA. Additionally, the MoU underscores the potential deployment of investment projects, such as those under the Global Gateway initiative, which aligns with the CRMA's goal of prioritising partnerships with countries possessing abundant reserves and robust value chains.

Moreover, the MoU's focus on enhancing supply security, reducing dependency, and fortifying partnerships along CRMs' value chains resonates with the CRMA's mandate for the CRM Board to assess the contribution of Strategic Partnerships in achieving these objectives. By prioritising countries with stringent regulatory frameworks and existing partnerships with the EU, the MoU ensures alignment with the CRMA's criteria for partnership prioritisation. Overall, the MoU between the EU and Ukraine represents a pragmatic approach to improving CRM supply chains, advancing economic development objectives, and fulfilling the obligations outlined in the Regulation concerning Strategic Partnerships and investments in resource-rich countries.

4.3 **The Future of Strategic Partnerships**

The Strategic Partnership analysed exemplifies a pragmatic approach aimed at enhancing CRM supply chains, advancing economic development objectives, fulfilling the obligations and aligning with the broader goals established in the CRMA, particularly in the context of its shift away from fossil fuels towards clean energy. However, this transition poses significant challenges, revealing inherent shortcomings in the EU's approach to 'open' strategic autonomy through unilateral regulation. The CRMA highlights these complexities by focusing on internal and external regulation dimensions.

Although the Strategic Partnership analysed complies with the CRMA's obligations and objectives, the CRMA places a heavy emphasis on Strategic Partnerships. This raises questions about the effectiveness of these partnerships as instruments for achieving the EU's goals, particularly regarding tangible deliverables such as market access or support for EU-sponsored sanctions. At the same time, the lack of alternative instruments or strategies to achieve these goals also warrants scrutiny. Potential alternatives could include binding agreements that offer greater legal certainty, mechanisms for multilateral cooperation through international *fora* such as the WTO or enhanced domestic measures such as subsidies or regulatory incentives to reduce reliance on external actors; however, these alternatives must be discussed in light of WTO law, particularly its provisions on non-discrimination, subsidies, and export restrictions, which shape the legal framework for such measures. Together, these considerations highlight the need for a critical assessment of the EU's reliance on Strategic Partnerships and the exploration of complementary or alternative approaches

to advancing its objectives.

The primary function of Strategic Partnerships may serve to reinforce the EU's position as an international actor,[139] in the CRMA framework, their primary function is to reduce dependencies and enhance supply chain resilience. In this sense, establishing Strategic Partnerships carries significant political and economic value, even if not legally binding, for both parties involved. The political value of these partnerships depends on various factors, including the third country in question and the stage of the relationship. The cases of Ukraine and the Russian Federation illustrate how the EU uses Strategic Partnerships as external relations instruments, particularly with this reflexive function in mind.[140]

The CRMA embodies a two-fold dimension: internal and external. The external dimension of the EU's strategy reflects the internal balance of forces between Member States and between Member States and EU institutions. As resource consumption within EU Member States is expected to significantly increase in the coming years, the CRMA must be understood in conjunction with bilateral agreements such as Strategic Partnerships. Ultimately, the success of the CRMA does not rest solely on internal regulation. Still, it heavily depends on the effectiveness of external supply chains, where Strategic Partnerships play a crucial, albeit still underdeveloped, role. Therefore, while Strategic Partnerships are a vital component of the EU's strategy, their current impact remains limited, underscoring the need to further strengthen these partnerships to achieve the desired outcomes.

The CRMA positions Strategic Partnerships as essential instruments for enhancing the EU's raw materials security and energy resilience. By prioritising diversification of imports and investing in projects with developing countries, these partnerships aim to mitigate the risks associated with over-reliance on a limited number of importers. Strategic Partnerships under the CRMA provide a framework for the EU to integrate CRMs into broader trade agreements, elevate their significance in international *fora*, and foster dedicated alliances around raw materials. Through these efforts, the EU seeks to strengthen its supply chains, reduce dependencies, and secure a stable supply of raw materials.

However, while Strategic Partnerships offer clear benefits, their effectiveness in achieving the EU's 'open' strategic autonomy is not without challenges. In the future, a significant issue could be the unequal distribution of benefits between the EU and its partners, which might influence the stability and long-term viability

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[139] G. Grevi, 'Why EU strategic partnerships matter', 1 *European Strategic Partnerships Observatory* Working Paper 2012, 1-24, at 12.

[140] The acknowledgment of certain countries as strategic partners does not imply any guarantee that this privileged status will endure in the future. The cases of Ukraine and the Russian Federation stand out as illustrative examples, as the EU dropped the "strategic partner" label for the latter following the annexation of Crimea in 2014. For more on this, see: L. C. Ferreira-Pereira and M. Smith, 'Strategic Partnerships in European Union External Action: Evolution and Analysis of a Developing Policy Instrument', in L. C. Ferreira-Pereira and M. Smith (eds), 'The European Union's Strategic Partnerships. Global Diplomacy in a Contested World', Palgrave Macmillan 2021, at 29.

of these agreements. For some partner countries, the primary incentive may be economic, such as gaining access to European markets or investments in local mining and processing industries; in contrast, the EU focuses on securing a reliable and sustainable supply of CRMs. This imbalance can lead to divergent priorities and expectations, potentially undermining the effectiveness of the partnerships, especially considering the non-binding nature of such agreements.[141]

The choice of partners is also critical. While resource-rich countries may seem like ideal partners, they may not always align with the EU's standards for environmental sustainability, labour rights, or governance. This misalignment can pose risks, as partnerships with countries with unstable political climates, governance challenges, or poor human rights records may lead to unpredictable or unreliable supply chains. Furthermore, relying heavily on these partnerships to secure raw materials may expose the EU to ongoing geopolitical risks and supply chain vulnerabilities. As such, the EU must carefully assess not only its partners' economic and resource potential but also their political stability and commitment to shared values.[142]

5. CONCLUSION

The CRMA provides a sound basis for both internal and external regulation of CRMs, aiming to enhance the EU's strategic autonomy and energy security. By outlining comprehensive measures to diversify supply sources, strengthen domestic production capacities, and promote international cooperation, the CRMA addresses the challenges associated with the EU's dependency on a limited number of suppliers for CRMs. The Act's emphasis on Strategic Partnerships marks a notable development in the EU's approach to external relations, suggesting a renewed reliance on collaborative efforts with resource-rich countries to secure a stable and sustainable supply of CRMs.

However, the return of Strategic Partnerships as a key instrument in the EU's external relations brings both opportunities and potential drawbacks. On the one hand, these partnerships could strengthen the EU's geopolitical influence, diversify supply chains, and foster sustainable practices. On the other hand, the effectiveness of such partnerships remains uncertain, particularly given their often non-binding nature. There is also the risk that some partners may not adhere to the EU's standards for environmental sustainability, labour rights, or governance, leading to unpredictable outcomes and potential supply chain disruptions.

Ultimately, while the CRMA sets a robust framework for enhancing the EU's raw materials security, the real test will be in the implementation and outcomes

[141] G. Grevi, 'Making EU strategic partnerships effective', 105 *FRIDE Working Paper* 2010, 1-28.
[142] S. Gratius, 'The EU and the "special ten": deepening or widening Strategic Partnerships?', 76 *FRIDE Policy Brief* 2011, 1-5.

of these Strategic Partnerships. Whether these partnerships will prove to be a boon or a burden for the EU's ambitions will depend on how effectively they are managed and the extent to which they can deliver tangible benefits. As the EU navigates this complex geopolitical landscape, only time will tell if Strategic Partnerships will be the right instrument for securing its strategic autonomy and sustainable development goals, or if alternative approaches – such as binding agreements for greater legal certainty, mechanisms for multilateral cooperation through international *fora* such as the WTO or enhanced domestic measures – will be required to complement or replace them.

ANNEX: 2024 CRITICAL AND STRATEGIC RAW MATERIALS[143]

Below is a table summarising the critical and strategic raw materials identified by the CRMA and presented in Annex II and Annex I of the Regulation.

Antimony	Copper	Lithium[144]	Platinum group metals
Arsenic	Feldspar	*Magnesium metal*	Scandium
Bauxite/alumina/ aluminium	Fluorspar	*Manganese* (battery grade)	Silicon metal
Baryte	Gallium	Manganese	Strontium
Beryllium	Germanium	*Graphite* (battery grade)	Tantalum
Bismuth	Hafnium	Graphite	Titanium metal
Boron (metallurgy grade)	Helium	Nickel (battery grade)	Tungsten
Boron	Heavy rare earth elements	Niobium	Vanadium
Cobalt	Light rare earth elements	Phosphate rock	*Rare earth elements for permanent magnets*
Coking coal	*Lithium* (battery grade)	Phosphorus	

[143] While all CRMs are strategic due to their economic significance and the susceptibility of its supply to disruption, not all strategic raw materials are considered critical. The main difference between the two relies on the criticality of their availability. In the table, the materials marked in italic are considered strategic but not critical, while the rest are either critical or both strategic and critical. See: M. Grohol and C. Veeh, *supra* note 7, at 3.

[144] In 2020, lithium, despite its relative abundance, was designated as a CRM for the first time. This decision was spurred by the rapid proliferation of battery electric vehicles (BEVs), underscoring the direct correlation between technological advancements and the perceived criticality of specific elements. See: M. David, s*upra* note 35, at 18.

CFSP/CSDP IN TIMES OF GEOPOLITICAL SHIFTS

WHEN STRATEGIC AUTONOMY MEETS THE COMMON FOREIGN AND SECURITY POLICY – IRRECONCILABLE (INSTITUTIONAL) PARADIGMS OR UNTAPPED SYNERGIES?

Christos Karetsos* and Alexandros Bakos**

1. INTRODUCTION

This paper discusses the EU Strategic Autonomy (SA) conundrum through the security and defence policy lens. It proceeds as follows: the first Part argues that autonomous security and defence policy is the most necessary component of the doctrine of strategic autonomy without which the concept loses its substance. This part will trace the roots of the strategic autonomy doctrine to policy and strategic positions that have mostly been associated with the foreign and security component of EU external relations. Although the concept of Strategic Autonomy is currently almost self-identified with the EU's Common Commercial Policy (CCP), this is explained by two factors: the malleability of the concept and the institutional and structural constraints. Both offered fertile ground for the development of the Open Strategic Autonomy doctrine within the EU's trade and investment policy sphere.

Nonetheless, we advocate for a separation between the malleability of the concept, often driven and exploited by the Commission and other actors who act as policy entrepreneurs, and the necessary development of this doctrine beyond CCP considerations – towards foreign policy and security aspects. We acknowledge, however, the legal and institutional constraints of the Common Foreign and Security Policy (CFSP)/Common Security and Defence Policy (CSDP) framework. Thus, we differentiate between the ideational elements of the (Open) Strategic Autonomy doctrine and its on-the-ground reality. In this part, we also explore how the institutional constraints that pertain to CFSP/CSDP have driven Union actors, especially the Commission, to leverage more supranational structures, such as the CCP, in their attempt to develop the SA doctrine. The more integrated a policy sphere is, the easier it becomes for entities such as the Commission to leverage the SA doctrine through securitisation processes, something we also explore in this Part.

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Moving past the discussion about the legal constraints of the CFSP/CSDP framework and the intergovernmental paradigm in this area, the second Part will flesh out recent legal and policy developments both at EU and Member-State level. The chronological starting point of the analysis is 24 February 2022, the day Russia invaded Ukraine. Even if this may amount to a very recent development in the broader historical framework of EU external relations, we argue that its relevance cannot be overstated. It establishes a reference point, one that has arguably led to a structural transformation in the security architecture of the EU and its relations with its immediate neighbourhood. Because of this, it represents a fixed and identifiable moment in time, one that exposes the structural limitations and inadequacy of a Strategic Autonomy doctrine focused predominantly on trade, investment, and economic security (more broadly) considerations. We take this approach for two reasons. Firstly, our goal is to examine whether the EU's actions showcase an increasingly autonomous EU in the security and defence realm, arguably required by geopolitical imperatives. Alternatively, we propose an acknowledgement of the "crossroads" at which the European Bloc finds itself, which can finally lead to that breakthrough in the development of the Strategic Autonomy doctrine. Secondly, and stemming from the previous point, we demonstrate, through specific examples based on the geopolitical constraints driving such developments, that genuine Strategic Autonomy can only be attained through developments in the security and foreign policy spheres.

In the third part, we briefly explore the potential of the EU's defence industrial policy to act as a bridge towards the further integration of security and foreign policy considerations in the Strategic Autonomy doctrine. Drawing, among others, on the recent Draghi report, we consider how the use of strategies oriented towards the development of the EU's defence industrial base can restructure the thinking around Strategic Autonomy and acknowledge its inevitable security and defence component. Nonetheless, we do not take any normative stance on whether institutional and legal changes must occur, as we are simply seeking to explain the necessary conceptual scope of the Strategic Autonomy doctrine and not to advocate for deeper integration in the defence and security spheres.

2. STRATEGIC AUTONOMY AND ITS ROOTS IN THE SECURITY INTERESTS OF THE UNION AND ITS MEMBER STATES

As currently understood, the concept of "(Open) Strategic Autonomy" is all-encompassing. It essentially refers to the EU's ability to act independently, especially externally, in accordance with its own values, objectives, and strategy priorities.[1] This entails resilience in the face of vulnerabilities that can arise in from supply chain disruptions, third-country dependence (that can lead to trade

[1] Ana E. Juncos and Sophie Vanhoonacker, "The Ideational Power of Strategic Autonomy in EU Security and External Economic Policies" (2024) 62(4) *Journal of Common Market Studies* 955, 955.

coercion), or geopolitical risks, more generally.[2] It is usually framed as a doctrine that mixes the rules-based oriented EU approach with the existence of a geopolitically-informed capacity to react to external threats.[3] Reduced to its essence, it drives developments in *reaction* to other actors' (such as states) actions, in consideration of manifestations of hard power, and arising from a view that takes territoriality as its starting point (also known as geopolitical awareness).[4] The doctrine also seeks to empower, especially ideologically, the EU to make extended use of geoeconomic tools (market mechanisms deployed for political and strategic purposes), such as sanctions and trade defence instruments.[5]

Understanding the essence of the concept and its drivers separates the concept (Strategic Autonomy) from the context (its leveraging predominantly in the trade and investment sphere). It helps with understanding its (logical and conceptual) source, which, as further explained below, is not necessarily the EU's CCP. Ultimately, the concept is heavily tied to security and defence considerations,[6] which logically precede its application to Common Commercial Policy aspects.[7] The exercise of hard power, directed by a geopolitically informed decision-making process, has always been characteristic of the security and defence policies of international actors.[8]

It is also true that there were calls for a geopolitically aware trade and investment policy, but the existence of such calls on the side must be contrasted with the main characteristics of CFSP, which has always been about geopolitical dynamics and their influence on the continent and abroad. Furthermore, as shown both by commentators, and as seen in various policy and reference documents issued by EU institutions or by various stakeholders, the concept of Strategic Autonomy was initially put forward with a view towards safeguarding the "hard-core" security and defence interests of the bloc.[9] Perhaps the best example in

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[2] Joan Miró, "Responding to the Global Disorder: the EU's Quest for Open Strategic Autonomy" (2023) 37(3) *Global Society* 315, 315-6.

[3] Mavluda Sattorova, "EU Investment Law at a Crossroads: Open Strategic Autonomy in Times of Heightened Security Concerns" (2023) 60 Common Market Law Review 701, 718-9. See, also, Najibullah Zamani & Henri de Waele, "Nobody Has any Intention of Building a Wall" Some Reflections on the EU's New-Found Assertiveness in the Sphere of Trade of Investment" (2023) 28(4) European Foreign Affairs Review 397, 398.

[4] David Cadier, "The Geopoliticisation of the EU's Eastern Partnership" (2019) 24(1) Geopolitics 71, 80.

[5] Zamani & de Waele (n 3), 398. See, also, Luigi Lonardo, Viktor Szép, "The Use of Sanctions to Achieve EU Strategic Autonomy: Restrictive Measures, the Blocking Statute and the Anti-Coercion Instrument" (2023) 28(4) European Foreign Affairs 363.

[6] For a brief overview of how the doctrine has developed historically, including its first mention in 2013 in the context of discussions in the European Council about European defence capabilities, see Eva Kassoti & Ramses A. Wessel, "Strategic Autonomy: The Legal Contours of a Security Policy Construct" (2023) 28(4) European Foreign Affairs Review 305, 305-6.

[7] See Federico Casolari, 'Supranational Security and National Security in Light of the EU Strategic Autonomy Doctrine: The EU-Member States Security Nexus Revisited' (2023) 28(4) European Foreign Affairs Review 323, 328 et seqq.

[8] Luigi Lonardo, *EU Common Foreign and Security Policy after Lisbon. Between Law and Geopolitics* (Springer 2023), 29-35.

[9] Miró (n 2), 317-20; Tara Varma, "European Strategic Autonomy: The Path to a Geopolitical

this regard would be the change in focus of US administrations from Europe towards other parts of the world after the end of the Cold War.[10] Because of that, calls were made for a decrease in reliance on the US for security.[11] Other, more recent, examples include the risk of US disengagement from Europe, especially after Donald Trump's election as President of the US in 2016, or the Russian invasion of Ukraine.[12] The first could affect Europe's security in terms of risk of withdrawal of support from the US, the other because of the existence of a war at Europe's borders.

Nonetheless, because of the institutional difference between CCP and CFSP, the (Open) Strategic Autonomy doctrine has gained a foothold in the former area but not in the latter one – at least not yet. This is owed to the CCP having a supranational element, concentrating exclusive power in the hands of the EU,[13] and the CFSP having an intergovernmental nature, whereby the (*de facto*) veto power is still present with the Member States – at least regarding the effects of decisions on that specific Member State.[14] In addition, as shown by a briefing from the Parliament:

> the concept of EU-SA in defence matters was never fully embraced by all Member States. A 2019 commentary by the International Centre for Defence and Security in Estonia showed that the enthusiasm of the strongest promotor of the concept, France, was not shared equally by countries with a more transatlantic tradition, such as the Netherlands, or those bordering Russia, such as Finland and Estonia. (...) Even today, some Member States still consider the concept of EU-SA in defence matters with suspicion. The EU High Representative for Foreign Affairs and Security Policy and Commission Vice-President (HR/VP) Josep Borrell has therefore been obliged to explain over and again how EU-SA should be seen as complementary to NATO (…).[15]

Finally, it needs to be considered that the doctrine of Strategic Autonomy percolates through various policy areas, an important number of them coming under EU competence. This is especially the case with trade and investment policy, as mentioned earlier, but also with industrial policy,[16] or digital policy.[17] In comparison to areas where the EU has the competence to act (even if this competence is shared with the Member States), there have been fewer develop-

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Europe" (2024) 47 Washington Quarterly 65, 64-6, 69-70.

[10] Jolyon Howorth, "The CSDP in Transition: Towards 'Strategic Autonomy?'", in Ramona Coman, Amandine Crespy and Vivien A. Schmidt (eds.), *Governance and Politics in the Post-Crisis European Union* (Cambridge University Press 2020), 313-8.

[11] Miró (n 2), 317.

[12] Varma (n 9), 69-72.

[13] Christian Freudlsperger and Sophie Meunier, "When Foreign Policy Becomes Trade Policy: The EU's Anti-Coercion Instrument" (2024) 62(4) Journal of Common Market Studies 1063, 1065.

[14] Pierre Haroche, "A 'Geopolitical' Commission: Supranationalism Meets Global Power Competition" (2023) 61(4) 970, 970-1.

[15] European Parliament, "EU Strategic Autonomy 2013-2023. From Concept to Capacity" <www.europarl.europa.eu/RegData/etudes/BRIE/2022/733589/EPRS_BRI(2022)733589_EN.pdf> accessed 30 September 2024, 2.

[16] Art. 173 of the Treaty on the Functioning of the European Union.

[17] Miró (n 2), 320-2, 325-6.

ments in regard to advancing Strategic Autonomy in the defence and security area: "the policy domain in which the strategic autonomy discourse was born happens to be the one in which fewest significant reforms has triggered so far".[18] This is understandable, however, when considering the institutional structure that underlies the European project, as already mentioned.

As such, both historically and conceptually, the doctrine of Strategic Autonomy seems to mainly have a defence and security angle first and foremost (even if this did not turn into a coherent common strategic direction Union-wide). Paradoxically, however, it only manifests itself in areas that go beyond security and defence considerations, and which are characterized by deeper degrees of integration. This is not to say that Strategic Autonomy does not have a "pedigree" when it comes to the EU's (External) Economic Relations. Nonetheless, it can be argued that this has been mostly a space for exploration within the academic sphere and less for the "real-world policymaking" circles,[19] at least until more recent times.

It is also interesting to note that one commentator has referred to the securitisation theory to explain how the strategic autonomy doctrine has expanded from the security and defence sphere to other areas.[20] These include spheres such as trade, industrial policy, telecommunications, energy, climate, common agricultural and even financial policy. We would take this theoretical approach even further and argue that the securitization lens can explain why the concept of Strategic Autonomy has found a more fertile ground in areas such as trade and investment policy than in the CFSP sphere. Put differently, not only has it expanded from CFSP to CCP, for instance, but it has reached new heights in areas such as the latter, precisely because of the extended scope for securitisation in such spheres.

Essentially, the theory assumes that the process of securitisation represents a speech, or performative act. Labelling something as having a security impact will automatically transform the reality experienced by the involved stakeholders.[21] Referring to something as touching upon the security interests of a community automatically permits the adoption of certain measures, required by the exceptional nature of the situation and by its urgency.[22] Otherwise, this would not have been possible in the presence of just any other public interest issue. It is the securitisation process that instills the urgency and exceptionalism surrounding a specific development, thus transforming the reality surrounding it.

It becomes clear, then, that the process of securitisation involves a race for

[18] Idem, 328.
[19] Idem, 316.
[20] Ibid.
[21] Thierry Balzacq, Sarah Léonard, Jan Ruzicka, "'Securitization' Revisited: Theory and Cases" (2016) 30(4) International Relations 494, 495.
[22] J. Benton Heath, "Making Sense of Security" (2022) 116(2) American Journal of International Law 298, 291.

epistemic authority to render something as pertaining to the security interests of a community.[23] The theory does not focus so much on the effects of framing an interest as pertaining to (national) security considerations (although they still inform the theory to a certain degree). It rather focuses on the process of securitising that interest in the first place. This involves the epistemic authority mentioned earlier. Because authority matters in this process, the speech act to which we previously referred is always addressed to an audience. Based on the underlying dynamics, that audience can either empower the author of the speech act in its securitisation process or prevent it from pursuing such acts – the addressees are known as "empowering" or "nullifying" audiences.[24]

Applying this theory to the CCP and CFSP spheres, one could better understand why and how the Strategic Autonomy doctrine found fertile ground for its development in the former policy area and not in the latter. Without doubt, the doctrine is heavily tied to the security interests of the EU and to those of the Member States.[25] Invoking it, however, also entails an attempt at securitising certain interests. This happens especially because of the ambiguity of the (Open) Strategic Autonomy concept and its malleability towards different interests,[26] particularly the security interests of the one relying on the concept. If the Commission, for instance, acts as a securitising actor (which is usually the case, at least at the supranational level, followed by the Council),[27] then based on the area in which it acts, CFSP or CCP, the empowering or nullifying audiences will differ.[28] In the CFSP, every Member State having an ultimate veto right (at least regarding the effects of the decision on it), the power of the empowering or nullifying audience far exceeds that of the securitising actor. Contrariwise, given the exclusive competence of the EU in the CCP sphere, the balance of power switches. The securitising actor, the Commission, benefits from a wider

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[23] Trine Villumsen Berling, "Science and Securitization: Objectivation, the Authority of the Speaker and Mobilization of Scientific Facts" (2011) 42(4-5) Security Dialogue 385, 392. For a nuanced differentiation between political and epistemic authority, see Sarah Wright, "Epistemic Authority, Epistemic Preemption, and the Intellectual Virtues" (2016) 13(4) Episteme 555, 557-63. It is beyond the scope of this paper to clarify whether the Commission benefits from epistemic or political authority and to build an argument on the nuanced difference between the two. For present purposes, it is enough to argue that, irrespective of the position one takes on this debate and its application to the present situation, the power of the Commission to act as an ideational entrepreneur (Juncos and Vanhoonacker (n 1), 956) that pushes the SA agenda only exists in the CCP sphere and not in the CFSP framework.

[24] James Sperling & Mark Webber, "The European Union: Security Governance and Collective Securitisation" (2019) 42(2) West European Politics 228, 246; Caroline Henckels, "Whither Security? The Concept of 'Essential Security Interests' in Investment Treaties' Security Exceptions" (2024) 27(1) Journal of International Economic Law 114, 115 (although applying the theory in the contest of international investment law and the relevant investment treaties, the piece addresses the conceptual aspects of empowering and nullifying audiences).

[25] European Parliament (n 15), 69.

[26] Raluca Csernatoni, "The EU's Hegemonic Imaginaries: From European Strategic Autonomy in Defence to Technological Sovereignty" (2022) 31(3) European Security 395, 396.

[27] Sonia Lucarelli, "The EU as a Securitising Agent? Testing the Model, Advancing the Literature" (2019) 42(2) West European Politics 413, 418.

[28] For more examples as to how the Commission's securitising attempts yield different results based on the area in which it acts and the role of the audiences, see Lucarelli (n 27), 417.

space to navigate in its securitisation endeavours because of the limited power of the nullifying or empowering audiences.[29] As such, it is the counterweight of such nullifying/empowering audiences that can also explain why the concept of Strategic Autonomy has been better leveraged in the CCP sphere than in the CFSP one.

Ultimately, one needs to differentiate between SA as a concept and its logical implications, including its origin in security and defence discourse, on the one hand, and the structural constraints that characterise the EU's institutional framework, on the other. The veto power of Member States (at least in regard to decisions affecting them) in the security and defence area represents a major reason for which a unified concept of Strategic Autonomy with specific application in this area is difficult to develop and implement.[30] Because SA represents not only a fixed doctrine, but also a mechanism through which certain policy developments can be justified, especially owing to the malleability of the concept,[31] an attempt to leverage it in the security and defence sphere could be met with pushback from certain Member States, in an attempt to safeguard their sovereignty. This is because the lack of EU competence in the security and defence sphere translates, as mentioned earlier, to a veto power for every Member State that does not wish to adopt a specific course of action. Such a pushback would not only have the immediate effect of neutralizing the development of the doctrine and its application, but it would also affect its inherent cogency, rendering it less attractive and less capable of justifying certain policy or strategic directions.

Contrariwise, in areas such as the Common Commercial Policy, where the EU holds exclusive competence, acting mostly through the Commission, this diffusion of authority that is seen within the CFSP is not present anymore. It turns into an exclusive competence for the EU to act. In turn, this also gives the Commission the epistemic authority to push the (Open) Strategic Autonomy, at least regarding the EU's Trade and Investment Policy.[32] Coupled with the decreased scope for accountability for decision-making processes in the CCP sphere, this leads to the Commission benefitting from epistemic authority that it can leverage in the development of the OSA doctrine. This context should offer a clearer explanation as to why there is a push towards Open Strategic Autonomy when it

[29] This is not to say that nullifying or empowering audiences do not exist in the CCP sphere at all and that none exist beyond the Member States. The Parliament would be an example. Nonetheless, the power of the empowering or nullifying audiences is much more restrained here than in the CFSP sphere.

[30] Juncos and Vanhoonacker (n 1), 967.

[31] Csernatoni (n 26), 396.

[32] Generally, Gesa Kübek and Isabella Mancini, "EU Trade Policy between Constitutional Openness and Strategic Autonomy" (2023) 19 European Constitutional Law Review 518; Luuk Schmitz and Timo Seidl, "As Open as Possible, as Autonomous as Necessary: Understanding the Rise of Open Strategic Autonomy in EU Trade Policy" (2023) 61(3) Journal of Common Market Studies 834. On how the increased powers that the EU Commission benefits from in the trade and investment sphere leads to issues of accountability, see Wolfgang Weiß, "The EU's Strategic Autonomy in Times of Politicisation of International Trade: The Future of Commission Accountability" (2022) 14(Suppl. 3) Global Policy 54, 58-9.

comes to EU investment and trade and not security and defence. Nonetheless, lack of opportunity to drive forward a specific policy, or even doctrine, in a specific area should not mean that that policy or doctrine is automatically disconnected from that area. And, as shown with the (geopolitical) developments described below, it is important to reassess the cogency of a Strategic Autonomy doctrine that prevents the bloc from acting in the security and defence sphere.

3. STRATEGIC AUTONOMY IN THE SECURITY AND DEFENCE REALM: A TRULY AUTONOMOUS EU?

Certain recent developments triggered by the war In Ukraine may question the extent to which failure to extend the Strategic Autonomy doctrine to the security and defence sphere truly allows the Union to act autonomously. This section examines, in turn, the developments at EU and Member State-level that the war in Ukraine triggered, arguing that the impetus towards a more defence-oriented Union that the war undoubtedly has provided has not matured so far in a way that gives substantial meaning to the Strategic Autonomy doctrine in the security and defence sphere.

3.1 **Developments at EU level: The delivery of lethal aid to Ukraine**

With the outbreak of the war in Ukraine, the EU has showcased its willingness to take an active role in supporting Ukraine in this conflict. Confronted with a high intensity conflict at its doorstep, growing security threats and instability, the Heads of State or Government of the EU met at the Versailles Summit of 10 and 11 March 2022.[33] At the Summit, they "decided to take more responsibility for Europe's security" and to take "decisive steps towards building […] European sovereignty, reducing […] dependencies and designing a new growth and investment model for 2030". Particularly, this means aiming to bolster defence capabilities, reducing energy dependencies, and building a more robust economic base. The Versailles Declaration stated that the Russian invasion of Ukraine constitutes "a tectonic shift in European history", with the Member States committing to focus on preparing to counter new threats, including hybrid warfare.[34] At the Summit, the heads of states and governments also emphasised that solidarity among Member States is enshrined in Art. 42(7) TEU.

Immediately after the Versailles Summit, by adopting the Strategic Compass for Security and Defence,[35] a historic decision was made to develop an EU Rapid

[33] European Council, "Informal Meeting of the Heads of State or Government. Versailles Declaration. 10 and 11 March 2022" (11 March 2022) <www.consilium.europa.eu/media/54773/20220311-versailles-declaration-en.pdf> accessed 30 September 2024.

[34] Idem, para 10.

[35] 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

Deployment Capacity. That would allow the deployment of up to 5000 troops into non-permissive environments for different types of crises. Another historic development that the war in Ukraine has triggered is the decision of the EU to provide *lethal* aid to Ukraine, through the European Peace Facility (EPF).[36] Nonetheless, it is for the first time ever that the European Union finances the purchase and delivery of lethal weapons and other equipment to a country under attack – as the Commission President, von der Leyen, stated, "a watershed moment".[37] At the same time, it is because Art. 41(2) TEU prohibits any "operations having military or defence implications" to be financed by the EU budget, the Council opted for the financing of weapons through the European Peace Facility (EPF).

The EPF was created in 2021. Financed through Member States' yearly contributions, it is used to fund actions carried out under the CFSP.[38] It has two pillars.[39] Firstly, the "operations pillar" finances the common costs of CSDP missions and operations that have military or defence implications. The "assistance measures" pillar finances Union action for third states, regional or international organisations, in accordance with Arts. 28 and 30 TEU. It aims at strengthening military and defence capacities and supporting military aspects of peace support operations. In terms of governance, the EPF is not a supranational instrument. As it is funded from the yearly contributions of the Member States, its *modus operandi* is intergovernmental in nature.[40] The financial ceiling of the EPF has been extended three times so far. In March 2024, the EU decided to increase the financial ceiling of the European Peace Facility by 5 billion, by establishing a dedicated Ukraine Assistance Fund, bringing the total financial support allocated via the EPF to 11.1 billion EUR.[41]

The EPF also funds EU initiatives at the military procurement front and in relation to the training of Ukraine Armed Forces. With respect to the latter, the EU has engaged in troop training *inside*[42] EU territory. A few months after the Russian

Peace and Security", document of the Council no. 7371/22, 21 March 2022 at 3.

[36] Council Decision (CFSP) 2022/339 of 28 February 2022 on an assistance measure under the European Peace Facility to support the Ukrainian Armed Forces, *OJ* L 61/1; Council Decision (CFSP) 2022/338 of 28 February 2022 on an assistance measure under the European Peace Facility for the supply to the Ukrainian Armed Forces of military equipment, and platforms, designed to deliver lethal force, *OJ* L 60/1.

[37] European Commission Statement, available at: <ec.europa.eu/commission/presscorner/detail/en/statement_22_1441>; accessed 30 September 2024.

[38] Council Decision (CFSP) 2021/509 of 22 March 2021 establishing a European Peace Facility, and repealing Decision (CFSP) 2015/528 L 102/14.

[39] Consilium, *European Peace Facility*, available at: <www.consilium.europa.eu/en/policies/european-peace-facility/>; accessed 30 September 2024.

[40] Art. 10 et seqq, Council Decision (CFSP) 2021/509 of 22 March 2021 establishing a European Peace Facility, and repealing Decision (CFSP) 2015/528 L 102/14.

[41] Consilium, *European Peace Facility*, available at: <www.consilium.europa.eu/en/policies/european-peace-facility/>; accessed 30 September 2024.

[42] Point 10 Preamble, Council Decision (CFSP) 2022/1968 of 17 October 2022 on a European Union Milit ary Assistance Mission in support of Ukraine (EUMAM Ukraine), *OJ* L 270/85 [Emphasis added].

attack on Ukraine, the European Union Military Assistance Mission Ukraine (EUMAM Ukraine) was launched in October 2022,[43] tasked with the training of over 50.000 Ukrainian soldiers by summer 2024.[44] With respect to the former, in March 2023 the Council agreed on a three-track plan to speed up the delivery and joint procurement of ammunition and missiles for Ukraine, with the first two tracks, each worth €1 billion, being financed through the European Peace Facility.[45] The first track, adopted on 13 April 2023, allows the EU to reimburse member states for material donated to Ukraine from existing stocks or from the reprioritisation of existing orders.[46] The second track, adopted on 5 May 2023, supports the joint procurement of ammunition and missiles from economic operators established in the EU or in Norway.

The third track, adopted on 20 July 2023, is the Act in Support of Ammunition Production (ASAP).[47] It mobilises €500 million from the EU budget to support the ramping up of manufacturing capacities for the production of ground-to-ground and artillery ammunition as well as missiles.[48] As opposed to all the undoubtedly historic aforementioned developments, which operate under an intergovernmental scheme, the Act in Support of Ammunition Production (ASAP) represents a significant development at the supranational level, which is worth noting. From an EU legal perspective, ASAP constitutes a significant development for CFSP/ CSDP – both in formal and substantive terms.[49] The EU institutions, and especially the Commission, had for a long time aspired to enhance the EU's industrial base capacity. For a long time, however, the Court of Justice was not asked to adjudicate cases about armaments and war materials. In this context, the prevailing interpretation of Art. 346 TFEU (the security exception, particularly concerning the production and trade of armaments and war materials) was that it was shielding Member States' discretion in this area.[50] This had been a proposition that the Union institutions were not willing to challenge until the late 1990s. The narrow interpretation of Art. 346(1)(b) by the ECJ,[51] a provision of the Treaties from the early stages of European integration, paved the way for

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[43] Council Decision (CFSP) 2022/1968 of 17 October 2022 on a European Union Military Assistance Mission in support of Ukraine (EUMAM Ukraine), *OJ* L 270/85.

[44] European Union Military Assistance Mission Ukraine (EUMAM), <www.eeas.europa.eu/eeas/european-union-military-assistance-mission-ukraine-eumam_en?s=410260> accessed 30 September 2024.

[45] Consilium, European Peace Facility, *EU military support for Ukraine* <www.consilium.europa.eu/en/policies/eu-response-ukraine-invasion/military-support-ukraine/#ammunition> accessed 30 September 2024.

[46] Ibid.

[47] Regulation (EU) 2023/1525 of the European Parliament and of the Council of 20 July 2023 on supporting ammunition production (ASAP), *OJ* L 185/7.

[48] On the ASAP Regulation, *See* Stéphane Rodrigues, 'Financing European Defence: The end of budgetary taboos', European Papers Vol. 8, 2023, No 3, 1155-1177 at 1170-1171.

[49] Federico Fabbrini, "European Defence Union ASAP: The Act in Support of Ammunition Production and the development of EU defence capabilities in response to the war in Ukraine" (2024) 29(1) European Foreign Affairs Review 67, 76.

[50] Panos Koutrakos, *The EU Common Security and Defence Policy* (Oxford University Press 2013), 257.

[51] Idem, 257 et seqq.

greater involvement of the EU in the field of defence procurement. Nonetheless, legal commitments concerning industrial integration proved difficult.[52]

In 2003, however, Belgium, France, Greece, and Luxembourg put forward the idea of a European armaments' agency. The following year, based on the Joint Action 2004/551/CFSP of the Council of 12 July 2004, the European Defence Agency was set up and subsequently "anchored" in the Treaty of Lisbon.[53] The European Defence Agency (EDA) was tasked with contributing to the identification of the Member States' military capability objectives. Its duties also involved evaluating the observance of the capability commitments given by the Member States, promoting harmonisation of operational needs and the adoption of effective, compatible procurement methods. The EDA also supports defence technology research and acts to strengthen the industrial and technological base of the defence sector.[54] The EDA was intended to act as a catalyst for the pooling of capabilities between Member States. Nonetheless, its initiatives were until recently quite limited and overshadowed by the boldness of the measures taken through the European Peace Facility.[55] As is the case with the EPF, the European Defence Agency's mechanism is intergovernmental, in stark contrast with ASAP.

With the Russian invasion of Ukraine, the Commission took a more active role in shaping the defence industry, through a more expansive use of the "supranational" legal bases available in the Treaties.[56] Arts. 114 and 173(3) TFEU are the legal bases for ASAP. While Art. 173 TFEU established the EU's competence over industrial policy matters,[57] it had been regarded as a marginal legal basis for EU action.[58] Nonetheless, after the war in Ukraine, Art. 173(3) TFEU has been used more frequently, and more aggressively. ASAP, for instance, went beyond research and development by funding ammunitions' production and procurement with EU money.[59] In the same vein, Art. 114 TFEU, the EU internal market competence has been "engineered"[60] to provide the necessary legislative space for the EU to act in this changing landscape.[61] Although the same could be said about the European Defence Fund (EDF), as Art. 173(3) TFEU was jointly used

[52] Steven Blockmans, "The EU's Modular Approach to Defence Integration: An Inclusive, Ambitious and Legally Binding PESCO?" (2018) 55(6) Common Market Law Review 1785, 1788.

[53] See Art. 42(3) TEU; Stéphane Rodrigues, "Financing European Defence: The end of budgetary taboos" (2023) 8(3) European Papers1155, 1157.

[54] Art. 45(1) TEU.

[55] Stéphane Rodrigues, "Financing European Defence: The end of budgetary taboos" (2023) 8(3) European Papers 1155, 1158-9.

[56] Fabbrini (n 49), 77.

[57] Which is the sole provision of Title XVII of Part III TFEU, named 'Industry'.

[58] Fabbrini (n 49), 77-78. As the author points out, Art. 173(3) TFEU had been used by the EU, together with Art. 175 TFEU on cohesion policy, as the legal basis for the adoption of several economic stimulus programmes; in the field of defence industrial development, Art. 173 TFEU had also been used before the war in Ukraine to fund defence related research & development.

[59] Fabbrini (n 49), 78.

[60] Bruno De Witte, "The European Union's Covid-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift" (2021) 58(3) Common Market Law Review 635, 644–646 and 653.

[61] Fabbrini (n 49), 79.

together with other legal bases to adopt in 2021 the Regulation establishing the EDF,[62] despite its €8 billion budget, the EDF operates under intergovernmental structures, with national "reflexes" still prevailing – *de facto* favouring Member States with an established industrial base.[63] Although the Regulation could be seen as tiptoeing between intergovernmentalism and supranationalism in defence,[64] ultimately it is the extent of intergovernmental defence integration under the CSDP that is crucial to determine the EDF's success.[65]

ASAP is not in conflict with the prohibition of funding from the EU budget operations with military or defence implications,[66] as it focuses on defence production and not defence operations. Nonetheless, it is an important development. Through its internal market and industrial policy competences, the EU has accessed the field of military capabilities through the backdoor. By choosing a supranational solution to the defence industrial challenges posed by the war in Ukraine, it essentially positioned the whole Bloc into the conflict through the procurement of defence material.[67]

3.2 Developments at Member-State level: transformations in the European security architecture

In the aftermath of the Ukraine war, the three Scandinavian countries reevaluated their security and defence philosophy. Denmark held a referendum,[68] which accepted to abandon its reservations and opt-in the EU security and defence structures after thirty years.[69] The country can now participate in EU military operations, contribute to the development of military capabilities in the Union and, of course, invoke the mutual assistance clause, deepening integration in this area. In the same vein, and quite remarkably, the two non-aligned Scandi-

[62] Regulation (EU) 2021/697 of the European Parliament and of the Council of 29 April 2021 establishing the European Defence Fund and repealing Regulation (EU) 2018/1092, *OJ* 2021 L 170/149.

[63] Bram Vroege, "Strategic Autonomy in Military Production: The EDF and the Constitutional Limits to EU Defence-Industrial Spending Power" (2023) 28(4) European Foreign Affairs Review 341, 359.

[64] *See,* Calle Håkansson, "The European Commission's New Role in EU Security and Defence Cooperation: The Case of the European Defence Fund" (2021) 30(4) European Security 589.

[65] Vroege (n 63), 361.

[66] Art. 41(2) TEU.

[67] Fabbrini (n 49), 80.

[68] The Danish Parliament, 'The Danish opt-outs from EU cooperation' <www.thedanishparliament.dk/en/eu-information-centre/the-danish-opt-outs-from-eu-cooperation?__cf_chl_tk=lrHGT1seUnRi3y1uqtPycipTNAkybBoHYcZf4cpj3U8-1727109689-0.0.1.1-5972> accessed 30 September 2024.

[69] The Danish opt-out precluded Denmark from (Art. 5, Protocol 22 on the Position of Denmark *OJ* C 326/1) following the incremental institutionalization of security and defence at the EU level after 1999, staying clear of military operations conducted under the CSDP umbrella and abstaining from taking part in intergovernmental decision-making and implementation in the CSDP area.

navian states, Finland[70] and Sweden,[71] successfully applied to become NATO members abandoning their decades-long neutrality.

Lastly, only a few days after the Russian invasion of Ukraine, the German Chancellor decided to modernize the German armed forces. On 27 February 2022, he proposed the adoption of a 100 billion EUR one-off special budget in addition to the regular annual budget. This move, which also has political and constitutional implications,[72] marks the tectonic shift of Germany, which for the first time hits the 2% GDP contribution target.[73] Not only does this have an effect on NATO capabilities, but it also reshapes the European security and defence architecture.

3.3 **EU security and defence policy: significant steps forward but still missing the target**

The war in Ukraine disturbed the comatose state of defence policy[74] in the EU and accelerated its effort to enhance its strategic autonomy.[75] This has driven the development of several new tools in the field of CFSP, among others.[76] Nonetheless, the EU has failed, so far, to give substantial meaning to its strategic autonomy doctrine in security and defence. What those developments suggest, however, is that the Bloc finds itself at a crossroads. The ideal moment to pivot towards a more coherent and integrated Strategic Autonomy doctrine, which also has foreign and security policy implications, has already come. Nonetheless, one cannot argue that the EU has transitioned towards a state of affairs that successfully gives meaning to the notion of a strategic autonomous EU in the security and defence realm. This is despite the reaction of the EU and the European States to the Ukraine war. It is true that those reactions have triggered both constitutional and statutory reforms on the continent, which enable increased participation in multilateral fora and alliances (NATO and CSDP/CFSP) and increased financial investment in defence. Notwithstanding their admittedly historic nature, those developments have not – yet – led to deeper integration.

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[70] NATO, "Finland joins NATO as 31st Ally" <www.nato.int/cps/en/natohq/news_213448.htm> accessed 30 September 2024.

[71] NATO, "Sweden officially joins NATO" <www.nato.int/cps/en/natohq/news_223446.htm > accessed 30 September 2024.

[72] Carolyn Moser, "The War in Ukraine and its Repercussions on Europe's "Security and Defence Constitution" <constitutionnet.org/news/war-in-ukraine-repercussions-europe> accessed 30 September 2024.

[73] NATO, "Defence Expenditure of NATO Countries (2014-2024)" <www.nato.int/nato_static_fl2014/assets/pdf/2024/6/pdf/240617-def-exp-2024-en.pdf > accessed 30 September 2024, 10.

[74] Roberto Caranta, "The EU's role in ammunition procurement" (2023) 8(3) European Papers 1047, 1047.

[75] Thomas Verellen and Alexandra Hofer, "The Unilateral Turn in EU Trade and Investment Policy" (2023) 28 (Special Issue) European Foreign Affairs Review1.

[76] Frank Hoffmeister, "Strategic Autonomy in the European Union's External Relations Law" (2023) 60(3) *Common Market Law Review* 667, 667-70.

The intergovernmental paradigm is still the norm. What the vast majority of the (aforementioned) developments have in common is that they do not operate under a supranational scheme. The only significant (supranational) exception is ASAP. It strengthens the EU's role in building common defence capabilities and it can be seen as a positive step towards developing an EU defence union, as envisaged by Art. 42(2) TEU.[77] Conceding that the "purchase and the development of weapons and related material are activities linked to core functions of the notion of the Westphalian nation-state",[78]at least given the current state of affairs, the volumes and intensity thereof,[79] this is not sufficient to overcome the overarching intergovernmental theme of security and defence in the EU.

But some could argue, why should one be so affixed to the intergovernmental or supranational character of the security and defence landscape in the EU, if the latter ultimately "works"? The answer here is that even in relation to security *per se*, this legal(istic) perspective is not at all trivial. As Part I has shown, a component of an efficient and "autonomous" defence actor is the ability to decide effectively. This necessarily comes down to either some form of supranational decision-making or the continuous existence of a common consensus among *all* EU Member States in security matters to operate effectively under the current intergovernmental scheme. Currently, neither exists. But aside from this, from a pure hard power/military perspective, the EU defence structures lack the necessary operational capabilities to safeguard the Union's ability to defend itself.[80] The ambition of a hard power Europe, that the notion of strategic autonomy ultimately aims for in the defence and security realm, is out of sight.[81]

In the same vein, from a purely defence hard power perspective, the "strength" of EU defence structures is by no means comparable to that of NATO. It is indicative that the size of the rapid reaction force that the EU pledges to make operational is trivial compared to the corresponding response force of NATO.[82] The recent enlargement of NATO with Sweden and Finland further proves the point. Sweden and Finland were fully integrated in the EU defence structures. This means that the two EU Member States were entitled to invoke Art. 42(7) TEU in an event of aggression from a third country. The mutual assistance clause, Art. 42(7), has been recalled by the Versailles Declaration,[83] and is at the heart

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[77] Fabbrini (n 49), 80.

[78] Aris Georgopoulos, "The EDA and EU Defence Procurement Integration", in Nikolaos Karampekios, & Iraklis Oikonomou (eds), *The European Defence Agency* (Routledge 2015), 118.

[79] The ASAP budget is insignificant with only EUR 500mn for two years, a tiny fraction of the 2021-2027 long-term EU budget & NextGenerationEU. See European Commission, "EU budget 2021-2027 and NextGenerationEU" <commission.europa.eu/strategy-and-policy/eu-budget/long-term-eu-budget/2021-2027_en> accessed 30 September 2024.

[80] Oriol Costa and Esther Barbé, "A moving target. EU actorness and the Russian invasion of Ukraine Oriol" (2023) 45(3) Journal of European Integration 431, 434.

[81] Vroege (n 63), 353. In the same vein, Carolyn Moser, "Hard Power Europe?" (2020) 80 ZaöRV, 1, 12.

[82] NATO, "NATO Response Force" **<**www.nato.int/cps/en/natolive/topics_49755.htm> accessed 30 September 2024.

[83] European Council (n 33) at 3.

of the Strategic Compass adopted by the Council of the European Union on 21 March 2022.[84] According to the latter, the new security environment requires "a far greater sense of urgency and determination and [to] show mutual assistance and solidarity in case of aggression".

Art. 42(7) TEU covers any collective response by Member States to an armed attack on the territories of the latter. The collective measure must comply with Art. 51 of the United Nations Charter and, at the same time, in case the Member State is a NATO member, comply with its commitments under the North Atlantic Treaty Organisation. Art. 42(7) TEU (in contrast with the solidarity clause of Art. 222 TFEU) also covers measures outside EU territory. The Member States are obliged to provide support to the Member State invoking Art. 42(7) TEU. Although the clause includes an obligation that is not limited in its symbolic nature,[85] Member States enjoy broad discretion and are able to water down the binding nature and the level of support flowing form their duty to assist the invoking Member State.[86] Each Member State is free to decide the nature and the level of assistance, which includes economic-logistics assistance, diplomatic support, intelligence information and, of course, military options.[87]

The joint application of Sweden and Finland to join NATO not only showcases – the undebatable – fact that the mutual assistance clause by no means has the substantial 'strength' of Art. 5 of the North Atlantic Treaty Organisation, but it is also a testament to the fact that EU security and defence policies are not mature enough. NATO remains the only reliable security provider in Europe. The defence structures of the Union are complementary at best.[88]

4. DEFENCE INDUSTRIAL POLICY AS A POTENTIAL BRIDGE TOWARDS A FULL-FLEDGED STRATEGIC AUTONOMY DOCTRINE?

When considering the EU's industrial policy and strategy, especially its defence industrial policy and the most recent calls for a deeper focus on such developments, a few avenues towards a more comprehensive Strategic Autonomy doctrine become visible. It is worth highlighting that any concept of security and

[84] 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), Council no. 7371/22, 21 March 2022.

[85] Aistė Mickonytė, "The Mutual Assistance Clause under Article 42(7) TEU. Considerations in Light of the Ukraine's Quest for Membership" (2022) Graz Law Working Paper No 04-2022, 7 et seq.

[86] Idem; Carolyn Moser, "Awakening dormant law – or the invocation of the European mutual assistance clause after the Paris attacks" <verfassungsblog.de/awakening-dormant-law-or-the-invocation-of-the-european-mutual-assistance-clause-after-the-paris-attacks> accessed 30 September 2024.

[87] Mickonytė, *supra* (n 85), 20-21.

[88] On the reliance on US security guarantees for Europe, See Luigi Lonardo, *Russia's 2022 War Against Ukraine and the Foreign Policy Reaction of the EU. Context, Diplomacy, and Law* (Springer 2022), 43; Juncos and Sophie Vanhoonacker (n 1), 958-9 and 961; Costa and Barbé (n 80), 442.

defence ultimately relies on the existence of an effective industrial base. Such an industrial base equips an actor like the EU with the proper tools to pursue its security interests (even if this is not necessarily sufficient to attain SA). For instance, as pointed out by one commentator, reaching Strategic Autonomy requires "developing a capacity to act, in particular in traditional security fields where Europe has relied on US support for the past 70 years".[89] As mentioned throughout this chapter, excessive reliance on the US for the EU's security interests has been one of the catalysts to the advent of the Strategic Autonomy doctrine. Already from 2012 the European Council was emphasising the importance of an adequate industrial base to safeguard the EU's security and defence interests:

> 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 strategic autonomy and its ability to act with partners. The EDTIB should be strengthened to ensure operational effectiveness and security of supply, while remaining globally competitive and stimulating jobs, innovation and growth across the EU. These efforts should be inclusive with opportunities for defence industry in the EU, balanced and in full compliance with EU law. The European Council stresses the need to further develop the necessary skills identified as essential to the future of the European defence industry.[90]

Yet, the pursuit of (defence) industrial policies, unlike the broader CFSP sphere, lies within the competence of the EU, [91] even if the precise limits of its competence are still not clearly drawn, as evidenced in the previous Part. This gives the Commission space to act and pursue a strategy that ultimately brings about the infrastructure needed to safeguard the EU's security and defence interests. In this regard, while also considering the broader understanding of Strategic Autonomy discussed in this paper, we consider that the development of the EU's defence industrial base can act as a bridge towards extending the concept of Strategic Autonomy in the defence and security sector more broadly. Nonetheless, this is not a plea for radical institutional change that would lead to integration in the CFSP sphere – we do not take any normative positions on this topic here.

Nonetheless, we do consider that the EU finds itself at a crossroads, whereby from a neofunctionalist perspective, integration in one area can have spillover effects into another one.[92] More specifically, if the EU pursues a more coherent approach to its defence industrial strategy, then the links between this and decision-making in the broader CFSP area are not hard to identify. In any case, it is likely that any spillover effects would arise from political will and not from legal and institutional causes. And it seems that political will exists to pursue the development of Strategic Autonomy in the security and defence sector. In

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[89] Varma (n 9), 65.

[90] European Council Conclusions on EU Common Security and Defence Policy (EUCO 217/13) <data.consilium.europa.eu/doc/document/ST-217-2013-INIT/en/pdf> accessed 30 September 2024, 7.

[91] Art. 173 of the TFEU.

[92] Freudlsperger and Meunier (n 13), 1067-8.

the European Council's Versailles Declaration of 11 March 2022, for example, there was a clear desire both to bolster the bloc's defence industrial policy and to ensure Strategic Autonomy in the defence sector, more broadly:

> In December 2021, we decided that the European Union would take more responsibility for its own security and, in the field of defence, pursue a strategic course of action and increase its capacity to act autonomously. The transatlantic relationship and EU-NATO cooperation, in full respect of the principles set out in the Treaties and those agreed by the European Council, including the principles of inclusiveness, reciprocity and decision-making autonomy of the EU, are key to our overall security. A stronger and more capable EU in the field of security and defence will contribute positively to global and transatlantic security and is complementary to NATO, which remains the foundation of collective defence for its members. The solidarity between Member States is reflected in Article 42(7) TEU. More broadly, the EU reaffirms its intention to intensify support for the global rules-based order, with the United Nations at its core.[93]

The recent Draghi report on the future of European competitiveness has also emphasized the importance of the development of the EU's defence industrial policy to its strategic autonomy:

> The EU's defence sector is critical to ensure Europe's strategic autonomy in facing increasing external security threats, as well as driving innovation through spillovers across the entire economy. Nevertheless, the EU's defence industrial base faces challenges in terms of capacity, know-how and technological edge. As a result, the EU is not keeping pace with its global competitors. Moving forward, new and emerging industrial segments will require massive investment and new technological capabilities, while the EU's strategic defence priorities may continue to diverge from those of the US, calling for immediate policy action at the EU level.[94]

Member States would still be left with the power to veto or opt out of certain developments in the CFSP sphere. Nonetheless, the Draghi report, which has arguably been highly persuasive in determining the portfolios of the present Commission,[95] could give the impetus for further cooperation, even if not integration, in the CFSP area. Ultimately, this can act as a catalyst towards a full embrace of the Strategic Autonomy doctrine in a cross-cutting manner. Such a development would lead to the SA doctrine addressing the EU's economic security needs and would also offer a platform for the eventual pursuit of Strategic Autonomy in the CFSP sphere.

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[93] European Council (n 33), para. 8.

[94] Commission, "The Future of European Competitiveness. Part B | In-Depth Analysis and Recommendations" <commission.europa.eu/document/download/ec1409c1-d4b4-4882-8bdd-3519f86bbb92_en?filename=The%20future%20of%20European%20competitiveness_%20In-depth%20analysis%20and%20recommendations_0.pdf> accessed 30 September 2024.

[95] Carlo Altomonte and Valbona Zeneli, "The Draghi Report Grabbed Europe's Attention. Now it's Time for the EU to Put it Into Action" (Atlantic Council, 6 January 2025) <www.atlanticcouncil.org/blogs/new-atlanticist/the-draghi-report-grabbed-europes-attention-now-its-time-for-the-eu-to-put-it-into-action/> accessed 11 January 2025.

5. CONCLUSION

The war in Ukraine disturbed the comatose state of defence policy in the EU. The steps taken by the EU since the war started in February 2022 are historic, showcasing its willingness to pursue its Strategic Autonomy in security and defence. The investments in the defence sector, the employment of the European Peace Facility to facilitate the delivery of lethal aid to Ukraine, the adoption of the Strategic Compass, and the pledge to create an EU Rapid Deployment Capacity by 2025, along with the Commission's initiative to channel half a billion through ASAP to boost defence procurement are all major steps towards the creation of a defence union. It is the creation of such union that essentially gives the necessary meaning to the Strategic Autonomy doctrine in its security and defence iteration. Nonetheless, these steps are not enough. In an ever-changing threat environment, the EU cannot operate autonomously, relying heavily on NATO for its security, with its defence structures being complementary at best. Against this backdrop, and in the meantime, industrial policy may prove the best alternative for the Union to invest in, not only financially, but also politically, until the necessary consensus for significant changes in the security and defence landscape is (ever) formed.

COLLECTIVE DEFENCE IN THE EU: A LAW-IN-CONTEXT ANALYSIS OF ARTICLES 42(7) TEU AND 222 TFEU IN LIGHT OF THE WAR IN UKRAINE

Federica Fazio*

1. INTRODUCTION

In 1991, then-Belgian Minister of Foreign Affairs, Mark Eyskens, described the EU as 'an economic giant, a political dwarf and a military worm'.[1] Today, the EU is no longer a political dwarf or a military warm, though military capability shortfalls remain.

In 2007, the Lisbon Treaty modified the 1992 Maastricht Treaty (or TEU) – as well as the other founding treaty, the Treaty Establishing the European Community (TEC), which it renamed as TFEU – and transformed the European Security and Defence Policy (ESDP), establishing the Common Security and Defence Policy (CSDP). Outlined in Articles 42-46 of Title V, Section 2, the CSDP has made security and defence an integral part of the Common Foreign and Security Policy (CFSP) intergovernmental framework and allows EU Member States to make security and defence policy decisions on the basis of unanimity.[2]

While reaffirming the Maastricht Treaty's principle that a common defence policy would develop progressively, with a common defence requiring unanimous agreement by the European Council,[3] the Lisbon Treaty introduced a mutual assistance obligation for EU Member States in Article 42(7) TEU. This obligation requires Member States to assist one another in the event of an armed attack. Consequently, although the failure of the 1952 European Defence Community (EDC) project means that the EU lacks a common defence – such as NATO's

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[1] As quoted by C.R. Whitney 'War in the Gulf: Europe; Gulf Fighting Shatters Europeans' Fragile Unity', *The New York Times*, 25 January 1991, available at <www.nytimes.com/1991/01/25/world/war-in-the-gulf-europe-gulf-fighting-shatters-europeans-fragile-unity.html>.

[2] Art. 42(4), Consolidated version of the Treaty on European Union *OJ* [2016] C 202/38, 7.06.2016.

[3] Idem, Art. 42(2); Art. J.4(1), Treaty on European Union, *OJ* [1992] C 191/59, 29.07.1992.

integrated military structure, shared nuclear doctrine, and other traditional defensive alliance characteristics – the EU Treaty now includes a qualified mutual defence clause.

While acknowledging that NATO remains the cornerstone of territorial defence for those countries who are members of both organisations, the 2016 EU Global Strategy (EUGS) and, more recently, the 2022 Strategic Compass, have stressed the need for EU Member States to be prepared to translate mutual assistance commitments into action.[4] Although the strategic autonomy envisaged in the EUGS remains a work in progress to a great extent, the EU has made considerable steps forward, particularly since Russia launched an all-out war against Ukraine on 24 February 2022.[5]

The Union has provided Ukraine with €11.1 billion in military aid through the European Peace Facility (EPF), including lethal weapons for the first time,[6] established a €5 billion Ukraine Assistance Fund,[7] and launched a training mission for Ukrainian forces on its soil.[8] The EU has also introduced initiatives like the European Defence Industry Reinforcement through common Procurement Act (EDIRPA) to address capability gaps, the Act in Support of Ammunition Production (ASAP)[9] to boost artillery shell production, and the European Defence Industry Strategy (EDIS), its first defence industrial strategy, supported by the

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[4] European External Action Service, *Shared Vision, Common Action: A Stronger Europe: A Global Strategy for the European Union's Foreign and Security Policy*, 2 June 2016, 9, 14, 19 and 20, available at <www.eeas.europa.eu/sites/default/files/eugs_review_web_0.pdf>; European External Action Service, *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* 24 March 2022,10, 14, 23, 28, 30, 31, 34, 35, 36, 39, 40, 53 and 54, available at <www.eeas.europa.eu/sites/default/files/documents/strategic_compass_en3_web.pdf>.

[5] *See*, e.g., T. E. Brøgger 'A 'Europe of defence?' The establishment of binding commitments and supranational governance in European security and defence', *Journal of European Integration* 2024, 1–20; F. Fabbrini, 'The EU Beyond the War in Ukraine', in F. Fabbrini (ed.), *EU Fiscal Capacity: Legal Integration After Covid-19 and the War in Ukraine* (Oxford: Oxford University Press 2022), 127–153; F. Fabbrini, 'To "Provide for the Common Defense": Developments in Foreign Affairs and Defence', in Federico Fabbrini (ed.), *The EU Constitution in Time of War* (Oxford: Oxford University Press 2025) 21–47; D. Fiott, 'In every crisis an opportunity? European Union integration in defence and the War on Ukraine', (45/3) *Journal of European Integration* 2023, 447–462; H. Maurer *et al.*, 'The EU and the invasion of Ukraine: a collective responsibility to act?', (99/1) *International Affairs* 2023, 219–238.

[6] Council of the European Union, 'European Peace Facility: Timeline-European Peace Facility', available at <www.consilium.europa.eu/en/policies/european-peace-facility/>; *see* also F. Fabbrini 'Funding the War in Ukraine, the European Peace Facility, the Macro-Financial Assistance Instrument, and the Slow Rise of and EU Fiscal Capacity' (11/4) *Politics & Governance* 2023, 52–61.

[7] Council of the European Union, 'Ukraine Assistance Fund: Council allocates €5 billion under the European Peace Facility to support Ukraine militarily', Press Release 18 March 2024, available at <www.consilium.europa.eu/en/press/press-releases/2024/03/18/ukraine-assistance-fund-council-allocates-5-billion-under-the-european-peace-facility-to-support-ukraine-militarily/>.

[8] Council of the EU, Ukraine: EU launches Military Assistance Mission', Press Release, 15 November 2022, available at <www.consilium.europa.eu/en/press/press-releases/2022/11/15/ukraine-eu-launches-military-assistance-mission/>.

[9] *See*, e.g., F. Fabbrini 'European Defence Union ASAP: The Act in Support of Ammunition Production and the development of EU defence capabilities in response to the war in Ukraine', (29/1) *European Foreign Affairs Review* 2024, 67–84.

European Defence Industry Programme (EDIP) for long-term readiness. Additionally, the Strategic Compass envisions the creation of a Rapid Deployment Capacity of up to 5,000 troops by 2025.[10]

Therefore, the EU has adopted important defence initiatives and, by endangering the credibility of NATO's Article 5 security guarantee, the second Trump administration will likely accelerate this trend further. Stronger initiatives should be expected given the evolving US stance on both NATO and Ukraine.

In light of these developments, this paper aims to review the EU's mutual assistance clause, Art 42(7) TEU, by looking at its formulation, interpretation and evolution over time. This study employs a law-in-context approach, generally recognised as the most suitable methodology in European studies to analyse a law or legal phenomenon in the larger political, social, historical and economic context in which it is embedded.[11]

Given the topic, special attention will be devoted to the historical and geopolitical context in which the clause was adopted and has come to operate. To this end, historical unclassified documents relative to the 1948 Brussels Treaty (BT), the 1954 Modified Brussels Treaty (MBT), the 2004 Constitutional Treaty (CT), and the 2007 Lisbon Treaty (LT) will be analysed and discussed. Examining these past treaties and related documents not only sheds light on the evolution of the mutual assistance clause but also highlights how the EU's legal framework has been influenced by the priorities and challenges of its Member States over time.

The paper is structured as follows. The next section examines the evolution of the collective defence clause through the above-mentioned treaties. This is followed by a legal analysis of Article 42(7) TEU and the collective defence responsibilities it entails for the members of the EU, including differences and overlaps with similar obligations under Article 222 TFEU and Article 5 NAT.

The analysis shows that, similarly to Article 5 NAT, Article 42(7) TEU envisages an *obligation of result, not of means* but no disciplinary measures are contemplated in the event of inaction or inadequate action by one or more Member States. Furthermore, Article 42(7) TEU, like Article 5 NAT, covers both conventional and unconventional attacks, including cyber, hybrid, and space attacks, as well as state-sponsored and non-state-sponsored terrorist attacks. In fact, France preferred invoking Article 42(7) TEU over Article 222 TFEU in the aftermath of the 2015 Paris terrorist attacks, due to its intergovernmental nature, automaticity, and lack of procedural requirements. This paper, however,

[10] Strategic Compass, *supra* note 4, at 6, 11, 25, and 31; on the Rapid Deployment Capacity, *see*, e.g., C. Meyer *et al.*, 'From EU battlegroups to Rapid Deployment Capacity: learning the right lessons?', (100/1) *International Affairs* 2024, 181–201.

[11] M. Donaldson, 'Peace, war, law: teaching international law in contexts', (18/4) *International Journal of Law in Context* 2022, 393-402; P. Cane, 'Context, context everywhere', (16/4) *International Journal of Law in Context* 2020, 459-463. W. Twinning, *Law in Context: Enlarging a Discipline* (Oxford: Claredon Press 1997).

argues that the defence obligations triggered by the invocation of Article 42(7) TEU are *automatic*, unlike those under Article 5 NAT, *but not*, as some authors have suggested,[12] *unconditional*, due to the presence of both the Irish and NATO clauses.

2. MUTUAL DEFENCE THROUGH THE TREATIES

2.1 **The negotiations leading to Article 4 of the Brussels Treaty**

The EU's mutual assistance clause, also known as mutual defence clause, traces back to the 1948 BT. A year after the United Kingdom (UK) and France signed the Dunkirk Treaty against Germany, the emerging Soviet threat led the two Allied powers to conclude a similar defensive arrangement with the Benelux countries.[13]

A draft agreement modelled on the Dunkirk Treaty, which was a collective defence treaty based on Article 51 of the Charter of the United Nations (UNC), was presented first to France on 5 February and then to the Benelux countries on 19 February.[14] While France accepted it without reservation, the Low Countries expressed some concerns. Led by Belgium, which played a prominent role in the negotiations, they advocated for the adoption of a single pact modelled on the Rio Treaty and not multiple bilateral agreements following the Dunkirk model. Additionally, they preferred it to be grounded in Article 52 rather than Article 51 UNC.[15]

The Rio Treaty, still in force today, obligates its eighteen members to 'undertake to assist in meeting the attack', while allowing them to choose the means of assistance.[16] In contrast, the now-defunct Dunkirk Treaty required each of the two parties to provide the other with 'all the military and other support and assistance in his power' in the event of a German armed attack.[17] The Rio Treaty, therefore, envisages an obligation of result, whereas the Treaty of Dunkirk imposed an obligation of means.

As for Article 52 UNC, it is generally interpreted as constrained by Article 53,

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[12] H.J. Blake and S. Mangiameli 'Article 42 [CSDP: Goals and Objectives; Mutual Defence] (ex-Article 17 TEU), in H.J. Blake and S. Mangiameli (eds.) *The Treaty on European Union (TEU): A Commentary* (Berlin: Springer-Verlag Berlin Heidelberg 2013), at 1228.

[13] T. Insall and P. Salmon, *The Brussels and North Atlantic Treaties, 1947-1949: Documents on British Policy Overseas*, Series I, Volume X (London: Routledge 2015), n.7, 14-16 and n.12, at 28.

[14] Idem, n.12, at 28, n.14, at 31, and n.17, at 34.

[15] Idem, n.23, at 43, n.26, at 48, n.27, at 49, n.28, at 51, n.29, 52-53, n.33, 60-61, n.37, at 67.

[16] Art. 3, Inter-American Treaty of Reciprocal Assistance, Rio de Janeiro, 2 September 1947, 21 U.N.T.S. 77.

[17] Article 2, Treaty of Alliance and Mutual Assistance between the United Kingdom and France, Dunkirk, 4 March 1947, 9 U.N.T.S. 187.

which requires previous authorisation by the UN Security Council (UNSC) for enforcement action.[18] Therefore, had express reference been made to Article 52, any action could have been blocked by a Soviet veto in the UNSC before it could be implemented. In contrast, Article 51 UNC does not require UNSC authorisation for acts of individual or collective self-defence and, thus, no veto would have been possible. The Prime Minister of Belgium, Paul-Henri Spaak, however, held a different opinion. He believed that a regional pact under Article 52 would not have been constrained by Article 53, which he argued applied only to enforcement actions lacking prior UNSC authorisation.

Eventually, a document based on an adjusted Dunkirk model and on Article 51 UNC was signed on 17 March 1948 jointly by the UK, France and the Benelux countries in Brussels.[19] In the final text, Article 4 stated that 'If any of the High Contracting Parties should be the object of an *armed attack in Europe*, the other High Contracting Parties will, in accordance with the provisions of Article 51 of the Charter of the United Nations, afford the Party so attacked *all the military and other aid and assistance in their power*' [emphasis added].[20]

Although, as for Article 5 NAT, the determination of the *casus foederis* was left to the individual parties to the Treaty, compared to Article 5 NAT, the obligations imposed by Article 4 BT were somewhat more stringent, at least in theory. The wording '*all the military and other aid and assistance in their power*' seems to suggest that the signatories would have been required to undertake military action since, unlike Article 5, the article envisaged an *obligation of means, and not result* in case of an 'unprovoked attack' on one of the parties.[21]

Yet, without concrete US military support, the clause amounted to nothing more than a paper tiger, powerless against the Soviet bear.[22] Article 4 allowed the five powers to rearm and reorganise,[23] but '[t]he only real deterrent to Russian aggression [*was and still*] is the possession by the Americans of the atomic bomb'.[24]

In the words of Secretary of State George C. Marshall, the BT was an '*essential prerequisite* to any wider arrangement in which other countries including the United States might play a part' [emphasis added].[25] Since the US could not formally accede to the BT, a separate and parallel Atlantic security system was contemporarily pursued and then established a year later with the signing of the NAT.[26]

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[18] T. Insall and P. Salmon, *supra* note 13, n.29, at 52 n.33, at 60, and n.37, at 67.
[19] Idem, n.46, at 73, n.55, 88-89, n.73,112-113.
[20] Art. 4, Brussels Treaty of Economic, Social and Cultural Collaboration and Collective Self-Defence, Brussels, 17 March 1948, 18 U.N.T.S. 3.
[21] T. Insall and P. Salmon, *supra* note 13, n.90, at 137 and n.95, at 147.
[22] Idem, n.127, at 203.
[23] Idem, n.4, at 10, n.6, at 13, and n.120, 182-183.
[24] Idem, n.46, at 74.
[25] Idem, n.79, at 124.
[26] Idem, n.62, at 96, n.63, 97-98, n.65, note 3, at 100, n.68, 103-104, n.71, at 110, n.77, at 122, n.81, at 126, n.82, 127-128, n.83, at 128, n.84, at 130, n.87, 132-134, n.88, 134-135, n.89,

2.2 The negotiations leading to Article 5 of the Modified Brussels Treaty

After the French parliament rejected the EDC Treaty, negotiations – initiated by the UK – soon followed to amend the BT to include also Italy and West Germany, and bring the latter into NATO. In September 1954, the signatories of the EDC Treaty, plus the UK, the US and Canada met in London to devise an alternative plan. The MBT was signed in Paris a month later on 23 October 1954 and entered into force on 6 May 1955, replacing the BT. On the same day, after its occupation by the Western Allies ended, Germany joined NATO, and any references to the potential renewal of an aggressive policy by Germany disappeared from the MBT.[27]

The MBT retained the mutual defence clause in Article 5, which fully replicated the content of Article 4 BT,[28] and established the WEU to serve as a framework for coordination on security and defence policy. The WEU did not have any of the supranational features of the EDC, but was rather intergovernmental in nature. It did not possess an integrated military command structure to avoid duplicating NATO's, relying, therefore, on the latter for its implementation[29].

2.3 The negotiations leading to Article I-41.7 of the Draft Constitutional Treaty

In 1992, the Maastricht Treaty created the CFSP as a second pillar of the EU and envisioned 'the eventual framing of a common defence policy' within it.[30] Under the Treaty, however, it was the WEU that carried out decisions and actions with defence implications.[31] The WEU would, in fact, become the 'defence component of the European Union and a means to strengthen the European pillar of the Atlantic Alliance'.[32] To this end, WEU Foreign and Defence Ministers signed the Petersberg declaration, which gave its name to the crisis management tasks that the WEU would undertake alongside the common defence.[33]

135-136, n.90, 137-138, n.91,138-140, n.92, 140-141, n.94, 142-143, n.95, 145-147, n.96, at 149, n.107, at 162, n.109, 164-165, n.110, at 166, n.111, at 168, n.112, 169-170, n.145, at 234.

[27] NATO, *German Reunification*, 1 January 1990, available at <www.nato.int/cps/en/natohq/declassified_136311.htm#:~:text=Meanwhile%2C%20in%20Germany%2C%20families%20were,effect%20on%205%20May%201955>; *see* also G.W. Pedlow, 'NATO 1949-1967', in J.A. Olsen (ed.) *Routledge Handbook of NATO* (Routledge 2024), at 32.

[28] *See* table 1.

[29] Art. 4, Protocol Modifying and Completing the Brussels Treaty, Paris, 23 October 1954, 221 U.N.T.S. 59.

[30] Art. J.4(1), Treaty on European Union, *OJ* [992] C 191/1, 29.07.1992.

[31] Idem, Art. J.4(2).

[32] Treaty on European Union, Declaration on Western European Union, *OJ* [1992] C 191/105, 29.07.1992.

[33] Namely 'humanitarian and rescue tasks; peacekeeping tasks; tasks for combat forces in crisis management, including peacemaking'; *see* 'Petersberg Declaration made by the WEU Council of Ministers', 19 June 1992, II.4, available at <www.cvce.eu/en/obj/petersberg_declaration_made_by_the_weu_council_of_ministers_bonn_19_june_1992-en-16938094-bb79-41ff-951c-

Later on, the 1997 Amsterdam Treaty further clarified that 'the progressive framing of a common defence policy […] might lead to a common defence, should the European Council so decide'.[34] The WEU would give the EU 'access to an operational capability' for the Petersberg tasks, which came to be incorporated into the EU treaty framework.[35] '[C]loser institutional relations' between the two organisations should, therefore, be pursued with the aim of integrating the WEU into the EU.[36]

After the ESDP was launched in 1999,[37] the Petersberg tasks were then progressively transferred to the EU, and eventually so was the Article 5 MBT mutual defence clause before the WEU was disbanded in 2011.[38]

Most transfers occurred at the 2000 Nice European Council, but debates on a mutual defence clause gained momentum only after the Laeken European Council convened the European Convention in 2001.

In the final report of the Working Group VIII on Defence, the Chairman, Michel Barnier, noted that 'Several members of the Group proposed a collective defence clause […] Such a collective defence clause was considered unacceptable by some Member States for reasons connected with the non-aligned status of certain Member States, and by others who considered that collective defence was covered by the Atlantic Alliance'.[39]

These 'certain Member States' were identified in section C. The non-aligned states were Austria, Finland, Ireland and Sweden,[40] while the common members of the EU and NATO (at the time ten) were Belgium, Denmark, France, Germany, Greece, Italy, Luxemburg, the Netherlands, Portugal, Spain and the UK.[41] Additionally, Denmark represented a 'special case' as it did not participate in the elaboration and implementation of the Union's decisions with defence implications by virtue of Article 6 of Protocol 5 annexed to the Treaty of Amsterdam.[42]

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[34] Art.17(1), Consolidated Version of the Treaty on European Union, *OJ* [1997] C 340/1, 10.11.97.

[35] Idem, Art. 17(2).

[36] Idem. Art. 17(1).

[37] European Parliament, *Cologne European Council 3-4 June 1999, Conclusions of the Presidency*, available at <www.europarl.europa.eu/summits/kol1_en.htm>.

[38] T. Dyson and T. Konstadinides 'The Legal Underpinnings of European Defence Cooperation', in T. Dyson and T. Konstadinides (eds.) *European Defence Cooperation in EU Law and IR Theory.* New Security Challenges Series. (London: Palgrave Macmillan 2013), at 67; R.A. Wessel, 'The EU as black widow; Devouring the WEU to give birth to a European Security and Defence Policy', in V. Kronenberger (ed.), *The European Union and the international legal order: Discord or* harmony, (The Hague: T.M.C. Asser Press 2001), 405-434.

[39] European Convention, *Barnier Report, Final Report of Working Group VIII on Defence Chaired by Michel Barnier*, 16 December 2002, paras. 62-63, 21-22, available at <data.consilium.europa.eu/doc/document/CV-461-2002-INIT/en/pdf>.

[40] Idem, para.36, at 11.

[41] Idem, para.34, at 11.

[42] Idem, para.35, at 11; Art. 6, Protocol on the position of Denmark, *OJ* [1997] C 340/101, 10.11.1997.

'Under those circumstances' the report continued '[…] [the] new Treaty could therefore establish a **closer type of cooperation on defence**, open to all Member States wishing to enter into such a commitment and fulfilling the requirements for such a commitment to be credible […]'[bold in original].[43] This concept of enhanced cooperation had been introduced by the Amsterdam Treaty and extended to CFSP by the 2001 Nice Treaty[44], although it expressly excluded 'matters having military or defence implications'.[45] The concept made its way into draft Article 30(7) issued by the Convention Presidium of April 2003, which stated that 'Under this cooperation, if one of the Member States participating in such cooperation is the victim of *armed aggression* on its territory, the other participating States shall give it *aid and assistance by all the means in their power*, *military and other*, in accordance with Article 51 of the United Nations Charter [emphasis added].'[46] Therefore, as highlighted by Reichard, a collective defence clause mirroring Article 5 MBT was seen 'as an option to be realised by interested Member States under enhanced cooperation […]'.[47]

In the CT presented by the President of the Convention, Valéry Giscard d'Estaing, at the Thessaloniki European Council of June 2003, Article 30(7) became Article I-40(7) and a sentence was added at the request of Denmark stating that '[*i*]*n the execution of closer cooperation on mutual defence, the participating Member States shall work in close cooperation with the North Atlantic Treaty Organisation*' [emphasis added].[48]

Following pressure by the British government,[49] a new draft of Article I-40(7) CT was presented by the Italian Presidency of the Council at an Intergovernmental Conference (IGC) meeting in Naples in November 2003, which further clarified that '***Commitments and cooperation in this area* [of mutual defence] *shall be consistent with commitments under NATO, which, for those States which are members of it, remains the foundation of their collective defence***

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[43] Barnier Report, *supra* note 39, para.63, 21-22.

[44] Arts. 27a-27e, Treaty of Nice, *OJ* [2001] C 80/8, 9, 10.03.2001.

[45] Idem, Art. 27b. *See* also M. Cremona, 'Enhanced Cooperation and the Common Foreign and Security and Defence Policies of the EU', EUI Working Paper LAW (2009/21), *European University Institute*, at 2, available at <cadmus.eui.eu/bitstream/handle/1814/13002/LAW_2009_21.pdf?sequence=1&isAllowed=y>; B. De Witte, 'The Process of Ratification of the Constitutional Treaty and the Crisis Options: A Legal Perspective', EUI Working Paper LAW (2004/16), *European University Institute*, at 11, available at <cadmus.eui.eu/bitstream/id/1993/law04-16.pdf/>.

[46] The European Convention, *Draft articles of the Constitutional Treaty on external action*, CONV 685/03, 23 April 2003, Art. 30(7), at 17, available at <www.astrid-online.it/static/upload/protected/Draf/Draft-Art-on-Ext-Action-parte-I-tit-.pdf>.

[47] M. Reichard. *The EU-NATO Relationship: A Legal and Political Perspective* (London: Routledge 2006), at 201.

[48] Idem, at 202; *see* also European Convention, *Draft Constitution, Volume I – Revised text of Part One*, CONV 724/03, 26 May 2003, Art. I-40(7), at 30, available at <www.statewatch.org/media/documents/news/2003/may/draftcv26May.pdf>. The draft was then submitted to the President of the European Council in Rome on 18 July 2003. *See* Art. 40(7), Draft Treaty establishing a Constitution for Europe, *OJ* [2003] C169/1, 18.07.2003.

[49] A Constitutional Treaty for the EU- The British Approach to the European Union Intergovernmental Conference 2003, Cm 5934, September 2003, para. 95. at 38.; Convention on the Future of Europe, HL Deb 9 September 2003, vol.652, cc.195.

and the forum for its implementation'[bold in original, emphasis added and translated from French].[50]

While this text still made express reference to 'military and other' means of assistance, like both Article 4 BT and 5 MBT before it, the text presented at the Brussels Conference a month later generically mentioned '*an obligation of aid and assistance by all the means in their power*'[emphasis added].[51] This 'watering down' resulted from a November 2003 compromise between France, Germany, and the UK to ensure that the mutual defence clause did not create the impression that the EU was becoming a military alliance rivalling NATO.[52] Protests from neutral and non-aligned countries then led the Italian Presidency to also incorporate the so-called 'Irish formula' about avoiding prejudice to the specific character of the security and defence policy of certain Member States.[53]

No further modifications were made to it except for changes to its numbering (from Article I-40(7) to Article I-41(7)) until the CT was signed in Rome on 29 October 2004.[54]Although ratified by fifteen Member States, the draft CT was eventually rejected in national referenda in France and the Netherlands in May and June 2005, respectively. Therefore, the Treaty and the mutual defence clause envisaged in Article I-41(7) never entered into force.

2.4 **The negotiations leading to Article 42(7) of the Lisbon Treaty**

In response to the French and Dutch failed referenda, the European Council in June 2005 called for a period of reflection to review the CT, assess national debates, and determine how best to proceed with the ratification process.[55] Ultimately, this period of reflection came to an end when the European Council of

[50] Conference of the Representatives of the Governments of the Member States, *IGC 2003 – Naples Ministerial Conclave: Presidency proposal*, CIG 52/03 Add 1, 25 November 2003, Art. I-40(7), at 24, available at <www.astrid-online.it/static/upload/protected/Conc/Conclave-Proposte-pres-it-52-Add-1.pdf>.

[51] Conference of the Representatives of the Governments of the Member States, I*GC 2003 – Defence*, CIG 57/03, 2 December 2003, Art. I-40(7), at 3, available at <data.consilium.europa.eu/doc/document/CG%2057%202003%20INIT/EN/pdf>.

[52] D. Keohane, 'ESDP and NATO', in G. Grevi *et al.* (eds.) *European Security and Defence Policy: The First 10 Years (1999-2009)* (Paris: European Union Institute for Security Studies 2009), at 131; M. Reichard, *supra* note 47, at 204.

[53] Conference of the Representatives of the Governments of the Member States, *Letter from Erkki TUOMIOJA, Minister of Foreign Affairs of Finland, Brian COWEN, Minister of Foreign Affairs of Ireland, Benita FERRERO-WALDNER, Minister of Foreign Affairs of Austria, Laila FREIVALDS, Minister of Foreign Affairs of Sweden,* CIG 62/03 DELEG 30, 5 December 2003, at 2, available at <data.consilium.europa.eu/doc/document/CG%2062%202003%20INIT/EN/pdf>.

[54] Conference of the Representatives of the Governments of the Member States, *Treaty establishing a Constitution for Europe*, 29 October 2004, Art. I-41(7), 46-47, available at <data.consilium.europa.eu/doc/document/CG%2087%202004%20REV%202/EN/pdf>. *See* table 1 for the final text.

[55] Council of the European Union, *Brussels European Council 15/16 June 2006, Presidency Conclusions*, 10633/1/06 REV1, CONCL 2, 17 July 2006, 16-17, available at <www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/90111.pdf>.

21-23 June 2007 established a comprehensive mandate for a subsequent IGC under the Portuguese Presidency to draw up a 'Reform Treaty', based on the March 2007 Berlin Declaration signed for the 50th anniversary of the signature of the Treaties of Rome.[56]

The aim of this Treaty was not to replace all existing treaties with a single one, as the CT had attempted to do, but rather to amend the TEU and TEC by introducing the changes agreed in the context of the previous IGC of 2004.[57] The new IGC officially started in July 2007 and concluded in October 2007. The LT was signed on 13 December 2007 in Lisbon and entered into force on 1 December 2009.

No changes were made to Article I-41(7) CT, which became first Article 28(7) A[58] and then Article 42(7) TEU. The next section will analyse this legal provision in detail.

Article 4 1948 Brussels Treaty	'If any of the High Contracting Parties should be the object of an *armed attack in Europe*, the other High Contracting Parties will, in accordance with the provisions of Article 51 of the Charter of the United Nations, afford the Party so attacked *all the military and other aid and assistance in their power*.'
Article 5 1954 Modified Brussels Treaty	'If any of the High Contracting Parties should be the object of an *armed attack in Europe*, the other High Contracting Parties will, in accordance with the provisions of Article 51 of the Charter of the United Nations, afford the Party so attacked *all the military and other aid and assistance in their power*.'
Article I-41(7) 2004 Draft Constitutional Treaty (Never entered into force)	'If a Member State is the victim of *armed aggression on its territory*, the other Member States shall have towards it an *obligation of aid and assistance by all the means in their power*, in accordance with *Article 51* of the United Nations Charter. *This shall not prejudice the specific character of the security and defence policy of certain Member States. Commitments and cooperation in this area shall be consistent with commitments under the North Atlantic Treaty Organisation, which, for those States which are members of it, remains the foundation of their collective defence and the forum for its implementation*.'
Article 42(7) 2007 Lisbon Treaty	'If a Member State is the victim of *armed aggression on its territory*, the other Member States shall have towards it an *obligation of aid and assistance by all the means in their power*, *in accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States. Commitments and cooperation in this area shall be consistent with commitments under the North Atlantic Treaty Organisation, which, for those States which are members of it, remains the foundation of their collective defence and the forum for its implementation*.'

Table 1: The evolution of the mutual defence clause

[56] For the text of the Berlin declaration, *see* <news.bbc.co.uk/2/hi/europe/6491487.stm>.

[57] European Commission, *Brussels European Council 21-22 June 2007, Presidency Conclusions*, D/07/2, Draft IGC Mandate, Annex I, available at <ec.europa.eu/commission/presscorner/detail/en/doc_07_2>.

[58] Art. 28(7) A, Treaty of Lisbon, *OJ* [2007] C 306/34, 17.12.2007.

3. LEGAL ANALYSIS OF ARTICLE 42(7) TEU

Article 42(7) TEU states:

> If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States.
>
> Commitments and cooperation in this area shall be consistent with commitments under the North Atlantic Treaty Organisation, which, for those States which are members of it, remains the foundation of their collective defence and the forum for its implementation.[59]

Several elements seem to deserve further examination:

I. The use of the words 'armed aggression' rather than 'armed attack';
II. The fact that the aggression must have taken place on the territory of the aggressed;
III. The framework of response: bilateral (Member States) vs collective (EU);
IV. The phrasing 'obligation of aid and assistance by all the means in their power';
V. The express reference to Article 51 UNC;
VI. The so-called 'Irish formula';
VII. The 'NATO formula'.

3.1 **Armed aggression vs armed attack**

An armed attack is a form of armed aggression, which means that that of armed aggression is a broader category, comprising other forms of aggression beyond armed attacks. Although the two terms are often used interchangeably, some authors[60] have argued that since Article 42(7) TEU refers to armed aggression while Article 5 NAT to armed attack, the former could potentially cover a broader spectrum of threats than the latter. For example, it could be activated for those hybrid acts that do not meet the threshold of armed attack under Article 5 NAT, such as recent incidents in the Baltic Sea.[61] Therefore, at least in theory, EU Member States would be legally bound to the collective defence in cases when NATO Member States are not. This argument seems implausible for two orders of reasons.

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[59] Art. 42(7), Consolidated version of the Treaty on European Union, *OJ* [2016] C 202/1, 7.06.2016.

[60] A. Bakker *et al.* 'The EU's Mutual Assistance Clause.' Spearheading European Defence: Employing the Lisbon Treaty for a Stronger CSDP', Report, *Clingendael Institute*, 2016, at 25, available at <www.jstor.org/stable/resrep05543.8>.

[61] German Federal Foreign Office, *Joint Declaration by the Foreign Ministers of Germany, France, Poland, Italy, Spain and the United Kingdom in Warsaw*, Press Release, 19 November 2024, available at <www.auswaertiges-amt.de/en/newsroom/news/2685538-2685538>; European Commission, *Joint Statement by the European Commission and the High Representative on the Investigation into Damaged Electricity and Data Cables in the Baltic Sea*, Statement, 26 December 2024, available at <ec.europa.eu/commission/presscorner/detail/en/statement_24_6582>.

First, it is not only Article 5 NAT that preferred the coinage armed attack to armed aggression but also Article 51 UNC, which both Article 5 NAT and 42(7) TEU make express reference to.[62] As pointed out by Reichard, Article 103 UNC gives it legal primacy over other international treaties.[63] Article 30(1) of the Vienna Convention on the Law of Treaties (VCLT) reflects the effects of this supremacy.[64] As a consequence, since obligations under Article 42(7) TEU cannot be wider than those under Article 51 UNC, armed aggression and armed attack are to be intended as synonyms.[65]

No document has been found which explains why the drafters decided to change the wording from armed attack into armed aggression. Article 6(2) of the Preliminary Draft of the CT of 4 December 2002, known as 'the Penelope' draft, as well as the Additional Act No 1 on Defence attached to it, still used the word 'attack'.[66] However, the version issued by the Convention Presidium a few months later in April 2003 had replaced 'attack' with the word 'aggression'.[67] In the absence of any reference to the motives behind this change in the documents that were issued between December 2002 and April 2003, it is safe to assume, as some commentators have,[68] that 'the reference to "armed aggression" may simply be the result of a literal translation of the French "agression armée".'

Second, in 2016, NATO Allies recognised cyberspace as a domain of warfare, alongside land, sea, air and, more recently, space, and countering hybrid threats has been an area of strengthened EU-NATO cooperation ever since.[69] Additionally, '[h]ybrid attacks have been explicitly identified by both the EU Strategic Compass and the NATO Strategic Concept as qualifying for collective response'.[70] Furthermore, NATO has recently announced the launch of

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[62] F. Fazio, 'Collective defence in NATO: A legal and strategic analysis of Article 5 in light of the war in Ukraine', DELI Working Paper Series (2/24), *Dublin European Law Institute*, 4-5.

[63] M. Reichard, *supra* note 47, at 210.

[64] *See*, e.g., A. Orakhelashvili, '1969 Vienna Convention. Article 30: Application of Successive Treaties Relating to the Same Subject Matter', in O. Corten and P. Klein (eds.) *The Vienna Convention on the Law of Treaties A Commentary* (Oxford: Oxford University Press 2011), 764 and 780.

[65] H.J. Blake and S. Mangiameli, *supra* note 12, at 1225.

[66] European Commission, *Feasibility Study-Contribution to A Preliminary Draft Constitution of The European Union-Working Document*, 4 December 2002, Art. 6(2), at 5 and Additional Act No 1 – Defence, at 90, available at <www.europarl.europa.eu/meetdocs/committees/afco/20021217/const051202_en.pdf>.

[67] The European Convention, *supra* note 46, at 17.

[68] B. Deen *et al.*, 'Uncharted and uncomfortable in European defence: The EU's mutual assistance clause of Article 42(7)', Clingendael Report, *Netherlands Institute of International Relations*, January 2022, at 7, available at <www.clingendael.org/sites/default/files/2022-01/uncharted-and-uncomfortable.pdf>; J. Howorth 'The European Draft Constitutional Treaty and the Future of the European Defence Initiative: A Question of Flexibility', (9/4) *European Affairs Review* 2004, 483-508; E. Perrot 'The art of commitments: NATO, the EU, and the interplay between law and politics within Europe's collective defence architecture', (28/1) *European Security* 2019, at 45.

[69] European Parliament, *Joint Declaration by the President of the European Council, the President of the European Commission and the Secretary General of the North Atlantic Treaty Organization'*, 8 July 2016, available at <www.europarl.europa.eu/cmsdata/121580/20160708_160708-joint-NATO-EU-declaration.pdf>.

[70] B. Siman, 'Hybrid Warfare: Attribution is Key to Deterrence', *Egmont Institute*, 30 Janu-

'Baltic Sentry' to bolster its military presence in the Baltic Sea and deter further sabotage of critical undersea infrastructure by state and non-state actors alike.[71] Therefore, it seems unreasonable to believe that an act of hybrid warfare would trigger Article 42(7) TEU but not Article 5 NAT.

As discussed in the previous sections, Article 42(7) traces back to Article 4 BT, and, like Article 5 NAT, it was originally designed for collective defence against conventional military attacks and not attacks by non-state actors. The activation of Article 42(7) TEU in response to a non-state-sponsored terrorist attack, despite the existence of Article 222 TFEU specifically designed to address such incidents, seems to support the argument of an extensive interpretation of this norm.[72]

Furthermore, like NATO, the EU recognised cyberspace and space as operational domains in 2018[73] and has since put forward a new Cybersecurity Strategy in 2020,[74] a Military Vision and Strategy on Cyberspace as a Domain of Operations in 2021,[75] and the first-ever Space Strategy for Security and Defence in 2023.[76] There is a strong focus in the Compass on regular exercises to further strengthen mutual assistance in case of armed aggression, including in the cyber,[77] hybrid[78] and space domains.[79] Therefore, it seems safe to assume that, although the interpretation of Article 42(7) TEU has never been discussed or expanded in European Council decisions or conclusions, unlike that of Article 5 NAT in NATO Summit communiqués, Article 42(7) should be considered applicable under the same circumstances as Article 5. Non-traditional attacks, such as terrorist attacks, cyberattacks, hybrid attacks and attacks to, from and within space are, therefore, also covered by the EU's Article 42(7), with potential overlaps between the two clauses.

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ary 2023, available at <www.egmontinstitute.be/hybrid-warfare-attribution-is-key-to-deterrence/>.

[71] NATO, *Joint press conference by NATO Secretary General Mark Rutte with the President of Finland Alexander Stubb and the Prime Minister of Estonia Kristen Michal at the Baltic Sea NATO Allies Summit*, 14 January 2025, available at <www.nato.int/cps/en/natohq/opinions_232116.htm> SHAPE, 'Baltic Sentry to Enhance Nato's Presence in the Baltic Sea', 14 January 2025, available at <shape.nato.int/news-releases/baltic-sentry-to-enhance-natos-presence-in-the-baltic-sea>.

[72] H.J. Blake and S. Mangiameli, *supra* note 65, 1225-1226. *See* also section 3.3.

[73] Council of the European Union, 'EU Cyber Defence Policy Framework (update 2018)', 14413/18, 19 November 2018, available at <data.consilium.europa.eu/doc/document/ST-14413-2018-INIT/en/pdf#:~:text=Cyberspace%20is%20the%20fifth%20domain,and%20resilient%20cyber%20operational%20capabilities>.

[74] Available at <digital-strategy.ec.europa.eu/en/library/eus-cybersecurity-strategy-digital-decade-0>.

[75] Available at <www.statewatch.org/media/2879/eu-eeas-military-vision-cyberspace-2021-706-rev4.pdf>.

[76] Available at <ec.europa.eu/transparency/documents-register/detail?ref=JOIN(2023)9&lang=en>.

[77] Strategic Compass, *supra* note 4, at 31, 35 and 39.

[78] Idem, at 31 and 39.

[79] Idem, at 34 and 36.

3.2 **Armed aggression on a Member State's territory**

While Article 5 NAT states that the armed attack against one or more NATO Allies must have been committed in 'Europe or North America', with Article 6 further clarifying the geographical reach of the attack that can trigger the mutual defence obligation, Article 42(7) TEU simply states that a member state must be '*victim of armed aggression on its territory*'. This leads to two considerations:

First, only the aggressed member state(s) can invoke Article 42(7) TEU. It was France, the victim of the terrorist attacks, that invoked Article 42(7) in 2015. In contrast, in the case of Article 5 NAT, it was not the US, the victim of the terrorist attack, but its Allies who offered to invoke it.[80]

Second, in light of the fact that no further clarification is provided in terms of geographical coverage, overseas territories outside of Europe should be intended as included in the scope of Article 42(7). For example, should an attack occur on the land, in the waters or in the airspace of the French territory of *La Martinique*, in the Caribbean, France could potentially invoke Article 42(7) as it did after the Paris attacks. It could not invoke NATO's Article 5 though, since the island is located below the Tropic of Cancer.[81]

However, it has been argued that since EU primary law does not apply to all overseas territories, neither should Article 42(7) TEU.[82] In fact, some scholars and practitioners[83] have emphasised the distinction between the EU's outermost regions (ORs), which include for example *La Martinique*, and the EU's overseas countries and territories (OCTs).

The former are part of EU territory, subject to EU law, and enjoy all the rights and obligations of EU membership, though certain specific measures apply.[84] In contrast, the latter are associated with the EU but not considered part of it.[85] While EU law does not extend to them, their foreign, security and defence policy often falls under the jurisdiction of the EU Member States they maintain special ties with. As EU law applies to ORs but not OCTs, it follows that Article 42(7) TEU could be invoked for ORs but not for OCTs. This classification has gained renewed attention following US President Donald Trump's refusal to rule out the use of military force to acquire Greenland, an OCT.[86]

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[80] F. Fazio, *supra* note 62, at 6.

[81] P.N.I. Serradell, *A Comparative Study of Article 5 of the NATO and Article 42(7) of the Treaty on the European Union: Its Scope and Limits*, (Brussels: Finabel 2024), at 12.

[82] H.J. Blake and S. Mangiameli, *supra* note 65, at 1226.

[83] E. Perot, *supra* note 68, at 49; B. Deen *et al.*, *supra* note 68, at 17.

[84] Arts.349 and 355, Consolidated Version of the Treaty on the Functioning of the European Union, *OJ* [2016] C 202/195 and 197, 7.06.2016. ORs are currently 9 in total. The full list is available at <ec.europa.eu/regional_policy/policy/themes/outermost-regions_en>.

[85] Idem, Arts.198-204. OCTs are currently 13. The full list can be found at <international-partnerships.ec.europa.eu/countries/overseas-countries-and-territories_en>.

[86] F. Fazio, 'What happens if Trump invades Greenland?', Blog, DCU Brexit Institute, *Dublin City University*, 13 January 2025, available at <dcubrexitinstitute.eu/2025/01/what-happens-if-

However, the status of ORs and OCTs can be easily changed by the European Council without requiring any amendment to the TFEU. The French territory of Mayotte, for example, was originally an OCT until 2014 when it became an OR at the request of France.[87] Were it to come under attack, France could, therefore, invoke Article 42(7). This also applies to the Spanish cities of Ceuta and Melilla in Morocco[88], which, although located above the Tropic of Cancer, are not covered by Article 5 NAT.[89]

Finally, the clause's sole reference to Member State territories appears to exclude its applicability to ships in international waters or military personnel deployed out-of-area. This means that if ships sailing under an EU Member State's flag in international waters or soldiers involved in an EU CSDP mission or other operations get attacked, Article 42(7) does not apply.[90] Therefore, the recent proposal to send European troops outside NATO and without US support, to secure a potential ceasefire between Russia and Ukraine would leave them vulnerable to attacks.

3.3 **Framework of response: Individual (Member States) vs collective (EU) response**

While Article 42(7) TEU commits only the Member States to come to each other's assistance in case of armed aggression, another norm, Article 222 TFEU, requires both the Member States and the EU institutions to provide support in the event of terrorist attacks as well as man-made or natural disasters. It states:

> 1. The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the object of a terrorist attack or the victim of a natural or man-made disaster. The Union shall mobilise all the instruments at its disposal, including the military resources made available by the Member States, to:
>
> (a) prevent the terrorist threat in the territory of the Member States;
> (b) protect democratic institutions and the civilian population from any terrorist attack;
> (c) assist a Member State in its territory, at the request of its political authorities, in the event of a terrorist attack;
> (d) assist a Member State in its territory, at the request of its political authorities, in the event of a natural or man-made disaster.

trump-invades-greenland/>.

[87] F. Gouardères 'Outermost regions (ORs)', Fact Sheets on the European Union, *European Parliament*, March 2024, available at <www.europarl.europa.eu/factsheets/en/sheet/100/outermost-regions-ors-#:~:text=The%20European%20Union%20supports%20the,the%20Canary%20Islands%20(Spain)>.

[88] For more information on EU territories, *see* <taxation-customs.ec.europa.eu/territorial-status-eu-countries-and-certain-territories_en>.

[89] P.N.I. Serradell, *supra* note 81, at 12.

[90] E. Perot, *supra* note 68, at 50. B. Deen *et al.*, *supra* note 68, at 18.

2. Should a Member State be the object of a terrorist attack or the victim of a natural or man-made disaster, the other Member States shall assist it at the request of its political authorities. To that end, the Member States shall coordinate between themselves in the Council.

3. The arrangements for the implementation by the Union of the solidarity clause shall be defined by a decision adopted by the Council acting on a joint proposal by the Commission and the High Representative of the Union for Foreign Affairs and Security Policy. The Council shall act in accordance with Article 31(1) of the Treaty on European Union where this decision has defence implications. The European Parliament shall be informed.

   For the purposes of this paragraph and without prejudice to Article 240, the Council shall be assisted by the Political and Security Committee with the support of the structures developed in the context of the common security and defence policy and by the Committee referred to in Article 71; the two committees shall, if necessary, submit joint opinions.

4. The European Council shall regularly assess the threats facing the Union in order to enable the Union and its Member States to take effective action.'[91]

Like the mutual defence clause, this solidarity clause was first introduced into the EU legal framework during the negotiations leading to the signing of the CT. The final report of Working Group VIII on Defence released in December 2002, roughly a year after 9/11, stated that '[t]here was broad support for a new clause spelling out the principle of solidarity between Member States' and that 'such a clause […] would apply to *threats from non-State entities*' and would be triggered '*only at the request of the civilian authorities of the country* concerned'[emphasis added].[92]

These recommendations translated into Article X of Part I, Title V.[93] In the comments, it was explained that its location in Part I of the CT had to do with the '*horizontal scope*' of the clause, whose activation would involve '*both national military capabilities and the instruments of the Union*'.[94] It was also specified that the clause would be activated in case of a terrorist threat or attack 'by non-State bodies'.[95] The reasoning behind this was that '*[a]n attack by a third State, even if it took the form of a "terrorist" attack, would constitute an act of "aggression"*' and, as such, be covered by draft Article 30(7), the mutual defence clause.[96]

A month later, a sentence was added to the article, which was no longer Article X but Article I-42, and read: '***The Union and its Member States shall act jointly in a spirit of solidarity if a Member State is the victim of terrorist attack or natural or man-made disaster***. The Union shall mobilise *all the*

[91] Art. 222, *supra* note 84.
[92] Barnier Report, *supra* note 39, paras.57-58, p.20.
[93] For the full text of the article, *see* The European Convention, *supra* note 48, at 22.
[94] Barnier Report, *supra* note 39, at 22.
[95] Idem.
[96] Idem.

instruments at its disposal, including the military resources ***made available by the Member States***'[bold and italics in original].[97] This addition was in response to amendments proposed jointly by the UK, France and Germany, which along with Austria, Belgium, Finland, and Ireland, also advocated for the inclusion of natural or man-made disasters. No changes were made to the version presented in Thessaloniki in June 2003, with the exception of the article concerning the implementation of the clause, which was identified as Article III-231.[98]

The draft presented by the Italian Presidency in November 2003 included a declaration stating that neither Article I-42 nor Article III-231[99] would 'affect the *right of another Member State to choose the more appropriate means* to comply with its own solidarity obligation towards that Member State' [emphasis added and translated from French], which had been victim of a terrorist attack or natural or man-made disaster.[100]

Based on the abovementioned declaration, Denmark further declared that its 'participation in actions or legal acts pursuant to Articles I-42 and III-231 w[ould] take place with respect of Part I and Part II of the Protocol on the position of Denmark'.[101] Both declarations were reiterated in the version of the CT of December 2003, in which no significant changes were made to either Article I-42 or III-231.[102]

The terrorist attacks perpetrated by Al-Qaeda on 11 March 2004 in Madrid, the first of this kind suffered by an EU Member State, led the Council to adopt a Declaration on Solidarity Against Terrorism. The declaration committed both EU Member States and those scheduled to join the EU on 1 May 2004, as part of the so-called 'Big Bang' enlargement, 'to mobilise all the instruments at their disposal, including military resources' to assist Spain.[103] The declaration, however, also reiterated that it would be up to Member States and upcoming Member States 'to choose the most appropriate means to comply with this solidarity commitment'.[104] Adopted at a time when the CT had not even been signed or ratified yet, the declaration was a mere political act. Therefore, the

[97] The European Convention, *supra* note 48, at 103.

[98] The draft was then submitted to the President of the European Council in Rome on 18 July 2003. *See* Art. 42, Draft Treaty establishing a Constitution for Europe, *OJ* [2003] C 169/1, 18.07.2003.

[99] A sentence was added in Art. III-231.1 stating that 'The Council shall act in accordance with Article III-210, paragraph 1 where this decision has defence implications'[translated from French]. *See* Conference of the Representatives, *supra* note 50, at 55.

[100] Idem, at 46.

[101] Idem, at 45.

[102] Conference of the Representatives of the Governments of the Member States, *IGC 2003 − Intergovernmental Conference (12−13 December 2003) ADDENDUM 1 to the Presidency proposal*, CIG 60/03 Add 1, 9 December 2003, Art. III-231, at 69, available at <www.statewatch.org/media/documents/news/2003/dec/cig60add1_en.pdf>.

[103] European Council, *Declaration on Solidarity Against Terrorism*, 25 March 2004, Annex II, at 18, available at <www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/79637.pdf>.

[104] Idem.

commitments it envisaged had non-legally binding effects.[105]

In the final version of the CT signed on 29 October 2004, Article I-42 became Article I-43 and Article III-231, Article III-329. The text of both articles remained unaltered, save for some minor changes.[106] A declaration on Article I-43 and III-329, which mirrored the one included in the draft of November 2003, was annexed.[107]

When the CT project failed, the solidarity clause first made its way into the LT, as Article 188 R, Title VII, which merged Article I-43 and Article III-329.[108] The clause was then eventually incorporated into the TFEU, where it was not subject to any further changes, nor has it been since. Declaration 37 on Article 222 TFEU reiterated what already stated in Declaration 9 on Article I-43 and III-329, which is that this legal provision was not 'intended to affect the right of another Member State to choose the most appropriate means to comply with its own solidarity obligation.'[109] This means that, like the mutual defence clause, the solidarity clause envisages an *obligation of result rather than means*, despite the fact that, unlike the former, it explicitly refers to military means, similarly to Article 5 NAT.

Given that the intent of the legislator was for the solidarity clause to cover terrorist attacks by non-state actors,[110] France should have invoked Article 222 TFEU, the solidarity clause, rather than Article 42(7) TEU, the mutual assistance clause, after the ISIS attacks on 13 November 2015 that killed 131 people and injured 416 in Paris. However, the French government chose to invoke Article 42(7) TEU for three reasons: 1) Article 42(7) TEU involves only Member States, with no formal role for the EU as an institution; 2) invoking it does not require a unanimous decision by the Council; and 3) there is no formal procedure to be followed to activate it.

Article 222 TFEU, on the other hand, explicitly refers to the role the EU would play if invoked, which is to mobilise all available instruments, including the military resources provided by the Member States.[111] Additionally, paragraph 3 states that where its decisions have defence implications, the Council needs to

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[105] European Council, *Declaration on Combating Terrorism*, 25 March 2004, 1-13, available at <www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/79637.pdf>.

[106] Conference of the Representatives of the Governments of the Member States, *Treaty establishing a Constitution for Europe*, 29 October 2004, Art. I-43, at 48 and Art. III-329, at 263, available at <data.consilium.europa.eu/doc/document/CG%2087%202004%20REV%202/EN/pdf>.

[107] Conference of the Representatives of the Governments of the Member States, *Declarations to be annexed to the Final Act of the Intergovernmental Conference and the Final Act, Declaration 9 on Articles I-43 and III-329*, CIG 87/04 ADD 2 REV 2, 25 October 2004, available at <www.proyectos.cchs.csic.es/euroconstitution/library/constitution_29.10.04/declarations_EN.pdf>.

[108] Art.188 R, Treaty of Lisbon, *OJ* [2007] C 306/1, 17.12. 2007.

[109] Consolidated version of the Treaty on the Functioning of the European Union, *A. Declarations Concerning Provisions of the Treaties. 37. Declaration on Article 222 of the Treaty on the Functioning of the European Union*, *OJ* [2016] C 202/349, 7.06.2016.

[110] B. Deen *et al.*, *supra* note 68, at 10-11.

[111] Idem.

act in accordance with Article 31(1) TEU, which requires decisions to be taken by unanimity, save for the possibility of constructive abstention.

The exact procedure for the implementation of Article 222 TFEU by the Union is set out in the Council Decision of 24 June 2014. The Decision not only further clarifies what is meant by terrorist attack,[112] but also poses a condition on the invocation of the clause: 'the affected Member State may invoke the solidarity clause if, *after having exploited the possibilities offered by existing means and tools at national and Union level*, it considers that *the crisis clearly overwhelms the response capabilities available to it*' [emphasis added].[113]

By contrast, no formal procedure is foreseen for the implementation of Article 42(7) TEU, making this norm more flexible. When former French Minister of Defence, Jean-Yves Le Drian, formally invoked Article 42(7) TEU at a meeting of the EU Foreign Affairs Council on 17 November, the Ministers of Defence of the then-twenty-eight Member States expressed their 'unanimous and full support to France and their readiness to provide all the necessary aid and assistance'.[114] Former High Representative for Foreign Affairs and Security Policy, Federica Mogherini, clarified that this assistance would consist in 'offers of material assistance or of support in theatres of operations where France [was] engaged' and that '[n]o formal decision or conclusion by the Council w[ould] be required to implement article 42(7).'[115] The obligations imposed by Article 42(7) TEU, therefore, unlike those under Article 222 TFEU and Article 5 NAT, are *automatic*.

At a joint press conference with Mr Le Drian on 17 November, Ms Mogherini added that, although the process would be *Member State-driven* and the aid and assistance provided bilaterally, 'the European Union c[ould] facilitate this and coordinate this' if useful and necessary.[116] Therefore, although the article does not formally envision a role for EU institutions, the attacked Member State can still request the EU's support, for instance when it comes to coordinating the overall aid and assistance, as France did.

The invocation of Article 42(7) TEU was described as 'a political act', by Le Drian

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[112] Council of the European Union, *Council Decision of 24 June 2014 on the arrangements for the implementation by the Union of the solidarity clause*, Art. 3, *OJ* [2014] L 192/55, 1.07.2014. The Council Framework Decision 2002/475/JHA is no longer in force as it was replaced by Directive 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism. For the full list of acts that constitute terrorist offences, *see* Art. 3 Title II, Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, Art.3, *OJ* [2017] L 88/6, 31.03.2017.

[113] Art.4, *OJ* [2014] L 192/56, 1.07.2014.

[114] Council of the European Union, *Outcome of the 3426th Council meeting, Foreign Affairs*, 14120/15 Presse 69 PR CO 61. Meeting of defence Ministers. Mutual defence clause (article 42(7) TEU), at 6, 16 and 17 November 2015, available at <www.consilium.europa.eu/media/23101/st14120en15.pdf>.

[115] Idem.

[116] European Commission, *LIVE Foreign Affairs Council (Defence)- press conference HRVP Federica Mogherini*, 17 November 2015, available at <audiovisual.ec.europa.eu/en/video/I-112329>.

and Mogherini.[117] Le Drian, however, avoided explaining why it was chosen over Article 5 NAT, simply supporting the President's decision.[118] *Politico* reported that the EU clause was preferred to avoid pressuring the US or provoking further instability in the Middle East.[119] France's relationship with NATO has always been rather complicated. The country had withdrawn from NATO's integrated military command structure in 1966 and rejoined it in 2009, and has been a strong advocate of European strategic autonomy. Additionally, France had suffered a terrorist attack only ten months earlier. On 7 January 2015, employees of the satirical magazine Charlie Hebdo were killed by members of Al-Qaeda in the Arabian Peninsula (AQAP) in Paris. Additional attacks followed on 8 and 9 January. At an informal European Council meeting on 12 February 2015, EU leaders then pledged to 'reinforce action against terrorist threats' with specific measures.[120] Hence, as suggested by de Galbert, the French government's decision to activate Article 42(7) TEU rather than Article 5 NAT may have aimed to 'create additional momentum to reinforce several EU counterterrorist tools' and prevent further attacks.[121]

Following the activation of the mutual assistance clause, bilateral negotiations took place between Member States and the French government regarding the type of aid to be provided. As Mogherini had anticipated, the assistance differed based on the foreign and defence policies of each Member State.[122] For instance, Ireland increased its personnel assigned to the EU Training Mission in Mali, which had been established in 2013 to support French operations against militant Islamist groups in Mali and the Sahel region through Operations Serval and Barkhane.[123] The next section will show that the aid provided can, in fact, include both civil and military assistance, as the clause imposes *an obligation of result, not means*.

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[117] European Commission, *LIVE Foreign Affairs Council (Defence)- press conference HRVP Federica Mogherini, Q&A*, 17 November 2015, available at <audiovisual.ec.europa.eu/en/video/I-112330?lg=EN>.

[118] Idem.

[119] J. Brigazzi, 'EU agrees to French request for military help. Countries unanimously support move to provide aid and assistance in fight against ISIL', *Politico*, 17 November 2015, available at <www.politico.eu/article/eu-agrees-to-french-request-for-military-help/>.

[120] European Council, *Informal meeting of the Heads of State or Government Brussels, 12 February 2015 - Statement by the members of the European Council*, 12 February 2015, available at <www.consilium.europa.eu/en/press/press-releases/2015/02/12/european-council-statement-fight-against-terrorism/>.

[121] S. de Galbert, 'After the Paris Attacks, France Turns to Europe in its Time of Need', Commentary, *Center for Strategic and International Studies*, 19 November 2015, available at <www.csis.org/analysis/after-paris-attacks-france-turns-europe-its-time-need>.

[122] European Commission, *supra* note 117.

[123] House of the Oireachtas, 'EU Issues - Dáil Éireann Debate - Written answers by the Irish Minister for Foreign Affairs and Trade Charles Flanagan', 27 September 2016, available at <www.oireachtas.ie/en/debates/question/2016-09-27/467/>.

3.4 **Obligation of aid and assistance by all the means in their power**

Another important point of analysis concerns the kind of aid and assistance that EU Member States are legally obliged to provide under Art 42(7). The current wording 'by all the means in their power' seems to suggest that the assistance offered can be either civil or military in kind. An explicit reference to military means appeared in Article 4 BT and 5 MBT, but was then later abandoned in draft Article I-40(7) CT presented at the Brussels Conference in December 2003. Despite this, the fact that there is no expressed exclusion seems to imply that the type of aid and assistance that the Member States are compelled to provide could potentially also include military means.[124]

The article's placement in Section 2, under the Provisions on the Security and Defence Policy, strongly supports this interpretation. This argument is further reinforced by the inclusion of the Irish and NATO clauses that follow, as their presence would be unnecessary if military means were not contemplated. Moreover, unlike the phrasing 'as it deems necessary' in Article 5 NAT, which grants Allies discretion over the nature, timing, and scale of their response[125], the wording 'by all the means in their power' in Article 42(7) TEU appears to allow far less flexibility. This has led some authors to argue that, unlike Article 5 NAT, Article 42(7) TEU 'entails an *unconditional obligation* of mutual assistance'.[126] Yet, the presence of the Irish and NATO clauses does pose conditions, as will be analysed in sections 3.6 and 3.7. Therefore, like NATO Allies, EU Member States are also free to choose the type and scope of assistance.

3.5 **The express reference to Article 51 of the UN Charter**

Like Article 5 NAT, Article 42(7) TEU makes express reference to Article 51 UNC. This reference was first introduced in Article 4 BT and kept in Article 5 MBT and Article I-41(7) CT. This is because, as explained in section 2.1, Article 51 UNC allows the members of the international community to act in both individual and collective self-defence in case of an armed attack directed against one of them, without previous UNSC authorisation. Both Article 5 NAT and Article 42(7) TEU are expression of the right of collective defence and, therefore, the obligations they envisage must be consistent with Article 51 UNC.[127]

[124] M. Reichard, *supra* note 47, at 201; E. Perot *supra* note 68, at 53.
[125] F. Fazio, *supra* note 62, 8-9.
[126] H.J. Blake and S. Mangiameli, *supra* note 65, at 1228.
[127] An in-depth analysis and discussion of collective defence in international law is outside the scope of this paper. A brief overview is, however, essential to understand EU Member States' collective defence obligations and how they relate to UN principles.

3.6 **The Irish clause**

This clause did not form part of either Article 4 BT or Article 5 MBT. It first appeared in the Maastricht Treaty,[128] primarily in response to Ireland's concerns about neutrality, and later made its way into the collective defence clause with the draft CT and later the LT. The provision is generally understood to refer to militarily non-aligned Member States and countries with long-standing traditions of neutrality - currently Austria, Cyprus, Ireland and Malta - or special security and defence arrangements - like Denmark, which until 2022 had an opt-out from the CSDP.[129] The clause no longer applies to Finland and Sweden, who joined NATO in 2023 and 2024, respectively.

These 'special status' countries are not required to disregard their positions to comply with mutual defence obligations. However, Article 42(7) TEU does not clearly state which countries are covered by this clause and, this is something that cannot be determined without looking at the drafting history of the article.[130] According to Perot, the clause could potentially apply also to Member States like Germany, where parliamentary authorisation of the use of force is constitutionally required.[131]

The provision seemingly suggests that various degrees of commitment were envisioned for each Member State based on the unique nature of their respective security and defence policies. Yet, this would translate in an evident asymmetry in military obligations, undermining the core purpose of the mutual defence clause, which is to ensure an equal sense of security among all parties involved[132]. The fact that Ireland, and initially Germany, have, through the EPF, provided non-lethal military support to Ukraine, which is not an EU Member State but a candidate country, in the context of Russia's war of aggression, suggests that this category of Member States would not be completely exonerated from the legal obligation to provide aid and assistance in the event of an invocation of Article 42(7) TEU; rather, they would be entitled to choose means of assistance which are not incompatible with their status or domestic law requirements.[133] This aligns with the argument that Member States are called 'to examine on a case-by-case basis whether their status requires non-participation' with the conclusion varying depending on the country.[134]

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[128] Art. J.4(4), Treaty on European Union, *OJ* [1992] C 191/59, 29.07.1992.

[129] Council of the European Union 'EU defence cooperation: Council welcomes Denmark into PESCO and launches the 5th wave of new PESCO projects', Press Release, 23 May 2023, available at <www.consilium.europa.eu/en/press/press-releases/2023/05/23/eu-defence-cooperation-council-welcomes-denmark-into-pesco-and-launches-the-5th-wave-of-new-pesco-projects/>.

[130] M. Reichard 2006, *supra* note 47, at 211.

[131] E. Perot *supra* note 68, at 52.

[132] M. Reichard 2006, *supra* note 47, at 211; H.J. Blake and M. Mangiameli, *supra* note 65, 1228-1229.

[133] House of the Oireachtas, 'Ukraine War Dáil Éireann Debate', 8 May 2024, available at <www.oireachtas.ie/en/debates/question/2024-05-08/74/>; The Federal Government, 'The arms and military equipment Germany is sending to Ukraine', 19 August 2024, available at <www.bundesregierung.de/breg-en/news/military-support-ukraine-2054992>

[134] H.J. Blake and M. Mangiameli, *supra* note 65, at 1229.

However, it should be noted that the Court of Justice of the EU has no jurisdiction on CFSP and CSDP (Article 24(1) TEU and 275 TFEU).[135] Therefore, as with NATO, if any Member State, and not just certain ones, decides to provide little or no aid and assistance at all, there is no sanctioning mechanism to compel it to act otherwise.[136]

3.7 **The NATO clause**

The 'NATO clause', like the Irish clause, was not included in Article 5 MBT but was later incorporated into Article I-41(7) CT. Based on this clause, special caveats apply also to the twenty-three EU members states that are also in NATO. This seems to imply that, for members of both organisations, mutual defence obligations arising from the NAT have primacy over those arising from the TEU.[137]

This is consistent with Article 8 NAT,[138] as well as Article 30(2) VCLT.[139] Furthermore, while not explicitly stated, the primacy of Article 5 NAT over Article 42(7) TEU is evident from EU security strategies[140] and EU-NATO Joint Declarations.[141]

Therefore, the EU's mutual defence obligation would only apply as long as it did not conflict with the prevailing obligation under the NAT. For this reason, before its invocation in 2015, it was thought that the EU's mutual defence clause could only be triggered for attacks against non-NATO EU Member States.[142] The French case has shown that, in the event of an attack, members of both organisations can choose which of the two articles to invoke. It has also revealed that calling for one does not automatically trigger the other, though this does not preclude the possibility of simultaneously invoking both clauses if necessary.[143] As highlighted by Fiott, 'such a situation would raise chain of command, financing and transportation considerations'.[144]

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[135] *See*, e.g., P. Koutrakos, 'Judicial Review in the EU's Common Foreign and Security Policy', (67/1) *International and Comparative Law Quarterly* 2018,1-35.

[136] F. Fazio, *supra* note 62, at 9.

[137] H.J. Blake and M. Mangiameli, *supra* note 65, at 1217.

[138] Art. 8, North Atlantic Treaty, Washington, D.C., 4 April 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

[139] Art. 30(2), Vienna Convention on the Law of Treaties, Vienna, 22 May 1969, 1155 U.N.T.S. 331.

[140] Council of the European Union, 'European Security Strategy: A Secure Europe in a Better World', December 2003, 9, available at <www.consilium.europa.eu/media/30823/qc7809568enc.pdf>; EUGS, *supra* note 4, at 19 and 20; 2022 Strategic Compass, *supra* note 4, at 2,5,13, and 17.

[141] Council of the European Union, *Joint Declaration on EU-NATO Cooperation by the President of the European Council, the President of the European Commission, and the Secretary General of the North Atlantic Treaty Organization*, 10 July 2018, at 8, available at <www.consilium.europa.eu/media/36096/nato_eu_final_eng.pdf>; NATO, *Joint Declaration on EU-NATO Cooperation by the President of the European Council, the President of the European Commission, and the Secretary General of the North Atlantic Treaty Organization*, 10 January 2023, at 8, available at <www.nato.int/cps/en/natohq/official_texts_210549.htm>.

[142] M. Reichard 2006, *supra* note 47, at 221.

[143] A. Bakker *et al.*, *supra* note 60, at 26; D. Fiott, 'Rising Risks: Protecting Europe with the Strategic Compass', CSDS Policy Brief (10/2022), *Centre for Security, Diplomacy and Strategy*, at 2.

[144] D. Fiott, *supra* note 143, at 3.

The article could also potentially be invoked by a non-NATO EU Member State against a non-EU NATO Ally, unlike Article 5 MBT.[145] In hypothesis, if attacked, Cyprus or Greece could, for example, activate the EU's collective defence clause against Turkey.[146] As a matter of fact, as Deen *et al.* pointed out, in 2020 Greece and Turkey were on the verge of war in the Eastern Mediterranean and, at one point, the Greek government made express reference to Article 42(7) TEU.[147] In such a scenario, members of both organisations could be subject to competing requests for assistance and have only one set forces. Therefore, NATO obligations would probably take precedence over European obligations.[148] Still, whether this precedence would really apply also depends on the circumstances. For instance, if the US were to attack Greenland, it is highly unlikely that Nordic countries like Sweden or Finland, as well as France would provide assistance to the US rather than Denmark.[149]

Additionally, this primacy of NATO over EU commitments does not amount to a 'right of first refusal' in favour of NATO. Despite the fact that the 2003 Berlin Plus arrangements did include a right of first refusal for NATO, even for peacekeeping operations, the launch of Operation Artemis in the Democratic Republic of Congo in June 2003 made it very clear that this was not the case.[150] The 1999 Helsinki European Council Conclusions had stated that the EU would act only in instances 'where NATO as a whole is not engaged',[151] but as pointed out by Blake and Mangiameli 'this principle is a matter of policy and not of law and in no way means that the EU may only act when NATO has refused to implement a special operation'.[152] The two organisations have conducted parallel operations in the same geographical areas, such as in Kosovo, Afghanistan and the Horn of Africa. In fact, the bulk of the over forty CSDP missions and operations that the EU has launched from 2003 onwards, have been conducted either in cooperation, coordination or competition with the Alliance.[153]

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[145] The 2003 Berlin Plus framework agreement consists of classified letter exchanges between then-EU High Representative Javier Solana and then-NATO Secretary General Lord Robertson. In one such letter, Solana allegedly stated that the ESDP and, therefore, also the EU's mutual defence clause, would never be used against a NATO Ally. However, as Reichard noted, the Berlin Plus arrangements are not binding. M. Reichard 2006, *supra* note 47, at 222.

[146] Since Cyprus joined the EU in 2004, formal cooperation between the two institutions has stalled due to the unresolved dispute between Turkey, a non-EU NATO Ally, and Cyprus, a non-NATO EU Member State, over the latter's sovereignty. Twenty years later, seemingly insurmountable obstacles still stand in the way of a peace deal and the two countries keep using their respective leverage, Turkey within NATO and Cyprus within the EU, to prevent formal meetings between the two institutions, blocking formal cooperation. For more information, *see*, e.g., S.J. Smith and C. Gebhard, 'EU–NATO relations: running on the fumes of informed deconfliction', (26/3), *European Security* 2017, 303-314.

[147] B. Deen *et al.*, *supra* note 68, 41-42.

[148] E. Perot 2019, *supra* note 68, at 52.

[149] F. Fazio, *supra* note 86.

[150] D. Keohane, *supra* note 52, at 130.

[151] European Council, *Presidency Conclusions, Helsinki, 10-11 December 1999*, para.27.

[152] Idem; H.J. Blake and M. Mangiameli, *supra* note 65, at 1217.

[153] S.C. Hofmann, 'Why Institutional Overlap Matters: CSDP in the European Security Architecture', (49) *Journal of Common Market Studies* 2011, at 112; *see* also D. Galbreath and C. Gebhard (eds.), 'Cooperation or Conflict? Problematizing Organizational Overlap in Europe' (Aldershot:

Finally, Reichard noted that, were a non-NATO EU Member State to be attacked, it could benefit from NATO's mutual security guarantee 'through the back door'.[154] As Mogherini recently mentioned, a situation in which a non-NATO EU Member State were attacked without provoking a reaction from NATO is inconceivable, given the substantial membership overlap.[155] Indeed, were Ireland to be attacked, for example, it is hard to imagine that the US and the UK would refrain from intervening or impose missile restrictions; or at least it was hard to image before Trump returned to the White House. The new President has made repeatedly clear that he might not be willing to come to defence of fellow NATO Allies, so it is unlikely that he would do so for a non-NATO country.

4. CONCLUSION

This paper has examined the EU's mutual assistance clause in its current formulation, as well as its genesis, to understand the type of legal responsibilities it imposes on the members of the Union. Today, the mutual defence clause enshrined in Article 42(7) TEU commits EU Member States to *obligations of result rather than means*. These obligations are *automatic*, as they require no formal Council decision or conclusion to be implemented. However, the inclusion of the Irish and NATO clauses makes them *conditional* to the foreign and security policies of neutral and non-aligned countries, on the one hand, and NATO countries, on the other, collectively encompassing the totality of EU Member States.

Despite the change in wording from '*all the military and other aid and assistance in their power*' to '*by all the means in their power*' and the shift in the type of obligations imposed, throughout its evolution from Article 4 BT to Article 42(7) TEU what has consistently set the European mutual defence clause apart from NATO's is the absence of a real military capability behind it.

Although neither NATO nor the EU possesses its own armed forces, NATO maintains a permanent, integrated military command structure staffed by personnel from all Allies. Under its new Force Model, NATO should be able to rely on 300,000 conventional forces in a high state of readiness, in addition to

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Ashgate 2010); J.A Koops, 'Unstrategic Partners: NATO's Relations with the European Union', in W. Kremp *et al.* (eds.), *Entangling Alliance: 60 Jahre NATO*. (Trier: Wissenschaftlicher Verlag Trier 2010), 41-77; T. Tardy, 'The EU and NATO as peacekeepers: Open Cooperation versus Implicit Competition', in H. Ojanen (ed.) *Peacekeeping – Peacebuilding: Preparing for the future* (Helsinki: The Finnish Institute of International Affairs 2006), 27-34; P. Van Ham, 'EU, NATO, OSCE: Interaction, Cooperation, and Confrontation', in F. Kernic and G. Hauser (eds.) *European Security in Transition* (London: Routledge 2006), 23-37.

[154] M. Reichard 2006, *supra* note 47, at 222.

[155] F. Mogherini, 'Europe's Inflection Point: A Conversation with Federica Mogherini', *Institute of International and European Affairs*, Young Professional Network, 25 January 2024, available at <www.eventbrite.ie/e/europes-inflection-point-a-conversation-with-federica-mogherini-tickets-795261136467?aff=oddtdtcreator>.

US tactical and nuclear weapons — for now, at least, as US commitment to Europe's defence appears increasingly uncertain. By contrast, the EU's Rapid Deployment Capacity expected to become operational this year, should consist of only 5,000 troops.

The initiatives taken by the EU in response to the war in Ukraine are a step in the right direction, but achieving more ambitious goals will require more robust investments. The second Trump presidency, with its uncertain stance on NATO and Ukraine, will likely drive greater defence spending and a higher level of ambition. With the potential to unlock €800 billion for defence, the ReArm Europe plan recently unveiled by the European Commission and agreed in the European Council represents a clear move in this direction.

CHALLENGES EMERGING FROM RUSSIA'S INVASION OF UKRAINE

FROM LIBERAL MARKETS TO GEOPOLITICS: THE SHIFT IN THE EU'S EXTERNAL ENERGY POLICY AFTER RUSSIA'S INVASION OF UKRAINE

Natasha A. Georgiou*

1. INTRODUCTION

The war in Ukraine has been a watershed moment in European energy policy given its profound implications for energy security and stability in global gas markets.[1] By invading Ukraine and weaponizing European gas supplies, Russia has effectively forced the EU (and more significantly, the European Commission (EC)) to rethink its energy security strategy with a potential shift in approach to EU energy markets and policy goals.[2] Although the weaponization of natural gas is a well-played verse out of Russia's playbook, the war in Ukraine will entail fundamental implications for European energy politics with a pivot from markets to geopolitics. With the uncertainty around natural gas ramping-up efforts to reduce energy dependency, expedited diversification and decarbonisation will emerge as new EU policy goals at the expense of further integrated energy markets under the EU's liberal market-based model.[3]

The EU's approach to external energy policy has predominantly been from a liberal market perspective. This approach has entailed relying on the size of the internal market and its attractiveness to energy suppliers, which the EU uses to promote the adoption of EU rules and regulation by third country partners in exchange for a stake in the EU market.[4] By using the attractive EU market as an incentive for states, the Union has managed to inspire wide-ranging reforms in the legal systems of third countries to facilitate regional cooperation and compliance with the EU internal market, including the EU's energy sector and energy security.[5] However, deteriorating relations between the EU and Russia have led to the securitisation of the EU's external energy policy with the

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[1] A. Goldthau and N. Sitter, 'Whither the Liberal European Union Energy Model? The Public Policy Consequences of Russia's Weaponization of Energy' 23(6) *EconPol Forum* 2022, at 4-7.

[2] J. Osička and F. Černoch, 'European Energy Politics After Ukraine: The Road Ahead' 91 *Energy Research & Social Science* 2019, at 1-6.

[3] A. Goldthau and N. Sitter, *supra* note 1, 4-7.

[4] Predominantly used in the European Neighbourhood Policy (ENP). See European Commission, "European Neighbourhood Policy Strategy Paper", COM (2004) 373 final, Brussels, 12 May 2004, 3.

[5] N. A. Georgiou, 'The External Dimension of the EU Internal Market and its Effect on the Russian Gas Sector: an Analysis of the Extraterritoriality of EU Law and its Global Reach in the Energy Sector 1 *European Law Review* 2023, at 3-28.

EC undertaking an increasingly geopolitical stance in its energy dependence.[6] The EC's adoption of geopolitical strategies alongside its traditional regulatory approach shows that the EC displays different forms of power in its external energy relations with Russia, shifting from a liberal and regulatory approach to a more geopolitical and strategic approach.[7]

Before the invasion of Ukraine, the EC predominantly relied on its regulatory power and legal instruments such as its internal market rules and Competition law to pursue its energy policy objectives and energy security. The EC's response to Russia's weaponization of energy has therefore been the use of legal instruments from its regulatory toolbox which have served to bolster the conceptualisation of the EU as a Regulatory Power in the energy domain. This has been reinforced by its unilateral EU internal market measures whereby the EC has been able to externalise its internal market regulation on Gazprom with the view of upholding the Single Market and getting Russia to play by the same rules. The EC's regulatory power has therefore been successful in maintaining a level playing field and preventing Gazprom, Russia's majority state-owned gas champion, from any anti-competitive practices that are inconsistent with liberal market principles. By subjecting Gazprom to the same internal market rules as European energy incumbents, the EC has been able to eliminate any discriminatory conduct and behaviour that serve to segregate and distort European energy markets. The EC's regulatory power and liberal market approach has therefore been augmented by Gazprom's conformity to internal market rules and principles for the sole purpose of retaining access to the Single Market and its commercial operations within Europe, which will be examined below.

However, following the invasion of Ukraine, the EU appears to have shifted its stance towards Russia and its way of engagement, which includes more coercive measures. The invasion resulted in a seismic shift in EU energy policy with the EU determined to phase-out Russian gas and accelerate the green transition. The effective measures undertaken by the EC suggest a more robust and active role that has been resumed post-invasion as an increasingly significant actor in EU energy security.[8] The EC's commitment to EU energy security by way of eliminating Russian fossil fuels and any Russian threat to Europe's security of supply, give credence to this assertion.

The research will draw a comparison between the EC's energy security strategy before and after the invasion of Ukraine, to ascertain any deviation and change in the objectives being pursued vis-à-vis Russia. By undertaking this analysis, the research will assess whether there has been a pivot in the EU's usual *modus operandi* in its external energy relations with Russia from a liberal market approach to an increasingly realist approach. For this purpose, the article will

[6] M. Siddi, 'The Role of Power in EU–Russia Energy Relations: The Interplay Between Markets and Geopolitics' 70(10) *Europe-Asia Studies* 2018, at 1552-1571.

[7] N. A. Georgiou, *supra* note 5, at 3-28.

[8] N. A. Georgiou, *supra* note 5, at 3-28.

focus on five analytical threads, namely: (i) the prevailing theoretical frameworks underpinning the analysis which will be used as a benchmark for assessing the EU's external energy policy and approach towards Russia; (ii) the different approaches to energy policy; (iii) the EU's energy security strategy and approach towards Russia before the invasion; (iv) the EU's energy security strategy and approach towards Russia after the invasion; and (v) the distinction in the EU's energy security strategy and approach towards Russia to determine whether there has been a shift in the EU's external energy policy from liberal markets to geopolitics.

Acknowledging the mainstream conceptualisations of EU-Russia relations and the liberal realist dichotomy no longer appropriately reflect the EU's growing role in energy markets following the invasion of Ukraine, the analysis aims to provide a more refined conceptualisation of the EU as a Global Actor in the context of Russia's growing assertiveness and weaponization of energy supply. The article does not attempt to debunk either perception of the EU as a Global Actor, namely: realist versus liberal. Rather, the article endeavours to make a valuable contribution to academic literature by filling a gap in the existing theoretical debate regarding the EC's evolved role as an energy security actor following the invasion of Ukraine.

2. PREVAILING THEORETICAL FRAMEWORKS

The way in which the EU exercises its power in the world has been the subject of much academic debate with several International Relations theories defining the nature of the EU based on its conduct and influence on the global stage. The EU can be said to be playing different roles in international affairs based on the kind of power it exercises in the global arena whether it be a normative,[9] soft,[10] civilian,[11] trade,[12] market[13] or regulatory[14] power which are often used interchangeably to describe a polity that refrains from using military action. The perception of the EU as a 'power' has led to conceptual ambiguity given the diverse strands of power and interpretations of what it constitutes in global politics.[15] The EU's lack of military clout has subsequently broadened the theoretical debate on EU foreign policy. In the absence of military power, the EU is

[9] I. Manners, 'Normative Power Europe: A Contradiction in Terms?' 40(2) *Journal of Common Market Studies* 2002, at 235 - 258.

[10] J. S. Nye Jr, *Soft power: The means to Success in World Politics* (Public Affairs, 2004).

[11] H. Bull, 'Civilian Power Europe: A Contradiction in Terms?' 21(2) *Journal of Common Market Studies* 1982, at 149-164.

[12] S. Meunier and K. Nicolaïdis, 'The European Union as a Trade Power' 12 *International Relations and the European Union* 2012, at 247-269.

[13] C. Damro, 'Market Power Europe' 19(5) *Journal of European Public Policy* 2012, at 682-699.

[14] A. R. Young, 'The European Union as a Global Regulator? Context and Comparison' 22(9) *Journal of European Public Policy* 2015, at 1233-1252.

[15] T. Forsberg, 'Normative Power Europe, Once Again: A Conceptual Analysis of an Ideal Type' 49(6) *JCMS: Journal of Common Market Studies* 2011, at 1183-1204.

said to default to norms and values to assert itself in the international sphere, thereby enhancing its role as a Global Actor.[16]

Although power is generally associated with the use of military force, for the EU, power is the ability to influence change through market access, which is conditioned on conforming to EU regulatory frameworks and market principles. In this respect, the EU (and more specifically, the EC) can be described as a regulatory power in its external energy relations with Russia, given Russia's convergence towards EU regulatory standards and market principles for the sake of maintaining commercial operations within the internal market. Although the EU as a Power debate has extended to EU-Russia relations,[17] the energy dimension is important from an economic and geopolitical perspective given the nuanced role of power in this strategic partnership.[18]

Of the three prevailing strands of International Relations theory, namely: realism, liberalism and constructivism; most scholarly works have described the EU as a liberal actor driven by its rule-based market approach in its external energy policy,[19] whilst Russia has predominantly been described as a realist or geopolitical actor driven by *Realpolitik*.[20] Whilst scholarship on EU-Russia relations has been deeply embedded in the liberal and realist paradigm, recent literature has deviated from the more conventional International Relations approaches in an attempt to understand the evolving nature of EU energy policy and the global energy dynamics at play. Some of these nuances have been revealed in recent literature with EU portrayed as a liberal actor using market forces and regulatory power over economic and geopolitical power.[21] This has led to the notion of the EU as a regulatory power while Russia is predominantly perceived as a geopolitical power in its external energy relations.[22]

As an extension of the EU's liberal model, founded on upholding a fully integrated and competitive single market, the EU constitutes a 'formidable regulatory state'[23] capable of extending the internal market rules beyond its borders. This process has been described in the literature as the 'Brussels Effect'[24];

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[16] I. Manners, *supra* note 9, at 235-258.

[17] T. Forsberg, 'The Power of the European Union: What Explains the EU's (lack of) Influence on Russia?' 1 *Politique européenne* 2013, at 22-42.

[18] M. Siddi, '*supra* note 6, at 3-28.

[19] A. Goldthau and N. Sitter. 'A Liberal Actor in a Realist World? The Commission and the External Dimension of the Single Market for Energy' 21(10) *Journal of European Public Policy* 2014, at 1452-1472.

[20] T. Casier, 'The Different Faces of Power in European Union–Russia Relations' 53(1) *Cooperation and Conflict* 2018, at 101-117.

[21] A. Goldthau and N. Sitter, "Regulatory or Market Power Europe? EU leadership Models for International Energy Governance' in J. Godzimirski (ed.) *New Political Economy of Energy in Europe: Power to Project, Power to Adapt* (Palgrave, 2019), 27-47.

[22] Siddi, Marco, *supra* note 6, at 1551-1571.

[23] A. Goldthau and N. Sitter, 'Soft Power With a Hard Edge: EU Policy Tools and Energy Security' 22(5) *Review of International Political Economy* 2015, at 941-965 .

[24] A. Bradford, 'The Brussels Effect' 107 *Northwestern University Law Revie*w 2012, at 1-68.

'Territorial Extension'[25] and 'Extraterritoriality'[26] which all serves to illustrate the 'global reach' of EU law.[27] With specific reference to the energy sector, the EC uses unilateral measures to externalise internal market rules which have an extraterritorial impact beyond its borders.[28] Here the EU exercises its regulatory power through the size of its internal market and the enforcement capacity of the EC as its regulatory institution.[29] Therefore, although the EU's energy policy is predominantly viewed from a liberal market perspective, the EU has mainly relied on its regulatory power in its external relations with Russia, making the EC a significant actor in the EU's external energy relations. The EC's regulatory power and commitment to market principles has proven more effective than adopting a geopolitical strategy towards energy security making regulatory power and market forces more influential drivers of the EC's external energy policy towards Russia.

However, the EC's pro-market regulation has not always been confined to a liberal approach as the EC has arguably used its regulatory toolbox in a strategic way.[30] This is evident in the EC's: (i) Third Energy Package (TEP)[31] and ownership unbundling regime[32]; (ii) the Antitrust Investigation[33] against Gazprom; and the (iii) Amended Gas Directive[34] (which will be examined below); all of which have had repercussions for Gazprom and the Russian gas sector.[35] The EC is therefore not only a liberal actor, as it pursues a political agenda through the use of its regulatory power. This suggests the EC has realist elements to its inherently liberal nature. By using energy regulation and competition law for strategic purposes such as EU energy security, the EC pursues a geopolitical agenda in its role as regulator of the energy market.[36] The EC's strategic use of its TEP and its unbundling rules, to restrict controversial pipelines deemed to further entrench the EU in its energy dependence on Russia (e.g. Nord Stream

[25] J. Scott, 'Extraterritoriality and Territorial Extension in EU Law' 62 (1) *The American Journal of Comparative Law* 2014, at 87-126.

[26] *Ibid*

[27] M. Cremona and J. Scott, eds. *EU Law Beyond EU Borders: the Extraterritorial Reach of EU Law* (Oxford University Press, 2019).

[28] N. A. Georgiou, *supra* note 5, at 3-28.

[29] D. Bach and A. L. Newman, 'The European Regulatory State and Global Public Policy: Micro-Institutions, Macro-Influence' 14(6) *Journal of European Public Policy* 2007, at 827-846

[30] A. Goldthau and N. Sitter, *supra* note 1, 4-7.; A. Goldthau and N. Sitter, '*supra* note 23, at 941-965.

[31] The TEP represents the third bundle of legislation that was adopted with the aim of creating an integrated European energy market.

[32] Article 9 of Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, *OJ* 2009 L 211/94.

[33] EU Competition Investigation of Gazprom's Sales in Central and Eastern Europe. See *OAO Gazprom v. Republic of Lithuania,* Stockholm Chamber of Commerce (2012) V 125/2011

[34] Directive (EU) 2019/692 of the European Parliament and of the Council of 17 April 2019 amending Directive 2009/73/EC concerning common rules for the internal market in natural gas, *OJ* [2019] L 117/1.

[35] N. A. Georgiou, *supra* note 5, at 3-28.

[36] *Ibid*

2),[37] discredits the impartiality of the EC as the regulatory watchdog of the internal energy market.[38]

Notwithstanding, the EC's narrative regarding its internal market rules and liberal market model has consistently been for the purpose of upholding the integrity of a fully integrated and competitive single market. Here it is important to note that EU's energy policy is based on three pillars, namely: competitiveness; environmental sustainability; and energy security. For the purpose of achieving its objectives, the EC uses energy regulation and competition law, with competition law as the principal instrument for ensuring its energy security. With the EC's narrative constantly driving the notion that internal market rules are to maintain the integrity of the European energy market and to ensure a level playing field, the suggestion that the EC's measures are specifically targeting Gazprom, is often negated. However, following the invasion of Ukraine, the EC's response and energy policies appear to have been specifically targeted towards Russia, in an effort to diversify supply and reduce dependence on Russian gas exports. Such measures appear to have become more realist in nature given that they are politically motivated and interventionist with the objective of phasing-out Russian gas and not funding the war in Ukraine.

As the war rages on in Ukraine, the EU finds itself at a critical juncture in the energy domain which has chartered a new course for the EC as an increasingly interventionist energy security actor. The energy crisis has had profound implications for the EU's energy policy which has ultimately changed the kind of energy actor the EU has become on the global stage. Acknowledging the mainstream paradigms in EU-Russia relations, no longer appropriately reflect the EU's growing role in energy markets following the invasion of Ukraine. The analysis aims to provide a more refined conceptualisation of the EU as a Global Actor in the context of Russia's growing assertiveness and weaponization of energy supply. Whilst realist discourse in EU energy security and energy policy have become more pronounced following Russia's annexation of Crimea in 2014, the EU's liberal paradigm requires further scrutiny following the full-scale invasion of Ukraine in February 2022.

3. APPROACHES TO ENERGY POLICY AND ENERGY SECURITY

For the purpose of this analysis, the perception of the EC as a 'liberal' actor is an actor driven by trade related policy objectives rather than geopolitics.[39] This means that the EC employs regulatory and policy tools to pursue its liberal agenda, which are focused on fully, integrated competitive markets and upholding

[37] M. de Jong, 'Too Little, Too Late? US Sanctions Against Nord Stream 2 and the Transatlantic Relationship' 20(2) *Journal of Transatlantic Studies* 2022, at 213-229.

[38] J. Grigorjeva and M. Siddi, *Nord Stream 2: Opportunities and Dilemmas of a New Gas Supply Route for the EU* (Jacques Delors Institute, 2016) .

[39] A. Goldthau and N. Sitter, *supra* note 19, at 1452-1472.

the Single Market. The liberal approach therefore upholds principles of the regulatory state model, which includes an extension of the internal market to external energy relations by virtue of the EU's norm export or *Acquis Communautaire.*[40] In the alternative and as a contrast to the liberal approach, a non-liberal or 'realist' approach entails security-oriented or protectionist measures in pursuit of strategic objectives and geopolitics. A realist approach would therefore include economic and political policy tools with interventionist measures designed to protect EU markets against third-country players for strategic objectives. Here, strategic objectives include the EU's interests (rather than values) including the EU's energy security concerns as a result of Russia's energy weaponization tactics.

Energy security is considered to be a strategic objective as it relates to a strategic sector of the economy fundamental to EU interests and security concerns. From an EU perspective, 'energy security' entails the uninterrupted availability of energy sources at affordable prices.[41] Energy security is also an issue of bilateral tension in EU-Russia energy relations that has evolved against a backdrop of strained relations between Russia and the West which highlights the strong geopolitical dimension in energy trade.[42] This is in contrast to upholding the Single Market and the EU's liberal market model which reflects EU values rather than strategic or geopolitical interests. For this purpose, the EC's approach to its external energy relations with Russia after the invasion of Ukraine, is referred to as a 'strategic' or 'geopolitical' approach which is used interchangeably to describe the interventionist and targeted measures undertaken by the EC to protect EU security of supply against Russia's energy weaponization which is funding the war in Ukraine.

4. THE EU'S ENERGY SECURITY STRATEGY AND APPROACH TOWARDS RUSSIA BEFORE THE INVASION

Energy security is an issue of bilateral tension in EU-Russia gas relations. Russian threat to European energy supply is exacerbated by the very nature of gas relations, which is not globally traded and dependent on pipeline infrastructure. With more than 50% of European imports stemming from Russia as a single supplier, this significant leverage has raised concerns within Europe that Russia may be exploiting EU dependence as a foreign policy tool.[43] Tension also arguably stems from different conceptualisations of what 'energy security' constitutes and

[40] The *Acquis Communautaire* is the accumulated body of European Union (EU) law and obligations from 1958 to the present day. It comprises all the EU's treaties and laws (directives, regulations, and decisions), declarations and resolutions, international agreements and the judgments of the Court of Justice.

[41] Daniel Yergin, 'Ensuring Energy Security' (2006) *Foreign Affairs* 69-82.

[42] Georgiou, Natasha A. "Energy Regulation in International Trade: Legal Challenges in EU–Russia Energy Relations from an Investment Protection Perspective." *International Economic Law: Contemporary Issues* (2017): 151-168.

[43] A. Goldthau, 'Rhetoric Versus Reality: Russian Threats to European Energy Supply' 36(2) *Energy Policy* 36 2008, at 686-692.

the manifestly inconsistent policies that have been pursued for this purpose.[44] For the EU, 'energy security' entails the reliable supply of energy at affordable prices in a sustainable way.[45] This is driven by the insufficient indigenous supply of energy sources for which EU economies need to rely on imports.[46] The EU's security of supply is therefore focused on diversification to minimise exposure to potential supply shocks. With the EU's energy policy based on three pillars (as mentioned above, including energy security), the EU relies on energy regulation and competition law to pursue its energy security objectives. For this purpose, the EU's liberalisation model and market-based approach is significant in the EU's efforts to maintain a level playing field and fully integrated energy market.

However, for Russia, 'energy security' requires state control with vertically integrated gas champions such as Gazprom, acting as a lever of the state to pursue foreign policy objectives. With security of demand a priority, Gazprom's monopoly over the pipeline network to Europe with no freedom of access to other suppliers, is fundamental to Russian energy policy. Russia's long-term contracts for delivering gas to Europe with restrictive clauses that segregate markets are therefore difficult to reconcile with the EU's internal market rules and liberalisation model that ensures a competitive market. Here we see different forms of power being exercised, Russia's geopolitical power based on vast supplies of energy resources and energy prices based on political relations [47] versus the EU's regulatory power which is derived from conformity to internal market rules in exchange for access to the internal market.[48] Inconsistencies between Gazprom and the EC's energy strategies have ultimately complicated the dynamic in EU-Russia relations and energy markets. EU tensions over new pipeline routes and the role of Russian gas in European markets and Russian disagreements over the rules that govern gas markets, further complicate relations.

Although the impasse in EU-Russia relations was brought to the fore following the annexation of Crimea and subsequent sanctions, relations were already strained following trade disputes and supply disruptions that questioned Russia's reliability as a trade partner. The transit disputes between Russia and Ukraine that effectively resulted in the gas crisis of 2006 and 2009 when gas supplies to Europe were cut-off, ultimately pushed energy security to the top of the EU agenda. Although the gas disputes were not specifically aimed towards European markets, Russia's deliberate cut of Ukrainian supplies resulted in Ukraine diverting European gas for its own consumption.[49] It also raised concerns within Brussels that Russia was using its gas supplies as an energy weapon towards

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[44] M. Siddi, *supra* note 6, at 1551-1571

[45] European Commission "Action and Measures on Energy Prices" (2022) <energy.ec.europa.eu/topics/markets-and-consumers/action-and-measures-energy-prices_en>.

[46] D. Yergin, 'Ensuring Energy Security' *Foreign Affairs* 2006, at 69-82.

[47] F. Proedrou, 'EU Energy Security Beyond Ukraine: Towards Holistic Diversification' 21(1) *European Foreign Affairs Review* 2016, at 57-73.

[48] A. R. Young, *supra* note 14, at 1233-1252.

[49] J. Stern, S. Pirani, and K. Yafimava. *The Russo-Ukrainian Gas Dispute of January 2009: a Comprehensive Assessment* (Oxford Institute for Energy Studies, 2009).

former Soviet states gravitating to the West. Realising its vulnerability in its heavy energy dependence on Russia, EU energy security emerged as pressing matter in the EC's foreign policy agenda, coupled with diversification efforts in securing energy supply. Similarly, Russia embarked on a diversification strategy that bypasses Ukraine to end-users in Europe through alternative supply routes. As a result, competing interests and perceptions of what energy security constitutes, have continued to plague EU-Russia gas relations and their respective policy shifts in the energy markets, which will be examined below.

The 2009 gas crisis was by far the worst of its kind, which served as a wake-up call for Europe.[50] The crisis revealed a lack of coherence and solidarity amongst member states in the EU's external relations with Russia. This is evident in the EU's diversification strategy that was constantly undermined by member states pursuing national interests and signing bilateral deals with Russia for cheaper gas with damaging consequences for Europe's energy security. Russia's pipeline politics were seen as a divide-and-rule mechanism to erode solidarity amongst EU member states creating a rift between old and new members.[51] By leveraging its market strength, Gazprom (acting under the Kremlin) was able to make concessions for select member states in its strategic network reorganisation.[52] Such pipeline deals included: South Stream[53] with Bulgaria, Nord Stream[54] with Germany, and Turkish Stream[55] with Greece; all of which were controversial as they were seen to further entrench the EU in its energy dependence on Russia.

To address Russia's weaponization of gas supply, the EC undertook a more active role in the EU's external energy policy and relied on its regulatory power to curb Gazprom's growing geopolitical clout within the European market. For this purpose, the EC used the following internal market regulatory measures:

[50] R. Leal-Arcas, 'The EU and Russia as Energy Trading Partners: Friends or Foes?' 13(3) *European Foreign Affairs Review* 2009, at 4.

[51] M. Leonard, Mark, N. Popescu, and European Council on Foreign Relations, 'A Power Audit of EU-Russia Relations' 9 *European Council on Foreign Relations* 2007, at 5.

[52] S. De Jong and J. Wouters, 'European Energy Security Governance: Key Challenges and Opportunities in EU-Russia Energy Relations' 65 *Leuven Centre for Global Governance Studies, Working Paper* 2011.

[53] South Stream is an abandoned pipeline project to transport natural gas of the Russian Federation through the Black Sea to Bulgaria and through Serbia, Hungary and Slovenia further to Austria.

[54] Nord Stream, an existing 55 bcm/y pipeline that connects Russia to Germany via the Baltic Sea, which is to be extended to double its capacity following an agreement between Gazprom, Royal Dutch Shell, E.ON and OMV.

[55] Turkish Stream aims to transport gas from Azerbaijan's Shah Deniz II field in the Caspian Sea, one of the world's largest gas fields, by the end of the decade.

4.1 The TEP's Third Country Clause, famously dubbed the 'Gazprom Clause'[56]

The TEP's Gazprom Clause is a licensing requirement that extends the 'ownership unbundling' regime to third country energy incumbents like Gazprom, to ensure a level playing field and competitive market. Ownership unbundling requires the separation of operation and ownership of infrastructure, which means that Gazprom cannot control both the extraction of gas and shipment to markets via pipelines in which Gazprom has a majority stake. The unbundling rules are therefore the most contentious issue in EU-Russia gas trade and Gazprom's business model. The Gazprom clause means that Gazprom's licence to operate within the European market can be revoked where it does not comply with internal market rules. The aim is to uphold EU energy security by preventing Gazprom from acquiring strategically important energy infrastructure and controlling EU networks.

4.2 The Antitrust investigation into Gazprom's sales in Central and Eastern Europe

The significance of the Antitrust investigation against Gazprom was to ensure that Gazprom no longer undertook distortive business practices[57] within the European market that were considered contrary to upholding a competitive and integrated market.[58] Gazprom's conduct was deemed to be in breach of competition rules, namely: the distortion of competition[59] and the abuse of dominant market position.[60] The investigation revealed that Gazprom was undertaking the following anti-competitive practices in its sales to Central and Eastern Europe, namely: (a) destination clauses which hinder cross-border gas sales; (b) unfair pricing that fragment the EU gas market; and (c) the supply of gas conditional on concessions made regarding pipeline projects e.g. South Stream in Bulgaria and Yamal-Europe pipeline in Poland.[61] Through the Antitrust investigation, the EC was able to secure commitments from Gazprom undertaking to refrain from distortive conduct inconsistent with the internal market regulation that was affecting liquidity in the market and the cross-border flow of gas.

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[56] Article 11 of Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, *OJ* [2009] L 211/94.

[57] European Commission, IP/15/4828, Commission sends Statement of Objections to Gazprom for alleged abuse of dominance on Central and Eastern European gas supply markets (April 22, 2015)

[58] J. Stern and K. Yafimava. 'The EU competition investigation into Gazprom's Sales to Central and Eastern Europe: a detailed analysis of the commitments and the way forward', *OEIS Paper* (2017).

[59] Article 101 Treaty on the Functioning of the European Union

[60] *Ibid*

[61] J. Stern and K. Yafimava, *supra* note 58.

4.3 **The Amended Gas Directive**

The Amended Gas Directive extended the TEP's unbundling rules, third-party access and regulated tariffs to all pipelines including import pipelines originating outside EU territory. The aim of the EC's amendments was to ensure that all pipelines operating within the EU were accessible to other operators and functioned with the same degree of transparency to uphold a competitive internal gas market. The extension of internal market rules to import pipelines, was largely seen as an effort to target Nord Stream 2, a contentious pipeline deemed to further bind the EU to Russia.[62] The import pipeline wholly owned by Gazprom, would carry gas from Russia to Europe across the Baltic Sea. Through the new gas directive, the full weight of the EC's liberalisation measures would be felt by Gazprom and Nord Stream 2, as the only pipeline unable to benefit from any exemptions under the new legal regime.[63]

The above serves to illustrate that EU has relied mostly on regulatory power in its external energy relations with Russia. This commercial rather than geopolitical approach has shown the EC's commitment to the internal market and upholding market principles. As such, regulatory power and market forces have been the prevailing drivers in the EC's responses to Russia's weaponization of gas. The EU's regulatory power is evident in Gazprom's convergence towards EU regulatory and market principles for maintaining commercial operations in the European markets. Through regulatory measures the EC has been able to restrict Gazprom's leverage in new infrastructure projects and any monopolistic practices. This is illustrated by the aborted South Stream project due to intergovernmental agreements between Russia and Bulgaria in breach of EU law. [64]

However, the EC's pro-market responses to Russia's weaponization tactics have not always adhered to liberal market principles with the EC using its regulation in a strategic way as evidenced by the regulatory measures examined above. Here the EC has used internal market measures that have specifically been imposed on Gazprom, thereby externalising the internal market rules with extraterritorial effects on the Russian gas sector.[65] As such, the EC has arguably pursued a political agenda through use of regulatory power for political purposes. By pursuing a political strategy in its role as a regulator of the energy market through internal market mechanisms specifically targeting Gazprom and Nord Stream 2, the EC can be seen to be responding to Russia's weaponization in a manner that is not purely regulatory but also strategic,[66] which has been amplified since the Ukraine invasion.

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[62] K. Yafimava, Gas Directive Amendment: Implications for Nord Stream 2' 49 *Energy Insight* 2019.

[63] *Ibid*

[64] M. Siddi, 'The Scramble for Energy Supplies to South Eastern Europe: the EU's Southern Gas Corridor, Russia's Pipelines and Turkey's Role' *Turkey as an Energy Hub?* Nomos Verlagsgesellschaft mbH & Co. KG 2017, at 49-66.

[65] N. A. Georgiou, *supra* note 5, at 3-28.

[66] J. Grigorjeva and M. Siddi, *supra* note 38.

5. THE EU'S ENERGY SECURITY STRATEGY AND APPROACH TOWARDS RUSSIA AFTER THE INVASION

The Russian invasion of Ukraine and the weaponziation of gas has created a shift in EU energy policy and the subsequent securitisation of energy supply. The invasion has served as a catalyst in the EC's switch in strategy from a traditional regulatory liberal market model to an increasingly geopolitical approach vis-à-vis EU energy security.[67] The EU's response to the invasion has included: sanctions; gas price-caps; enhancing gas storage; more pipeline gas from Norway and North Africa; new import infrastructure; switching gas for other fuels such as renewables and coal; more LNG; reducing consumption; financial support for consumers hit by high prices, and REPowerEU.[68] The multiple rounds of sanctions, asset freezes, travel bans and trade restrictions have predominantly been aimed at destabilising the Russian economy and preventing continued funding of Russia's military aggression.[69]

The EU's sanctions regime has specifically targeted Russia's energy sector in an effort to inflict as much damage to the Russian economy whilst preserving European economic interests.[70] Recognising the need for energy security and diversification of gas imports, the EC has undertaken an immediate and collective response towards Russia in an act of solidarity between member states at both political and economic levels. Significantly, the launch of the REPowerEU[71] plan aims at increasing pressure for decarbonisation and moving away from Russian energy. With the EC determined to phase-out Russian gas by 2027, the EU response to Russia's weaponization of gas has involved significant state intervention with further 'supranationalization of EU energy policy'.[72] It follows, that the war in Ukraine may have initiated a paradigm shift in European energy politics.[73]

The EC's energy policy shift[74] has been exacerbated by the war and uncertainty

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[67] M. Siddi, *supra* note 6, at 1551-1571.

[68] 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 Repowereu Plan. Com/2022/230 Final. <eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2022%3A230%3AFIN&qid=1653033742483>.

[69] L. A. Lambert, J. Tayah, C. Lee-Schmid, M. Abdalla, I. Abdallah, A. HM Ali, S. Esmail and W. Ahmed, 'The EU's Natural Gas Cold War and Diversification Challenges' 43 *Energy Strategy Reviews* 2022, at 1-9.

[70] By way of example, sanctions targeting oil imports that came into force in December 2022 have resulted in limiting Russia's revenues. According to the International Energy Agency, Russia's oil revenues dropped by over a quarter in January 2023 (compared to January 2022). The drop in February was even more significant (over 40%).

[71] 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 Repowereu Plan. Com/2022/230 Final. <eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2022%3A230%3AFIN&qid=1653033742483>.

[72] J. Osička and F. Černoch, *supra* note 2, 1-6.

[73] Ibid

[74] F. Kern, C. Kuzemko & C. Mitchell, 'Measuring and Explaining Policy Paradigm Change: the Case of UK Energy Policy', 42(4) *Policy & Politics* 2014, at 513-530.

regarding gas, which will have wider implications for European energy politics.[75] This includes accelerating the energy transition to expedite decarbonisation as a means of reducing the EU's energy vulnerability. With REPowerEU emphasising the importance of fast-tracking the development of renewable energy sources, the EC has been committed to decoupling European economies from Russian gas with renewable energy seen as a conduit for doing so. This has resulted in the securitisation of the green transition with renewable energy acquiring a strategic position in the EU's energy security. The Russian invasion has therefore accelerated the EU transition to a low-carbon economy with renewable energy rebranded as 'freedom energy'[76] which is at the heart of REPowerEU and decoupling of Russian fossil fuels.

The EC's bullish approach towards decarbonisation does not constitute short-term solution to gas diversification but rather a long-term solution to energy security through the development of renewables and energy efficiency.[77] The war has effectively resulted in the demise of Russian gas trade to Europe given the geopolitical unreliability of gas that is no longer competitive or ethical when compared to renewable energy. Although gas cannot be phased-out immediately from the EU energy mix, natural gas will be sourced as liquefied natural gas (LNG) from the US and Qatar and pipeline gas from Algeria and Azerbaijan rather than pipeline gas from Russia. The EC is unlikely to concede on low-cost Russian gas at the political risk of EU vulnerability resulting from Russian weaponization of energy.[78]

6. DISTINCTION IN THE EU'S ENERGY SECURITY STRATEGY AND EXTERNAL ENERGY POLICY

The new dynamics of EU energy policy following the war in Ukraine has shown a shift from markets to geopolitics. A geopolitical approach is highly dependent on power relations and state-driven policy rather than markets and norms, which will have implications for European energy policy.[79] This will entail the decoupling of Russian gas and acceleration of decarbonisation as top policy goals rather than the development of a fully integrated liberal energy market.[80] As such, the liberal and regulatory paradigm that has served the EU economy for two decades may be replaced by a more engaged and interventionist EC providing more Europe and state in EU energy affairs.[81]

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[75] J. Osička and F. Černoch, *supra* note 2, 1-6.

[76] Euractiv, "Solar is freedom energy – unless we depend on autocracies for the technology" 15 July 2022 <www.euractiv.com/section/energy/opinion/solar-is-freedom-energy-unless-we-depend-on-autocracies-for-the-technology/>.

[77] J. Osička and F. Černoch, *supra* note 2, 1-6.

[78] A. Goldthau and N. Sitter, *supra* note 1, 4-7.

[79] M. Siddi, *supra* note 6, at 1551-1571.

[80] J. Osička and F. Černoch, *supra* note 2, 1-6.

[81] A. Goldthau and N. Sitter, *supra* note 1, 4-7.

The EU has predominantly relied on its regulatory power and competition law as the principal instruments for ensuring its energy security. The EU's response to Russia's weaponization of gas has therefore been deeply imbedded in energy regulation and competition law. By using unilateral measures (as examined above), the EC has been able to externalise internal market rules on Gazprom, with the objective of maintaining the integrity of the internal market. The EU's regulatory power has therefore been effective in curbing Russian weaponization as it has ensured a level playing field by subjecting Gazprom to the same internal market rules as European energy incumbents. This is illustrated by Gazprom's adoption of EU market principles for the sake of maintaining commercial operations within the EU.

However, following the invasion of Ukraine, the EU response has included more coercive measures.[82] As a result, within seven months of the invasion, Russian gas had dropped to less than 10% of EU imports compared to 40% at the beginning of 2022.[83] These robust measures have suggested a more active role undertaken by the EC as a significant actor in energy security with a strong commitment to removing Russian fossil fuels from EU markets. Although the EC's response to Russia's weaponization has thus far been effective, it remains to be seen how long the EC's momentum will last. Inevitably, the EU's resilience will depend on less exposure to risk and gas price volatility. This will entail prioritising more LNG to meet European gas demand and improving storage and import facilities in the short-term; with diversification to non-Russian gas suppliers in the medium-term; and a shift from gas to renewables in the medium to long-term.

It is important to note that the replacement of Russia as a supplier of substantial volumes of gas, will incur challenges, namely: the North Sea's declining gas production; Mediterranean domestic demand; and the US and Qatar's LNG tied to long-term supply contracts.[84] The EU's diversification strategy therefore remains ambitious and suggests that decades of entrenched dependence on cheap Russian gas cannot be remedied in a year. That said, a more strategic approach on the part of the EC, will require a more active engagement of the state in the EU energy economy with energy security and the green transition prioritised by national governments to address the energy security crisis.[85] Therefore, whilst the Ukraine invasion has been a watershed moment in EU energy policy, the EC is at a crossroads. The effectiveness of its response to Russia's aggression and weaponization of energy is something that remains to be seen.

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[82] Since Russia's invasion of Ukraine in February 2022, the European Council has adopted 10 packages of sanctions against Russia and Belarus. The sanctions aim to weaken Russia's ability to finance the war and specifically target the political, military and economic elite responsible for the invasion. Economic indicators are showing that the restrictive measures taken in Europe and elsewhere against Russia have had an impact on the Russian economy. According to the World Bank, the International Monetary Fund (IMF) and the Organisation for Economic Cooperation and Development (OECD), 2022 was a bad year for the Russian economy. It is estimated that in 2022, Russia's gross domestic product (GDP) dropped by 2.1%.

[83] Gasworld, 'European gas imports from Russia fall to 9 percent' (1 September 2022)

[84] A. Goldthau and N. Sitter, *supra* note 1, 4-7.

[85] *Ibid*

7. CONCLUSION

The EU's energy policy has undertaken a new dynamic since the war in Ukraine shifting from markets to geopolitics. This geopolitical approach will have ramifications for European politics given the focus on power relations and state-driven policy as opposed to markets and norms.[86] An ambitious state-driven approach will focus on fast-tracking decarbonisation and reducing dependence on Russian gas as top priority goals rather than maintaining a liberal energy market.[87] As a result, the liberal and regulatory paradigm that has been at the core of the EU economy for several decades, will be phased-out and gradually superseded by a more interventionist and robust EC driving more state-driven policy in European energy affairs.[88]

However, the EC's effective response to Russia's weaponization of gas still remains work in progress, given that there is no immediate alternative to replacing Russian gas supply in its entirety. As the largest producer and supplier of natural gas to European markets, it comes as no surprise that the EU will need to diversify its energy mix to meet its energy supply demands. The EU's resilience will therefore depend on its risk appetite and exposure to the price volatility of gas markets. The EC's momentum will subsequently depend on meeting European gas demand in the short-term through alternative sources such as increased LNG imports, improved import capabilities and storage facilities. In the medium-term, the EC will need to diversify all Russian gas supply to alternative gas suppliers with a shift from gas to renewables in the medium to long term.

This would suggest that there is no quick fix to the replacement of cheap Russian gas within European markets and that ultimately a more strategic approach will be required from the EC and engagement of the state in EU energy politics.[89] A call for more state and more Europe in European energy security will be required to ensure that the green transition is prioritised with national governments expediting the shift from fossil fuels to renewables to address the EC's energy security objectives.[90] It follows, that the EC is at a crossroads with respect to its energy security strategy and its handling of any imminent crisis following the invasion of Ukraine. Whilst the invasion of Ukraine has been a watershed moment in EU energy policy, the success of the EC's energy strategy and response to Russia's weaponization is something that remains to be seen. Irrespective of the outcome, one thing is certain, the invasion of Ukraine has chartered a new course for the EC as a significant player in the EU's energy security, with a fundamental shift from a liberal market approach to increasingly geopolitical approach to address its energy security objectives adding a new dimension to

[86] M. Siddi, *supra* note 6, at 1551-1571
[87] J. Osička and F. Černoch, *supra* note 2, 1-6.
[88] A. Goldthau and N. Sitter, *supra* note 1, 4-7.
[89] A. Goldthau and N. Sitter, *supra* note 1, 4-7.
[90] Ibid.

the EC's actorness on the global stage in the context of energy. It follows, the EC's role as a Regulatory Power has evolved to encompass an energy security actor where energy security is the *telos* of the EC's energy policy objectives vis-à-vis Russia rather than upholding a competitive internal market. The change in objectives illustrate a shift in the EU's energy policy from the liberal paradigm of markets to geopolitics, as the new dynamics of EU-Russia energy relations following the invasion of Ukraine.

Reflecting on the recent EU manoeuvres in the energy domain, this article has endeavoured to revisit the liberal and realist dichotomy that has prevailed in the scholarship to provide a more nuanced perspective on the EU as a Global Actor after the invasion of Ukraine. Acknowledging that the conceptualisation of the EU as a Global Actor does not fall squarely in one single school of thought as either a liberal or realist actor, the paper offers a more refined perspective of what kind of power the EU has become. In a landscape of growing geopolitical tension and dependence on an unreliable energy partner, the EU appears to have developed an energy security dimension to its actorness adjusting to the turbulent energy markets and volatile energy supply that threaten European energy security.

CONFISCATING RUSSIAN CENTRAL BANK ASSETS AS A MANIFESTATION OF EU'S STRATEGIC AUTONOMY?

Nikolas Sabján*

1. INTRODUCTION

The concept of strategic autonomy has become undeniably fashionable in the recent years. It has prompted wide discussions, both in academic and public discourse and we see how the concept has migrated to different fields,[1] including law.[2] The concept itself is not entirely new - it first appeared in the sphere of defence policy, subsequently extending its scope to EU's foreign and security policy, while in the current juncture, it is deployed primarily in connection with questions of economic policy in general.[3] The latter extension has been triggered by what some call the turn towards a 'new geo-economic order',[4] the return of great power competition between US-China, together with the emergence of a multipolar world order that underpins these phenomena.[5] These developments forced the EU to step-up in protecting its economic interests and security, but also to create a space to act autonomously in line with its foundational values.[6] Beyond this, some have not shied away from describing this development as a new identity of the EU on the global scene.[7]

Simultaneously, international sanctions[8] came again to the fore after the Russian federation initiated its full-scale military invasion against Ukraine in February

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[1] As the concept is rather ambiguous, issues of trade, investment, health or cyberspace have been analysed in the context of strategic autonomy. See: N. Helwig, 'EU Strategic Autonomy after the Russian Invasion of Ukraine: Europe's Capacity to Act in Times of War', 61 *Journal of Common Market Studies* 2023, at 57.

[2] See for example the Special Issue of European Foreign Affairs Review (2022), 27.

[3] On the evolution of the concept see: N. Helwig and V. Sinkkonen, 'Strategic Autonomy and the EU as a Global Actor: The Evolution, Debate and Theory of a Contested Term', 27 *European Foreign Affairs Review* 2022, 2.

[4] A. Roberts, H. C. Moraes and V. Ferguson, 'Toward a Geoeconomic Order in International Trade and Investment', 22 *Journal of International Economic Law* 2019, at 655. I discuss this angle *infra*.

[5] A. Acharya, A. Estevadeordal and L. W. Goodman, 'Multipolar or Multiplex? Interaction Capacity, Global Cooperation and World Order', 99 *International Affairs* 2023.

[6] Enshrined in Articles 3 (5) and 21 of TEU.

[7] Ch. Beaucillon, 'Strategic Autonomy: A New Identity for the EU as a Global Actor' 8 *European Papers* 2023, 428. This might be put into opposition to EU as a normative power. In some contexts, these two identities could coexist, while in other a contradiction cannot be excluded.

[8] More precisely, the EU adopts "restrictive measures", a term used also in the relevant legal texts. I am using "restrictive measures" and "sanctions" interchangeably in the text.

2022. Some dubbed this as a 'watershed moment for sanctions'[9] and meanwhile, the traditional debates concerning sanctions have been reinvigorated again.[10] On the political level, the European Union (EU) did not hesitate too much and immediately reacted against the invasion by imposing sanctions on an unprecedented scale.[11]

Article 29 of Treaty of European Union (TEU) allows the Council of the European Union (Council) to adopt a decision to impose sanctions against non-EU countries, non-state entities or individuals. The respective Council Regulations are addressed to all persons, entities and bodies under EU jurisdiction, for which they create legal obligations. In other words, these regulations are directly applicable in EU Member States in light of the principle of direct effect. The said measures must be consistent with the objectives of the EU's external action, as laid down in Article 21 TEU.[12]

A specific type of restrictive measures imposed by the EU on Russia was the freezing of Russian Central Bank assets (hereinafter "RCB assets"). However, there have been also calls to confiscate these assets with the aim to provide compensation to Ukraine to which it is entitled under the law of state responsibility. This so-called "freeze-to-seize" debate has generated much controversy.

Recently, some analyses have appeared that attempt to situate sanctions in the context of strategic autonomy. What is missing in this (and other) analyses of the concept of strategic autonomy is the differentiation between various types of sanctions that may have different consequences. Concretely, there is a gap in the academic discourse about the relationship between the much-debated freezing and potential confiscation of RCB assets and strategic autonomy. Accordingly, some have put forward the proposition that these assets should be confiscated if the EU wants truly to put the concept of strategic autonomy into practice and fulfil its 'geoeconomic' component. However, is that really the case?

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[9] E. Chachko and J. B. Heath, 'A Watershed Moment for Sanctions? Russia, Ukraine, and the Economic Battlefield', 116 *American Journal of International Law* 2022.

[10] On the politico-economic sphere, the question of the effectiveness of sanctions is an ongoing and hotly debated issue. In the context of recent sanctions against Russia, see for instance: E. Ribakova, 'Sanctions against Russia will worsen its already poor economic prospects'. *Bruegel* (02 May 2023) <www.bruegel.org/analysis/sanctions-against-russia-will-worsen-its-already-poor-economic-prospects>; G. Ibadoghlu, 'What impact have EU sanctions had on the Russia Economy?', *LSE Blog,* (13 March 2023) <blogs.lse.ac.uk/europpblog/2023/03/13/what-impact-have-eu-sanctions-had-on-the-russian-economy/>; R. Agrawal, 'Are U.S. Sanctions on Russia Working?', *Foreign Policy* (07 February 2023); A. Demarais, 'Claims That Sanctions Hurt Europe More than Russia Are Wrong' *Foreign Policy (*14 March 2024) <foreignpolicy.com/2024/03/11/russia-sanctions-oil-gas-populists-europe-elections/>.

[11] As of yet, the 14th package of sanctions was adopted by the EU.

[12] For a more detailed distinction between general EU competence to engage external action (part V TFEU) and to conduct CFSP (Article 24 TEU), see: L. Lonardo, 'Common Foreign and Security Policy and the EU's External Action Objectives: an Analysis of Article 21 of the Treaty on the European Union', 14 *European Constitutional Law Review*.

The aim of the paper is to examine precisely that issue. The first objective of this paper is to answer the question whether confiscating RCB assets would contribute to the EU's security and its economic interests, i. e. if the confiscation of assets (even if morally justified) would be in line with the EU's doctrine of strategic autonomy. Secondly, even if there were plausible politico-economic and security reasons to confiscate, the question whether these should trump international legal concerns, in particular immunity law, needs to be examined. In other words, a potential quandary could emerge, entailing two competing imperatives: the geopolitical/geoeconomic imperative, if one accepts that there are plausible reasons to confiscate assets on the one hand (and this supposedly stems from strategic autonomy), and the aim of EU to remain true to its founding values (namely respecting international law), on the other. Therefore, the final objective of the paper is to analyse the issue of confiscation of RCB assets through the lens of the concept of strategic autonomy and provide an optimal solution which would properly balance the said competing aims and interests.

2. (OPEN) STRATEGIC AUTONOMY: A SKETCH

In the doctrinal sphere, several definitions of the concept of strategic autonomy have been put forward. On the one hand, a more policy-oriented definition understands 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.'[13] On the other hand, crossing the border from the policy discourse to the legal field, a definition is provided by Hoffemeister who understands strategic autonomy as '[s]triving for multilateral solutions, while being able to take lawful action alone to safeguard the Union's values, fundamental interests, security, independence and integrity.'[14] Thus, first, strategic autonomy in this sense rests on the presupposition that the preferred way of action is multilateral, though in some cases, unilateralism is not excluded (in fact, it's inevitable); secondly, despite the potential unilateral action, it should be in compliance with Union's international obligations; thirdly, different aims are sought by these actions. It is the second aspect of this definition, i. e. the requirement for *lawful* action in EU's external relations upon which the emphasis lies in this paper. Undisputedly though, a difficult balancing act will be required in some cases between the said precondition and the third aspect of the definition - the EU's endeavour to defend its interests (either political, economic, security or other). For this is nothing less than the ever-lasting law *versus* (geo)politics dilemma formulated in a slightly distinct manner.

Hoffemeister[15] also provides a taxonomy of measures that are supposed to

[13] N. Helwig and V. Sinkkonen, *supra* note 3, 2-3.

[14] F. Hoffmeister, 'Strategic Autonomy in the European Union's External Relations Law', 60 *Common Market Law Review* 2023, at 673.

[15] *Ibid.* Armin Steinbach contends that strategic autonomy is motivated by three factors: fur-

fall under strategic autonomy. Within the realm of common commercial policy, there are two types of instruments. Whereas the first category aims to protect the economic interests of the EU (e. g. a new methodology in anti-dumping cases, measures tackling the problem of subsidies, international procurement, investment screening, a foreign subsidy regulation, anti-coercion instrument and so on), the second category entails tools to foster European values (e. g. the CBAM or due diligence regimes).[16] Furthermore, there are other measures and initiatives in the field of EU's Common Foreign and Security Policy, the most important being (for the purposes of this paper) EU restrictive measures against Russia after the latter invaded Ukraine in February 2022.

The abovementioned potential tension or even contradiction between the different aims and principles is enshrined in Article 3 (5) of TEU (repeated, albeit in a slightly modified version in Article 21 TEU):

> 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 United Nations Charter [emphasis added].

These objectives are further laid down in Article 21 (1) and (2) TEU, in which the Union should in its external action '(a) safeguard its values, fundamental interests, security, independence and integrity', while it shall be guided by 'respect for the principles of United Nations Charter and international law.'[17] While the decades since the end of the Cold War tended to favour openness, multilateralism, free trade, interdependence and the attempt to strengthen the role of international law, a shift has occurred recently that starts from a more realistic-outlook, taking into account the new geopolitical realities. By and large, strategic autonomy simply implies that the abovementioned tension should be tipped towards the other way, i. e. it requires more of what is called today realism (power-politics), taking into account the relationship between economics and security and in some cases, preference for unilateralism.

Within the notion of strategic autonomy, the latter is oftentimes emphasized as unavoidable. As Armin Steinbach puts it, 'strategic autonomy does not merely extend to initiatives that aim to further European interests by relying on the reciprocal design of economic relations, but also includes policy action that seeks to rely on European economic and political might in order to advance European geoeconomic aspirations.'[18] The potential confiscation of RCB assets that is

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thering European values, defending economic interests and guaranteeing security. A. Steinbach, 'EU's Turn to 'Strategic Autonomy': Leeway for Policy Action and Points of Conflict', 34 *European Journal of International Law* 2023, at 3.

[16] See part three in F. Hoffmeister, *supra* note 14.

[17] I will discuss in more detail the two articles *infra*.

[18] A. Steinbach, *supra* note 15, 16-17.

the object of analysis represents one example of this turn to more hard-power outlook by the EU.

By contrast, many have also highlighted the ambiguous nature of the concept. As one author puts it, '[t]he concept of strategic autonomy remains central because it has managed to 'travel' and 'stretch' in ways that it now covers a broad scope of the security and economic policy debate, from the EU's industrial strategy to health and cyber'[19] and 'it can serve as a rhetorical device for calls for a more value-oriented, security focused or economically resilient EU. This ambiguity is also heightened by the fact that it is not entirely clear what the 'different geopolitical interests and values, as the strategy calls them, are and how they rank in importance to one another should they conflict with one another.'[20]

Two short comments are in order at this point. First, albeit the concept has a broad usage today, with economic and security issues being analysed from the strategic autonomy lens, the EU restrictive measures have found its way into the discussion only sporadically but nonetheless, there is a link between the two.[21] Secondly, complicated questions could arise with regard to the identification of geopolitical interests and values that should be pursued and protected and no less difficult is the balancing act between those, should a conflict occur. And eventually, the emergence of conflict is almost inevitable in most cases, including the confiscation of RCB assets.[22] Accordingly, Wessel and Kassoti affirm that strategic autonomy is the 'conceptual space where this tension manifests itself in a most dramatic manner.'[23] Steinbach also supports the conclusion about indeterminacy by stating that 'strategic autonomy is amenable to multiple meanings and diverse policies and highlights – with reference to the motivational categories – both leeway and barriers that policy-makers face when specifying concrete policy action as emanations of strategic autonomy.'[24]

Having said this, I would add a further comment to the question of ambiguity. Namely, to decide whether an act is actually in line with EU's strategic autonomy, a concrete analysis is required on a case-by-case basis. As a consequence, when it comes to the adequate balance between the conflicting constitutional objectives of EU as set out above, one has to analyse the proposed measure at hand to decide whether it helps to achieve or extend the aims of EU's strategic autonomy. We shall attempt to undertake precisely this kind of analysis in the subsequent parts.

[19] N. Helwig, *supra* note 1, at 57.

[20] T. Gehrke, 'EU Open Strategic Autonomy and the Trappings of Geoeconomics', 27 *European Foreign Affairs Review* 2022, at 76.

[21] As will be seen *infra*.

[22] This will be discussed in the last part of the paper.

[23] E. Kassoti and R. A. Wessel, 'Strategic Autonomy: The Legal Contours of a Security Policy Construct', 28 *European Foreign Affairs Review* 2023, at 309.

[24] A. Steinbach, *supra* note 15, at 4.

3. THE RELATIONSHIP BETWEEN EU RESTRICTIVE MEASURES AND STRATEGIC AUTONOMY: ECONOMIC AND POLICY ISSUES

As Luigi Lonardo and Viktor Szép have recently put it, 'sanctions define strategic autonomy as much as they are defined by it.'[25] Due to the ambiguous and indeterminate character of strategic autonomy (as pointed out above), they argue that strategic autonomy is 'whatever the EU wants it to be.'[26] This conclusion is, of course, correct, as it is the EU that defines its strategic autonomy framework through its action and rhetoric. In addition, it must be emphasized that the content and nature of the concept is evolving and cannot be described in some objective and definite manner. Since strategic autonomy is in large part a reaction to external conditions and developments, its content will undoubtedly reflect further international developments, i. e. the conceptual framework will itself evolve and change. In any case, the aim of the aforementioned authors is to provide a quasi-empirical analysis of strategic autonomy through the EU's practice of sanctions. I shall follow-up on that by extending the discussion to a particular instance of sanctions-practice, namely the possible confiscation of RCB assets.

So, what is the more precise connection between strategic autonomy and EU restrictive measures? Lonardo and Szép provide a succinct explanation:

> Prima facie, sanctions are instrumental to reaching strategic autonomy because they are aimed at enabling the EU to 'act autonomously'. This is the case for two reasons: they protect the EU's security (and public order), and they protect the internal market. Security is an existential requirement, as recognized also in the case law of the Court, without which there can be no EU action. The internal market is one of the main strengths of the EU on the international arena: the uses of its economic and regulatory power in international politics are well documented.[27]

In other words, sanctions contribute to the protection of security and economy (more precisely, the internal market) of the EU. Since this is the case, the argument goes, sanctions are a tool to create the structural conditions for an autonomous Union, i. e. supporting the aims of strategic autonomy whose main component is exactly the capability to act autonomously.

Let us look at the first element – security. The main examples given in this regard are restrictive measures against the Russian energy sector and the so-called EU cyber sanctions. It is true that both are somehow linked with security concerns. Nevertheless, one should not imply that this conclusion is generally applicable to all restrictive measures as these are diverse and might serve different purposes. In fact, it is surely not that controversial to question the effectivity (especially) of the latter type of measures and its contribution to the Union's security.[28]

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[25] L. Lonardo and V. Szép, 'The Use of Sanctions to Achieve EU Strategic Autonomy: Restrictive Measures, the Blocking Statute and the Anti-Coercion Instrument', 28 *European Foreign Affairs Review* 2023, at 364.

[26] *Ibid.*

[27] *Ibid*, at 365.

[28] Council Regulation (EU) 2019/796 concerning restrictive measures against cyber-attacks

As to the internal market, or economy more generally, there are various new tools and initiatives adopted within the context of strategic autonomy, e. g. the Anti-Coercion Instrument. Its aim is mainly defensive, while it should also serve as a deterrence. Moreover, the so-called Blocking statute is also given as an example that should help to further the aims of EU's strategic autonomy.[29] Similarly as in the case of cyber sanctions, the effectivity or the causal link between adopting and operating this type of legislation and contributing to EU's strategic autonomy is not straightforward.

Be that as it may, when we look at the confiscation of RCB assets in particular, the crucial question that arises is whether the wholesale confiscation would contribute or not to the EU's security and economy (i. e. to EU's strategic autonomy). One essential point to be made is that these two are more and more intertwined. In fact, one aspect that is often accentuated in the context of new 'geo-economic order' is precisely the inseparability of security and economics. As Anthea Roberts and others put it, geoeconomics represents the 'securitisation of economic policy and economisation of strategic policy.'[30] Thus, there is a relatively high level of convergence between economics and security as opposed to the post-Cold War period of the 90's that was characterized by the prevalence of the former (economics).

Accordingly, the issue of confiscation should be situated in this context and analysed against this background, as the strategic autonomy discourse also points toward this geo-economic aspect. Now, if we turn specifically to the issue of confiscation, some argue that such a measure could perform a deterrent role.[31] That is, states will need to take into account in their future behaviour on the international level the potential consequences of *erga omnes* violations (especially use of force violation/aggression) which could involve, *inter alia*, confiscatory measures.

Whether that conclusion is actually plausible remains difficult to determine. Historically, there is essentially no precedent of confiscatory measures in the

threatening the Union or its Member States enshrines the aims (and conditions for imposing cyber sanctions) state that the objective of EU cyber sanctions is to 'respond to and deter cyber-attacks with a significant effect which constitute an external threat to the Union or its Member States.' However, it must be admitted that the deterrence effect of cyber sanctions is not supported by empirical evidence. See: S. Patil, 'Assessing the Efficacy of the West's Autonomous Cyber-Sanctions Regime and Its Relevance for India: EU Cyber Direct', *Horizon* (2022), at 11, available at <eucyberdirect.eu/atlas/sources/assessing-the-efficacy-of-the-west-s-autonomous-cyber-sanctions-regime-and-its-relevance-for-india> or A. Bendiek and M. Schulze, 'Attribution: A Major Challenge for EU Cyber Sanctions', *Stiftung Wissenschaft und Politik (SWP)* (2021) available at <www.swp-berlin.org/10.18449/2021RP11/>.

[29] L. Lonardo and V. Szép, *supra* note 25, 367-370. For a more sceptical view of the Blocking Statute, see T. Szabados, 'Building Castles in the Air? The EU Blocking Regulation and the Protection of the Interests of Private Parties' 25 *Cambridge Yearbook of European Legal Studies* 2023.

[30] A. Roberts, H. Ch. Moraes and V. Ferguson, *supra* note 4.

[31] See e. g. K. Johnson and A. Mackinnon, 'Russia's Frozen Assets Might Pay for Ukraine Reconstruction', *Foreign Policy,* 30 January 2024 or J. E. Stiglitz and A. Kosenko, 'Seizing Russia's Frozen Assets Is the Right Move*', Project Syndicate,* 4 January 2024.

post-1945 period on such a scale as is being considered in the context of the Russian aggression against Ukraine. Recently, two other instances are brought up: the confiscation of Afghanistan's and Venezuela's central bank assets. Nonetheless, some have (correctly, in my view) pointed out that neither of these can be analogically applied to the current situation, as explained below.

Contrary to this, it is not entirely unreasonable, as some claim, that confiscating these assets might lead to escalation, threaten the hegemonic role of Western countries in the international monetary and financial system and most importantly, as will be argued *infra*, could result in a violation of traditional rules of international law, i. e. immunity law.

An important point is that the possible confiscation could also create a fragmented environment within the international financial sphere with the effect of further tension.[32] This could also fuel the creation of alternative financial mechanisms that would in the long-term undermine the effectivity of sanctions.[33] Some analysts have argued that this is already an ongoing trend, but the weaponization of financial means, especially in the grave form of confiscating RCB assets, might strengthen this. In fact, financial interdependence, together with economic and financial power constitute the essential preconditions of successful sanctions-policy. If further financial fragmentation that provides a fertile ground for the creation of novel alternative financial mechanisms ensues, the effectivity of sanctions could be threatened.[34]

Additionally, what sometimes is not fully appreciated is the fact that most of the assets are located in the EU Member States (the estimated amount is more than 200 billion euros[35]) and the consequences would be primarily borne by the European states (as opposed to US or UK where the amount of assets is considerably smaller).[36] In fact, just a short period before Russia invaded Ukraine in February 2022, Russia moved its foreign reserves from US and Canada to the EU.[37] Moreover, it is not insignificant that the euro has achieved the second place as a reserve currency, confirming its attractiveness and the potential negative consequences from confiscation could threaten its position.

In this regard, some argue that such fears are overblown as no considerable adverse effects have occurred even though the RCB assets have been frozen

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[32] P. Subacchi and R. M. Lastra, 'Financial Sanctions Need Global Governance', *Project Syndicate,* 2 April 2024.

[33] Agathe Demarais, 'The Unintended Consequences of Seizing Russian Assets', *Foreign Policy,* 27 November 2023.

[34] *Ibid.*

[35] N. Verón, 'The European Union Should Do Better than Confiscate Russia's Reserve Money', *Bruegel,* (April 2024), available at <www.bruegel.org/analysis/european-union-should-do-better-confiscate-russias-reserve-money>. However, the exact amount is not entirely known.

[36] *Ibid.* This is manifested in contradictory positions taken by the representatives of US and France, for instance.

[37] A. Moiseienko, 'Seizing Foreign Central Bank Assets: A Lawful Response to Aggresion?', *SSRN Electronic Journal* (2023), at 6.

for over two years now.[38] However, this argument is unconvincing for a distinction must be made between freezing and confiscation. As we will see below, freezing central bank assets is far from unprecedented in comparison to confiscation. The two measures – freezing/confiscating – are qualitatively different and should not be put on identical level. In other words, we should not imply that the effects from confiscating RCB assets would be the same as in the case of freezing.

Furthermore, another aspect is the potential effect on the EU's current and future relations with the states of the global South that are very sceptical of economic sanctions in general[39] and this scepticism is even more substantial in the case of a precedent that would involve the confiscation of assets. This, according to some, could 'deter sovereign wealth funds, central banks, corporations, and private investors from the Global South from investing in European assets. A potential outflow of investment in euros would have serious consequences: a rise in borrowing costs and inflation, as well as a fall in tax revenues.'[40] Albeit a slightly different contention, Lonardo and Szép assume that the aim of strategic autonomy should be for the EU to enable 'a selective use of international partnerships. This entails, above all, a 'positive' aspect: the EU must be able to choose its own allies.'[41] Here, the argument is more about the right to self-determination on the international level, i. e. the ability of EU to choose its allies without coercion. Nonetheless, the emphasis is also upon the 'selective use of international partnerships'. Thus, the EU must also consider the pros and cons of taking certain measures (in our case, confiscation of RCB assets) that may well be, on the one hand, just and moral in the present case but on the other, could affect the EU's ability and options to actually establish or maintain these partnerships.

Some even argue that were these measures to be adopted by Western countries, it would benefit alternative financial currency reserves, e. g. Chinese. More specifically:

> intensified weaponization of Western currencies could indeed boost China's yuan efforts, and, more significantly, provide a major stimulus to plans for a BRICS basket reserve currency. The move would simultaneously improve Beijing›s reputation as

[38] L. Litra and O. Lesia, 'You Break, You Pay: Why the West Should Start Confiscating Frozen Russian Assets Now', *European Council on Foreign Relations* (20 February 2024), available at <ecfr.eu/article/you-break-you-pay-why-the-west-should-start-confiscating-frozen-russian-assets-now/>.

[39] See e. g. the latest Symposium on Third World Approaches of International Law and Economic Sanctions at Yale: <www.yjil.yale.edu/symposium-third-world-approaches-to-international-law-economic-sanctions/> or A. Hofer, 'The Developed/Developing Divide on Unilateral Coercive Measures: Legitimate Enforcement or Illegitimate Intervention?', *16 Chinese Journal of International Law* 2017. As to the political sphere, even in the case of sanctions against Russia, the majority of global South has not aligned with the EU. See: Ch. Seshadri, 'Western Sanctions on Russia and the Global South's Stance', *Royal United Service Institute* (23 November 2023), available at <rusi.org/explore-our-research/publications/commentary/western-sanctions-russia-and-global-souths-stance>.

[40] A. Kolyandr, 'Russia's Frozen Assets Present a Policy Dilemma', *Carnegie Endowment for International Peace* (5 February 2024), available at <carnegieendowment.org/politika/91556>.

[41] L. Lonardo and V. Szép, *supra* note 24, at 375.

> an apparently more responsible actor with respect to foreign assets, while also perversely incentivizing it to further experiment with its own nascent unilateral sanctions regime.[42]

The fact of the matter is that confiscatory measures would be most certainly criticized and contested by China, India, Brazil or other states of global South as these countries and others already voted against (or abstained) an UN resolution in November 2022 calling upon Russia pay reparations for its grave breaches of international law.[43]

At the same time, this possible precedent could be abused by these states in the future. Certainly, as some have pointed out, these fears might be exaggerated because any potential confiscation would only occur, allegedly, in the case of grave violations of international law (e. g. violation of the prohibition of threat and use of force). The problem with this contention is that if confiscation of central bank assets is once allowed (even though international law as it stands grants rather extensive immunity protection to these assets[44]), there is hardly any guarantee that other exceptions will not emerge as 'grave' breaches of international law may open avenues for other cases too.

On top of that, another factor to be reckoned with is the possible retaliation by Russia, in the form of nationalisation of Western private investment capital.[45] European (or more generally, Western) investments are already trapped in Russia due to the prohibition on capital movement. Moreover, lawsuits are already pursued (at least in Russia) against frozen assets, though this could expand beyond Russia.[46]

In conclusion, there are concerns about the proposed confiscation from the perspective of EU's security and economy (or more precisely, *economic security*) that are genuine and thus, one shall not *a priori* accept the furtherance of the interests that should be part of EU's strategic autonomy by sanctions-practice. Two analysts summarised the issue succinctly:

> Confiscation now would set a problematic precedent and incentivise global financial fragmentation. Trust in international monetary arrangements would be undermined to a considerably greater extent by confiscation than by the inherently reversible immobilisation, for which precedents exist. That would disincentivise several central banks from holding their reserve assets in euros. […] Furthermore, it could expose EU countries that perpetrated misdeeds in the past to more pressure from their own claimants. In short, the EU would lose stature and damage global public goods it

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[42] R. M. Mitchel, 'Why Seizing Russia's Assets Would Be a Gift to Beijing', *Responsible Statecraft,* (27 March 2024), available at <responsiblestatecraft.org/seizing-russian-assets/>.

[43] UN General Assembly Resolution ES-11/5 of 14 November 2022.

[44] See below.

[45] A. Djokic, 'The Long Battle over Russia's Frozen Assets Heats Up', *Euronews* (20 March 2024), available at <www.euronews.com/business/2024/03/20/the-long-battle-over-russias-frozen-assets-heats-up>.

[46] G. Sorgi, 'Russia's Friends Beg EU to Leave Frozen Assets Alone' *POLITICO* (2 April 2024), available at <www.politico.eu/article/russia-frozen-assets-europe-confiscation-china-saudi-arabia/>.

> otherwise cherishes, for the sake of gaining an amount of money that it can do without.[47]

Unsurprisingly then, the holders of those assets (primarily EU states) are themselves not entirely convinced whether confiscation would be an adequate and rational measure. Although the war has been going on for more than two years, the only measure so far that gained support involves using the windfall profits from Russia's CB assets.[48] This measure itself is not uncontroversial from the legal perspective,[49] but represents a sort of middle-ground between "doing nothing" and outright confiscation. Regardless of legal hurdles, there are obvious differences from the perspective of policy. It should be admitted that the legal and policy aspects of confiscation in this case are intertwined to a certain degree and are not easily separated from each other. Certainly, they are at a minimum *seen* as such.

4. INTERNATIONAL LAW AND THE "FREEZE-TO-SEIZE DEBATE"

The discussion has so far focused on economic and policy issues with regard to the confiscation of RCB assets. In this part, we turn to this question from an international legal perspective, arguing first that freezing RCB assets does pose problems due to law of immunity, but this measure is justified in light of the doctrine of countermeasures; and secondly, we tackle a more difficult question whether third-party countermeasures can be invoked to justify confiscation.

4.1 **Freezing RCB Assets**

The legal basis for freezing assets can be found in Article 1 (e) of Regulation 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine. It states that 'freezing of economic resources' means preventing the use of economic resources to obtain funds, goods or services in any way, including, but not limited to, by selling, hiring or mortgaging them' and more precisely, in Article 1 (f) the 'freezing of funds means preventing any move, transfer, alteration, use of, access to, or dealing with funds in any way that would result in any change in their volume, amount, location, ownership, possession, character, destination or any other change that would enable the

[47] Nicolas Verón, *supra* note 35.

[48] Council of the EU, 'Immobilised Russian Assets: Council Decides to set aside extraordinary revenues' (12 February 2024), available at <www.consilium.europa.eu/en/press/press-releases/2024/02/12/immobilised-russian-assets-council-decides-to-set-aside-extraordinary-revenues/>.

[49] D. Franchini, 'Immobilised Assets, Extraordinary Profits: The EU Council Decision on Russia's Central Bank Reserves and Its Legal Challenges' *EJIL:Talk!* (1 March 2024), available at <www.ejiltalk.org/immobilised-assets-extraordinary-profits-the-eu-council-decision-on-russias-central-bank-reserves-and-its-legal-challenges/>.

funds to be used, including portfolio management.'

Now, as regard the freezing of central bank assets, two positions exist in the current doctrine. First, some argue that such freezes do not implicate immunity law due to the absence of link of these measures to court proceedings. The main instrument that regulates these immunities is the United Convention on Jurisdiction Immunities of States and Their Property (UNCSI)[50] that is seen as reflecting customary international law. According to UNCSI, immunity from jurisdiction and enforcement must be connected to court proceedings for immunities to be applicable. In the words of UNCSI, only pre-judgmental or post-judgment measures of constraints are covered by immunity law.[51] We can further support this argument with other international instruments, e. g. the European Convention on State Immunity, the domestic legislation of US (United States 1976 Foreign Sovereign Immunities Act), UK (1978 State Immunity Act), as well as other states (Australia, Canada, Singapore, Argentina) or the scholarly work concerning the issue at hand.[52] All of the legal materials cited are formulated in a similar way, that is, immunity is triggered only in the context of court proceedings. This conclusion might seem a bit counterintuitive, but the primary legal materials quite clearly state that the nexus to court proceeding is inevitable (this interpretation is also supported by scholarship).[53] If we accept this interpretation, it would mean that asset freezes, normally adopted by executive or generally non-judicial organs (in the case of Russian assets, the Council) without any involvement of court proceedings, do not violate central bank immunity.

Secondly, by contrast, Jean-Marc Thouvenin and Victor Grandaubert argue that under customary international law, immunity from execution is broader and the link to court proceedings is not a precondition. Rather, according to them, asset freezes would constitute a measure of constraint against another state and thus, violate state immunity. It shall be added that immunity from execution is almost absolute, while immunity from jurisdiction is characterised by certain exceptions which is a result of historical development from absolute to a more restrictive nature.[54] By deducing state immunity from the principle of sovereign equality of states, this means, in particular, that immunity from execution cannot be limited merely to court proceedings but measures of constraint can also be imposed by legislative or executive organs.[55]

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[50] As is well known, UNCSI has not entered into force yet.

[51] Specifically, Article 18 and 19 of UNCSI. As regards central bank immunity, Article 21 (1) (c) is pertinent.

[52] T. Ruys, 'Immunity, Inviolability and Countermeasures – A Closer Look at Non-UN Targeted Sanctions', in T. Ruys, *et al*. (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press 2019), p. 676.

[53] See e. g. I. B. Wuerth, 'Central Bank Immunity, Sanctions, and Sovereign Wealth Funds' *Social Science Research Network* (25 February 2023), available at papers.ssrn.com/sol3/papers.cfm?abstract_id=4363261.

[54] X. Yang, *State Immunity in International Law* (Cambridge: Cambridge University Press 2015).

[55] J. Thouvenin and V. Grandaubert, 'The Material Scope of State Immunity from Execution' in *supra* note 52.

This conclusion could be also partly supported by an extensive interpretation of the term "court" stipulated in Article 2(1)(a) UNCSI. A court is defined as 'any organ of a State, however named, entitled to exercise judicial functions.' The ILC Commentary then elaborates further on the term judicial functions:

> Judicial functions may be exercised in connection with a legal proceeding at different stages, prior to the institution or during the development of a legal proceeding, or at the final stage of enforcement of judgements. Such judicial functions may include […] *other administrative and executive functions as are normally exercised by, or under, the judicial authorities of a State in connection with, in the course of, or pursuant to, a legal proceeding* [emphasis added].[56]

Again, judicial functions are linked with court proceedings, as we can see from the ILC excerpt. At the same time, the ILC seems to endorse a more extensive interpretation, noting that judicial functions 'may, under different constitutional and legal systems, cover the exercise of the power to order or adopt enforcement measures (sometimes called "quasi-judicial functions") by a specific administrative organ of the State.'[57] Thus, the question remains whether EU restrictive measures (in our case asset freezes), adopted by the Council in the form of a decision/regulation, could be qualified as a "quasi-judicial function". Since there is a paucity of judicial practice in this regard, the issue remains unresolved for now.

Also, if we take heed of state practice, there are many more cases of asset freezes of central bank assets. From the EU's practice, asset freezes were adopted against the central banks of Syria, Iran, Belorussia and Russia.[58] Though not widely criticized by other states, there were some protests against such measures, for instance by the resolution of AALCO adopted in 2014.[59] As a result, it is difficult to conclude decisively whether immunity from execution (e. g. asset freezes) must have a nexus to court proceedings or a broader interpretation is warranted. To my mind, this latter position seems more reasonable, especially due to the fact that there is an extensive protection granted to central bank assets with practically no exception, and it is unlikely that states would accept that central bank immunities are inapplicable if constrained by administrative measures. Furthermore, the first position is based on a restrictive reading while

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[56] International Law Commission, 'Draft Articles on Jurisdictional Immunities of States and Their Property, with commentaries 1991' (1991), II (2) *Yearbook of the International Law Commission* 14.

[57] *Ibid*.

[58] Council Regulation No. 168/2012 of 27 February 2012 Concerning Restrictive Measures in View of the Situation in Syria, *OJ L 54, 28.2.2012*; Council Decision 2012/35/CFSP of 23 January 2012 Concerning Restrictive Measures against Iran, *OJ L 19, 24.1.2012*; Council Regulation (EC) No 765/2006 of 18 May 2006 concerning restrictive measures against President Lukashenko and certain officials of Belarus, *OJ L 134, 20.5.2006*. Asset freezes were also imposed by the US against the central bank assets of Afghanistan, Venezuela, Cuba, Iran and so on. See: Anton Moiseienko, *supra* note 37, p. 6.

[59] Asian-African Legal Consultative Organization, Resolution on Extraterritorial Application of National Legislation: Sanctions Imposed against Third Parties', AALCO/RES/53/S 6, 18 September 2014. See also: P. Dupont, 'Countermeasures and Collective Security: The Case of the EU Sanctions against Iran' 17 *Journal of Conflict and Security Law* 2012.

a more teleological interpretation favours the second position.

Nevertheless, it must be added that even if this interpretation is correct, the freezing of assets can be justified by countermeasures within the meaning of ARSIWA whereby the wrongfulness of the act not in conformity with international obligations is precluded. After all, asset freezing is explicitly given as an example of countermeasures by the ILC.[60] Quintessentially, it is a measure that aims to induce the other state to comply with its international obligations, while also fulfilling the conditions of temporariness and reversibility. As such, freezing central bank assets, if all the other procedural conditions set by ARSIWA are satisfied,[61] constitutes a lawful countermeasure. There is, nonetheless, a separate issue concerning freezing (and confiscation as well) of RCB assets. In particular, it raises the question whether such measures are permitted to be adopted by third states in the form of so-called third-party countermeasures, to which we now turn.

4.2. **Third-Party Countermeasures and Asset Freezes**

In line with Article 42 of ARSIWA, countermeasures can be invoked only by the injured state against the state that failed to act in accordance with its international obligations. However, sanctions in general (including the freezing of RCB assets) are often employed on behalf of the injured state by third states. Such measures are based on Article 48 (1) (b) of ARSIWA.[62] This is also the case with regard to the imposition of sanctions by mostly Western states against Russia, on behalf of Ukraine. Accordingly, we cannot avoid the issue of third-party countermeasures upon which does not seem to be a consensus among scholars and practitioners.

The ILC chose a cautious approach concerning third-party countermeasures and left the question to further development of customary international law.[63] It included Article 54, in the form of a "saving clause", which states that: 'This chapter does not prejudice the right of any State, entitled under Article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure the cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.' The current international legal discourse is divided on the issue. Phillippa Webb or Anton

[60] International Law Commission, Draft articles on responsibility of States for internationally wrongful acts, with commentaries, (2001) *Yearbook of International Law Commission.* Vol. II, Part Two, at 130.

[61] In particular Article 52 ARSIWA, but also other conditions stipulated in Articles 50 and 51.

[62] 'Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if: [...] the obligation breached is owed to the international community as a whole.'

[63] It shall be added though that the Special Rapporteur James Crawford himself seemed to think that there is some practice of non-injured States adopting countermeasures in cases of violations of *erga omnes* obligations. At the end, however, the ILC opted for a more cautious approach. See: A. Hofer, 'The "Curiouser and Curiouser" Legal Nature of Non-UN Sanctions: The Case of the US Sanctions against Russia', 23 *Journal of Conflict and Security Law* 2018, at 96.

Moiseinko seems to support the lawfulness of third-party countermeasures.[64] An extensive study of state practice (identified together with it *opinio juris*) was undertaken by Dawidowicz who concluded that third-party countermeasures are indeed legal.[65] A further study by Katsell in which she included a list of examples of third-party countermeasures reached a similar conclusion as Dawidowicz.[66] Additionally, the *Institute of International Law* also held in its Krakow resolution, namely in Article 5 that the non-injured states may 'take non-forcible counter-measures under conditions analogous to those applying to a State specifically affected by the breach.'[67] A more cautious approach is taken by others.[68]

The latter approach is supported in a recent study by Federica Paddeau and Miles Jackson, reaching a more nuanced conclusion with respect to third-party countermeasures. They claim that even if there is *quantitatively* considerable practice since 2001 (i. e. from the time ARSIWA was adopted), it is rather difficult to conclusively assess the relevance of this practice. In particular, the legality or illegality of this practice is oftentimes questionable and thus, to determine whether it constitutes a relevant practice is not always straightforward (this is applicable to asset freezes as well). Moreover, the generality of this practice is also dubious as it entails practice primarily from Western states.[69] Additionally, the identification of *opinio juris* is even more problematic because the instances, where states would justify the adoption of sanctions for instance by invoking third-party countermeasures, are scarce.[70] This is presumably because states aim to leave that question open and confine sanctions to the realm of foreign policy to prevent the emergence of more precise norms. As to the current practice of third-party countermeasures, there are states that actually doubted the legality of such measures, e. g. China, Russia or Netherlands and furthermore, Paddeau

[64] See: P. Webb, 'Legal Options for Confiscation of Russian State Assets to Support the Reconstruction of Ukraine', European Parliamentary Research Service (2024), at. 25, available at <www.europarl.europa.eu/RegData/etudes/STUD/2024/759602/EPRS_STU(2024)759602_EN.pdf>; Anton Moiseienko, *supra* note 37, at 46.

[65] M. Dawidowicz, *Third-Party Countermeasures in International Law* (Cambridge: Cambridge University Press 2017).

[66] E. K. Proukaki, *The Problem of Enforcement in International Law: Countermeasures, the Non-Injured State and the Idea of International Community* (London: Routledge 2011). See also Ch. J. Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge: Cambridge University Press 2005).

[67] Institute of International Law, *Obligations and rights erga omnes in international law* (2005), available at <www.idi-iil.org/app/uploads/2017/06/2005_kra_01_en.pdf>.

[68] See for instance I. B. Wuerth, *supra* note 53.

[69] M. Jackson and F. Paddeu, 'The Countermeasures of Others: When Can States Collaborate in the Taking of Countermeasures?', 118 *American Journal of International Law* 2024, 242-246. This conclusion is also reached by Gestri: 'On one side, it is difficult to ascertain the existence of a general practice, accepted as law, in favour of collective countermeasures. Relevant practice does not appear to be sufficiently widespread and representative of the major components of the international community and various geographical regions, being followed only by the US, the EU and other like-minded industrialised States. Russia, China and the great majority of developing, or non-aligned, countries have consistently objected to the notion of collective countermeasures.' M. Gestri, 'Sanctions, Collective Countermeasures and the EU', 32 *The Italian Yearbook of International Law*, 2023, 89-90.

[70] M. Jackson and F. Paddeu, *supra* note 69.

and Jackson also invoke recent practice from the context of cyber-space with an identical conclusion.[71]

Another scholar, Alexandra Hofer, argues that inferring *opinio juris* from state practice (as Dawidowicz did) is incompatible with the ICJ jurisprudence and the approach taken by the ILC in its study on the identification of customary international law.[72] She claims that the *opinio juris* has not been sufficiently established as states such as the US and UK (important actors in the case of sanctions practice) objected to third-party countermeasures during the drafting of ILC's ARSIWA.[73] The said states have remained unconvinced and did not support third-party countermeasures so far.

Having said this, a recent example of collective countermeasure practice can be found, at least indirectly, in the *RT France* case. The General Court stated in respect of restrictive measures that these 'may be understood as being the response, with the peaceful means at the Union's disposal and with a view to achieving the objectives laid down in Article 3(5) TEU, of a subject of international law faced with aggression in breach of Article 2(4) of the United Nations Charter and, consequently, a violation of the erga omnes obligations imposed by international law.'[74] This is an interesting contribution to the development of international law by the EU, linking restrictive measures with collective countermeasures in the case of Russia's violation of *erga omnes* obligations.

However, as Gestri notes, 'a coalition of more than 40 States has adopted sanctions on Russia (besides the EU and other previously mentioned States, the US, the UK, Canada, Japan, Australia, Singapore, South Korea, Taiwan). These States represent over half of the global economy; yet, the fact that the majority of States, representing two-thirds of the world population, have not adopted this kind of measures and many have condemned them, cannot be overlooked.'[75]

The issue of third-party countermeasures is equally crucial in the case of potential confiscation of RCB assets. Currently, there is no clear answer to the legality of such measures, although as Paddeau and Jackson noted, there is a renewed interest in clarifying the question. The reason for this is twofold. First, there is a concern that the factual inequalities between states would cause disadvantages for weaker states. Third party countermeasures could therefore provide an avenue for these countries to defend themselves against would-be aggressors (as in the case of Russian aggression against Ukraine). Thus, even if originally the drafters of ARSIWA attempted to balance two distinct interests – on the one hand, an effective way to react against the breaches of state's international legal obligations (on bilateral basis) and on the other, prevent the potential abuses by

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[71] *Ibid,* 244-245.

[72] A. Hofer*, supra* note 63, 96-98.

[73] *Ibid.*

[74] ECJ, Case T-125/22, *RT France v. Council* [2022] *ECR*, para. 164, available at <curia.europa.eu/jcms/jcms/j_6>.

[75] M. Gestri, *supra* note 69, 90-91.

more powerful states – third-party countermeasures could actually compensate for the existence of material inequalities.

Secondly though, the legal acceptance of third-party countermeasures carries also some risks, including potential conflicts between different groups or regional blocs that would act in tandem, justifying its action by collective countermeasures.[76] Again, as already mentioned above, this would lead to further fragmentation in the international arena.

In the light of the above, the legality of collective/third-party countermeasures is still controversial and uncertain. However, as we shall see in the next part, there are more significant obstacles in the context of asset confiscation.

5. CONFISCATION OF RUSSIAN CENTRAL BANK ASSETS IN THE CONTEXT OF STRATEGIC AUTONOMY: BETWEEN (INTERNATIONAL) LAW AND POLITICS

In the previous part, I have argued that freezing central bank assets could be justified as a countermeasure, while it is less certain however, if international law permits taking these measures as third-party countermeasures on behalf of another state (in our case, Ukraine). Even if we accept that third-party countermeasures are part of existing customary international law, we must finally answer the 'million-dollar question' regarding the potential confiscation of RCB assets. Additionally, my aim is to situate the question of confiscation more broadly into the context of strategic autonomy.

Since Russia launched its brutal invasion against Ukraine in February 2022, the international legal discourse has remained divided on the issue of confiscation. Apart from confiscation, various alternative proposals for using Russian assets have been put forward, for instance setting up a compensation commission by an international treaty, windfall contributions, using RCB assets as a collateral and other.[77] It is not my aim to analyse separately each proposal. Rather, I shall focus simply on the confiscation of RCB assets, while some legal concerns that arise with respect to it are also applicable to other schemes (e. g. confiscating the interests generated from RCB assets).[78]

A preliminary remark is in order. Namely, one should admit that any radically new doctrine or theory which would overcome some of the legal hurdles connected to the confiscation of RCB assets is not likely to emerge as the debate has been going on for more than two years now. In any case, the legal queries that crop up in the context of confiscation concern international investment law; the prin-

[76] M. Jackson and F. Paddeu, *supra* note 69, at 247.
[77] Most comprehensive analysis is provided by Philippa Webb, *supra* note 64, 32-48.
[78] *Ibid.* See also: Daniel Franchini, *supra* note 49.

ciple of non-intervention; and perhaps most controversially, immunity law.[79] With regard to the latter, it is generally accepted that central bank assets enjoy wide protection under immunity law.[80] Moreover, as already mentioned, since 1945, there is practically no comparable precedent to the confiscation of RCB assets that is being contemplated. Recently however, the examples of Afghanistan and Venezuela are given as precedents showing the justifiability of the confiscation of central bank assets. These analogies are, nonetheless, unconvincing. The principal difference lays in the fact that the US did not recognise the governments of these states and furthermore, as the argument goes, the assets are essentially disbursed back to Afghanistan, but to "other people" than those the government of US recognised. Certainly, the argument is tenuous at best, but the point is that the relevant factual background is simply different. Moreover, one might still question the compatibility of such confiscation and disbursement of assets with immunity law.[81]

A further example is the seizure ordered by the US President George W. Bush after the 2003 invasion of Iraq. The seizure involved more than $1.7 billion of Iraqi assets held in US banks which were subsequently disbursed to cover the salaries of Iraqi government employees.[82] Again, the circumstances are radically different from the current situation, while it is also not clear if such seizure was in fact not a violation of international law. To the best of my knowledge, there are no other (at least partially) comparable precedents.[83]

Now, it is uncontroversial from the legal point of view that Ukraine is entitled to compensation. As per Article 31 of ARSIWA, '[t]he responsible State is under an obligation to make full reparation for the injury caused by the international wrongful act.' Thus, Russia is obliged to provide compensation as it is clear that it committed grave breaches of international law.[84] The reconstruction of the country after the enormous destruction wrought by Russia will cost hundreds of billions and this compensation should be provided by Russia. Consequently, the question is whether RCB assets could be employed for this purpose (though most probably, even these proceeds would not be sufficient).

The second point concerns central bank immunities. The conclusions reached in part 3 are applicable to confiscation as well, thus I shall only refer to this without rehearsing all the arguments considered *supra*. In this respect, there is

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[79] See e. g.: Philippa Webb, *supra* note 64.

[80] I B. Wuerth, 'Immunity from Execution of Central Bank Assets' in Ruys T *et al*., (eds), in *supra* note 52.

[81] I. B. Wuerth, *supra* note 52, 10-14.

[82] A. Kolyandr, *supra* note 40.

[83] Another precedent that is sometimes invoked in this regard is the establishment of UN Compensation Commission by the Security Council that handled the compensation for the damage caused by Iraq's invasion of Kuwait in 1990. However, this mechanism was established by the UN Security Council. Ideally, a similar solution in the case of Russian aggression against Ukraine could be put into place. See M. Kamminga, 'Confiscating Russia's Frozen Central Bank Assets: A Permissible Third-Party Countermeasure?', 70 *Netherlands International Law Review* 2023, at 2.

[84] Anton Moiseienko, *supra* note 37, 2-3.

also a recent development that comes from the ICJ, namely the *Iran-US* case decided in March 2023.[85] Though the Court has left many questions open, Tom Ruys and Mira Deweerdt argue that, at least implicitly, the 'reasoning [of the ICJ] may indirectly provide further impetus to the trend of granting more far-reaching immunity to central bank assets, also as compared to other State property. Conversely, it may — again indirectly — further complicate plans to confiscate assets of the Russian Central Bank on account of their supposedly commercial character.'[86] In any case, there is a relatively wide consensus on the fact that central banks enjoy extensive immunities.

Having said this, I return once again to the question of countermeasures that is an issue to be considered in the context of confiscation. The lawfulness of countermeasures is problematic for the following reasons. First, as argued above, it is unclear if third-party countermeasures are legal. And secondly, lawful countermeasures must induce, rather than punish; be temporary rather than permanent; and moreover, the measures adopted must be reversible.[87] The principal problem with confiscation is that it would constitute, in this context, 'an equitable remedy for failure to pay'[88], i. e. it is essentially a direct way to enforce compensation, as opposed to inducement that lawful countermeasures are supposed achieve. The inducement condition has its rationale: the ILC aimed to prevent punitive action which would be based on self-judgment as this could be susceptible to abuse and lead to the aggravation of a particular situation.[89] To my mind, Wuerth correctly argues that countermeasures should be understood as inducing the state to 'comply with its obligations … of reparations.' She continues that 'States make reparations in various ways—through lump sum agreements, claims commissions, and so on—not necessarily by turning over their central bank's foreign currency reserves to new owners. Countermeasures may be used to induce a state to make reparations, but they do not function as a self-help measure to confiscate foreign central bank assets in the name of compensation.'[90]

Additionally, the condition of inducement must be interpreted in the light of other conditions, namely temporariness and reversibility. There is a link between the two conditions. Briefly, countermeasures are most likely to be lawful (i. e.

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[85] *Certain Iranian Assets* (Islamic Republic of Iran v. United States of America), Judgment, I.C.J. Reports 2023, p. 51

[86] T. Ruys and M. Deweerdt, 'From Tehran to Moscow: The ICJ's 2023 Certain Iranian Assets Judgment and Its Broader Ramifications for Unilateral Sanctions, Including against Russia', 70 *Netherlands International Law Review 2023*, 290-291.

[87] I shall leave aside the question of proportionality of countermeasures which also raises some complex issues, though *prima facie* it seems that confiscation would be proportional.

[88] I. B. Wuerth, 'Countermeasures and the Confiscation of Russian Central Bank Assets', *Lawfare* (03 May 2023), available at <www.lawfaremedia.org/article/countermeasures-and-the-confiscation-of-russian-central-bank-assets>.

[89] F. Paddeu, 'Transferring Russian Assets to Compensate Ukraine: Some Reflections on Countermeasures', *Just Security* (1 March 2024), available at <www.justsecurity.org/92816/transferring-russian-assets-to-compensate-ukraine-some-reflections-on-countermeasures/>.

[90] I. B. Wuerth, *supra* note 87.

temporary and reversible) if their character is provisional.[91] There is simply no way to go around this condition as confiscatory acts are not temporary, but permanent. Consequently, as opposed to freezing RCB assets, confiscation could not be characterised as inducing Russia to pay compensation to Ukraine (and subsequently, if such compensation is provided, the assets would be unfrozen), but rather, it would constitute a punishment, thereby not fulfilling the conditions of a lawful countermeasure. As noted by J. Crawford, 'reversibility is intimately linked to the instrumental function of countermeasures, to the extent that it implies a reversion to legality on both sides after the objectives of cessation and reparation have been met.'[92] Accordingly, after the cessation of the aggressive actions by Russia and providing reparation to Ukraine, the frozen RCB assets would have to be unfrozen, that is, both sides would need to return 'back to normal' as it were and comply with their international obligations. However, if the asset were confiscated now, there is no 'going back' – the state of legality cannot be re-established. After all, during the ILC debates, James Crawford was also quite explicit about confiscation and presented the view that confiscation of assets would be 'excluded entirely as a countermeasure because it would be irreversible.'[93]

Turning to the concept of strategic autonomy, the confiscation of RCB assets has sometimes been understood a necessary step for the EU to show fidelity to the concept and to 'flex' its "*geo-economic muscle*."[94] Somewhat similarly for some, confiscation is a question of politics, not law,[95] meaning that there should be willingness to confiscate RCB assets despite of possible legal risks. The relationship between law and politics is evident in the case of confiscation of RCB assets. However, this does not mean that legal issues can be ignored entirely. If this was the case, it cannot be ruled out that we would have seen more robust action taken by the EU or other states that hold RCB assets. On the contrary, a more plausible interpretation is that the EU had taken these legal uncertainties quite seriously. Moreover, the reason why so many proposals to use in some way the Russian assets appeared proves that straightforward confiscation was seen as implausible from the legal point of view. Certainly, policy consideration also came into play, but the point is that seeing confiscation *exclusively* as a political issue is unconvincing.

Returning however to the question of strategic autonomy and analysing the confiscation of RCB assets through its lens, I would like to invoke Article 3 (5),

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[91] F. Paddeu, *supra* note 88.

[92] J. Crawford, *State Responsibility: The General Part* (Oxford: Oxford University Press 2010), 687-688.

[93] F. Paddeu, *supra* note 88.

[94] W. Cimoszewicz, 'Europe Must Seize Russia's State Assets Now', *POLITICO* (24 January 2024), available at <www.politico.eu/article/europe-must-seize-russia-state-assets-now/>.

[95] A. Moiseienko, 'Politics, Not Law, Is Key to Confiscating Russian Central Bank Assets', *Just Security* (17 August 2022), available at <www.justsecurity.org/82712/politics-not-law-is-key-to-confiscating-russian-central-bank-assets/> or G. Sorgi and N.Toosi, 'Western Allies Split over How to Make Putin Pay' *POLITICO* (5 March 2024), available at <www.politico.eu/article/western-allies-split-how-make-vladimir-putin-pay-russia-ukraine-war/>.

together with Article 21 of TEU again. Essentially, as argued in the first part, according to the said articles, the EU shall act according to its interests while respecting international law. In the second part, I tried to show that confiscating RCB assets would be against the economic and political interests of the Union. However, even if we found good (economic and political) reasons to confiscate, I would still submit that respect for international law, especially rules concerning central bank immunity that are widely accepted and strongly embedded in the current international legal system. For one, the EU has always described itself as a normative power, upholding international law, that is, leaning 'to the strict observance and the development of international law.' True, Article 21 (1) of TEU "only" obliges the EU *to respect* the rules of international law, but the essence remains the same. In any case, attention should be also given to a further aspect, namely that it has been argued, indeed cogently, that normative effects should be accorded to Article 3 (5) TEU.[96] In other words, 'the provision in Article 3.5 should be read as a binding principle that is to form the interpretative framework for any external action by the Union. This principle even defines the scope of the external competence exercised by the Union.'[97]

Nevertheless, as the concept of strategic autonomy itself implies, we need to take into account other interests and objectives that the EU pursues in its external relations. That is, the new geopolitical realities described in the first part cannot be ignored. There is therefore a need to balance these considerations. My argument is that the proper balance between these different imperatives is to keep the RCB assets frozen until the war ends and also, until Russia carries out its international obligation to provide compensation to Ukraine. If not, this would constitute another breach of international law which would prompt the possibility to confiscate Russia's CB assets and justify that action by relying upon the doctrine of countermeasures. This solution is not risk-free from a legal point of view, but certainly more plausible than confiscation.[98] By contrast, confiscation would 'deprive the EU of potential future leverage in some scenarios of negotiations to come, even though no such scenario is probable as long as Vladimir Putin remains in power.'[99]

Another aspect is multilateralism. It must be emphasized that 'the multilateral system is recognized as a cornerstone of European security and prosperity.'[100] Even if G7 countries would act in coordination in the context of confiscation, unfortunately, a large majority of states from the global South would not be per-

[96] E. Kassoti and R. A. Wessel, 'The Normative Effect of Article 3(5) TEU: Observance and Development of International Law by the European Union', in P. G. Andrade (ed.), *Interacciones entre el Derecho de la Unión Europea y el Derecho Internacional Público* (Tirant Lo Blanch 2023), at 25.

[97] *Ibid*, at 25.

[98] See in this respect: E. Criddle, 'Turning Sanctions into Reparations: Lessons for Russia/Ukraine' *Harvard International Law Journal Online* (2023), available at <scholarship.law.wm.edu/facpubs/2123/> or P. Stephan, 'Response to Philip Zelikow: Confiscating Russian Assets and the Law', *Lawfare* (12 May 2022), available at <www.lawfaremedia.org/article/response-philip-zelikow-confiscating-russian-assets-and-law>.

[99] N. Verón, *supra* note 35.

[100] A. Steinbach, *supra* note 15, at 14.

suaded by the legality of such action. Even if this measure was characterized as a *development* of international law (in line with Article 3 (5) of TEU), it would basically involve few powerful Western states, which would be perceived as a kind of unilateral measure with little legitimacy. Nevertheless, the support of non-Western states remains crucial for the post-war reconstruction and settlement to ensure that the measures adopted will at least resemble what is known as "international community". For it is crucial to prevent the perception that such confiscation occurs as a result of rules manipulation to suit the interests of a few powerful states, which could also lead to accusations about double standards that are prevalent nowadays. The new Canadian legislation to seize RCB assets[101] could be an example of this – though adopted with the best intentions, the result is that the Canadian legislation circumvents domestic and international legal concerns by not requiring court proceedings in the case of confiscation.

6. CONCLUSION

The turn to strategic autonomy reflects the fact that relations between states on the international level are becoming more power-ridden and conflictual. This was summed up by Josep Borrell in the following way:

> Strategic autonomy is, in this perspective, a process of political survival. In such a context, our traditional alliances remain essential. However, they will not be sufficient. As power differentials narrow, the world will become more transactional, and all powers, including Europe, will tend to be so. […] 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. Today, we are in a situation where economic interdependence is becoming politically very conflictual.[102]

However, this should not deflect from the foundational values of EU that puts a strong emphasis on international law and multilateralism. Even though a difficult dilemma and a balancing act is required in this regard (with other objectives that gained a relative importance due to this geopolitical shift), in the particular case of confiscation, I argued for the abovementioned reasons that first, it would not in fact further the economic/political and security aspects of the Union and secondly, even if this analysis is incorrect or incomplete and there are other good (politico-economic) reasons to confiscate, EU should stick to its identity as a normative power. This would require respecting sovereign immunity and keeping the RCB assets frozen. Even though confiscation might be morally warranted, the actions of the EU should not further weaken international rule of law. Ultimately then, the principal question that was already part of the title

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[101] For a short analysis, see: P. Lim, 'Canada's Special Economic Measures Act under International Law', *Just Security* (27 February 2024), available at <www.justsecurity.org/91736/canadas-special-economic-measures-act-under-international-law/>.

[102] J. Borrell, 'Why European Strategic Autonomy Matters', *European Union External Action* (December 2020), available at <www.eeas.europa.eu/eeas/why-european-strategic-autonomy-matters_en>.

of this paper should be answered in negative. I shall add that I tried to formulate my conclusion in a cautious way, focusing only on the specific question of confiscation of RCB assets and thus, the conclusions cannot be generalized.

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Founded in 2008, the Centre for the Law of EU External Relations (CLEER) is the first authoritative research interface between academia and practice in the field of the Union's external relations. CLEER serves as a leading forum for debate on the role of the EU in the world, but its most distinguishing feature lies in its in-house research capacity, complemented by an extensive network of partner institutes throughout Europe.

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- To achieve high standards of academic excellence and maintain unqualified independence.
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