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From EU strategic autonomy to EU public order and security. Towards the framing of an “EU strategic security”?

CANDIDATO

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RELATRICE

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Abbreviations

AFSJ	Area of Freedom, Security and Justice
AVMSD	Audiovisual Media Services Directive
CEAS	Common European Asylum System
CFSP	Common Foreign and Security Policy
CSDP	Common Security and Defence Policy
CCP	Common Commercial Policy
CRMA	Critical Raw Materials Act
DSA	Digital Services Act
DMA	Digital Markets Act
EDTIB	European Defence Technological and Industrial Base
EEAS	European External Action Service
EMFA	European Media Freedom Act
EPF	European Peace facility
FDI	Foreign Direct Investment
FIMI	Foreign Interference and Manipulation of Information
HR/VP	High Representative/Vice-President of the European Commission
IRA	Inflation Reduction Act
OLP	Ordinary Legislative Procedure
PRC	People's Republic of China
NRRP	National Recovery and Resiliency Plan
NZIA	Net-Zero Industry Act
TEN-E	Trans-European networks for Energy
TTC	Trade and Technology Council
UAF	Ukrainian Armed Forces
UK	United Kingdom of Great Britain and Northern Ireland
U.S.	United States of America

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Introduction

"Europe has never been so prosperous, so secure nor so free. The violence of the first half of the 20th Century has given way to a period of peace and stability unprecedented in European history".[1] These words appear in the European Security Strategy,[2] endorsed by the European Council on December 2003, and describe a different world compared to the current situation at the international level. Nowadays, the global order shows indeed multiple elements of complexity and can be regarded as "bipolar, multipolar and nonpolar all at once",[3] presenting at its core a growing tendency towards strategic competition between world Powers.[4] Interdependences, which have prominently featured at the basis of global economy since the end of the "cold war", have increasingly been "weaponised" by certain actors,[5] which are also assertively promoting their economic and political interests at the international level. The progressive deterioration of the security environment - culminated in the still ongoing Russian war of aggression against Ukraine, which started in February 2022 - has added further uncertainties and prompted new challenges, especially in the Eastern and Southern neighbourhood as far as Europe is concerned.

Against this backdrop, the European Union (EU) has gradually adapted itself and developed new instruments to cope with these rising threats. The concept of "EU strategic autonomy", which was eventually adopted in 2016 in the context of the EU Global Strategy (EUGS), has represented a landmark achievement in this regard, allowing the EU to identify specific interests to be defended at the international level. Following the evolution

[1] COUNCIL OF THE EUROPEAN UNION (2003a), p. 3.
[2] This document represented the first attempt to define, in a coherent way, European interests *vis-à-vis* the surrounding strategic environment.
[3] TOCCI (2023), p. 2.
[4] From an international relations point of view, the discussion is centred around the supposed return of "great power competition", especially in the U.S.-PRC relations. For a complete overview, see DICICCO and ONEA (2023). For the role of Europe in this respect, *ex multis* BIBA and WOLF (2021). The EU Strategic Compass for security and defence explicitly states that "[i]n this era of *growing strategic competition*, complex security threats and the direct attack on the European security order, the security of our citizens and our Union is at stake" (emphasis added) and that "[t]he return to power politics leads some countries to act in terms of historical rights and zones of influence, rather than adhering to internationally agreed rules and principles and uniting to promote international peace and security" (emphasis added). See COUNCIL OF THE EUROPEAN UNION (2022a), p. 14 and *Infra*.
[5] In their work, FARRELL and NEWMAN (2019) paradigmatically recognize that "[a]symmetric network structures create the potential for "weaponized interdependence," in which some states are able to leverage interdependent relations to coerce others", in particular those with "political authority over the central nodes" and "appropriate domestic institutions" (p. 45).

of the international situation, the focus has nonetheless shifted progressively towards the protection of the security of the EU itself across different policy fields, also as a result of triggering events such as the Covid-19 pandemic.[6]

Within this context, the practice consisting in assessing the impact of specific transnational challenges in relation to the "EU public order and security" has recently emerged with reference to determined EU policy domains. This represents an interesting development within the EU framework, given that the notions of "public order" and "public security" have traditionally been employed in relation to the Area of Freedom, Security and Justice (AFSJ) and not, for instance, in relation to trade, disinformation and energy. Indeed, these are sectors that do not fall within the AFSJ and are normally referred to when talking about EU strategic autonomy.

Taken all from the above, the research questions this work aims to answer concern whether the concept of "EU strategic autonomy", which has prominently featured in the discourse covering EU external action, has progressively become an instrument to foster the internal security of the EU and, if so, what are the key characteristics of this "internal security" from an "EU strategic autonomy" point of view. On the basis of the mentioned *practice* concerning the "EU public order and security", this work argues that the concept of EU strategic autonomy has been increasingly focused on the internal dimension of the EU *vis-à-vis* external challenges and that an embryonic concept of security involving the EU *as a whole* is currently been formulated in relation to these domains. In order to understand these developments, the thesis proposes the adoption of a new term, "EU strategic security", which is to be understood as complementing Member States' national security.

To this aim, the present work will first analyse how the "EU strategic autonomy" paradigm allows to protect EU security (*Chapter I*). As a result, it will delve into the literature pertaining to the term analysing its conceptual development as well as its connection to other notions, with due reference to the "*open* strategic autonomy" paradigm in the context of the Common Commercial Policy (CCP), the quest for "EU resilience" against hybrid threats and the pursuit of "European technologic sovereignty", especially in the context of the so-called twin (green and tech) transition. *Chapter II* will instead centre around the concept of "EU's public order and security", as significantly mentioned in

[6] See *Chapter I*.

relevant *acquis* of the Union. Three case-studies will help understand this concept: the Foreign Direct Investment (FDI) Regulation, the Union's action in Foreign Interference and Manipulation of Information (FIMI) - including the so-called "broadcasting ban" provided for in the EU restrictive measures adopted in response to the Russian war of aggression against Ukraine - and the Net-Zero Industry Act (NZIA) proposal. *Chapter III* will discuss the notion of "EU strategic security" this work aims to introduce, with particular reference to the political and legal implications arising from the interplay between this new paradigm and the Member States' national security.

In order to do so, the analysis will rely on official documents and on the relevant literature, as well as on contributions produced by renowed think-tanks and research centres. Due reference to articles from eminent newspapers will be made, whenever necessary, because of the unfolding nature of the events under consideration. This work also builds upon a semi-structured interview to Prof. Nathalie Tocci, Director of the Rome-based *Istituto Affari Internazionali* (IAI) and former Advisor to Federica Mogherini and Joseph Borrel i Fontelles in their capacity as High-Representative/Vice-President of the European Commission (HR/VP).[7]

[7] The interview was carried out in Italian.

Chapter I. The use of "EU strategic autonomy" for the protection of EU security

It goes without saying that the notion of "EU strategic autonomy" has prominently featured in the EU external action debate since its inclusion in the EUGS in 2016, which aimed at providing the Union itself with the necessary conceptual and operational tools to cope with a challenging international order.[8] This has represented an important instrument for a redefinition of EU priorities, not least for the greater attention directed towards the protection of EU security.[9] The evolving nature of the internal and external threats for the Union has nevertheless required a recalibration of the available tools and, within this context, the concept of EU strategic autonomy makes no exception at all. As a result, it has increasingly appeared alongside other relevant terms - such as "*open* strategic autonomy", "resilience" and "EU sovereignty" - all implying the EU as becoming more autonomous on the international scene, but pointing to other dimensions as well, notably as far as EU security is concerned in all its different aspects.

This chapter aims at analysing how the concept of EU strategic autonomy has allowed the EU to focus on its internal security needs. In order to do so, it will first provide an in-depth analysis of the concept itself, highlighting its origins as well as initial development. The work will then focus on the adoption of the "EU *open* strategic autonomy" paradigm in the context of the CCP and on the related notion of "EU economic security", which has been developed quite recently. Attention will be then directed towards the other two concepts that have been highlighted above, namely "resilience" and "EU sovereignty", the latter being analysed with particular regard to the challenges that the ongoing technological race at an international level poses to the EU. Overall, the chapter aims to show the different meanings as well as the conceptual evolution of "EU strategic autonomy" and of its related terms, which seem nowadays to have achieved a multi-faceted dimension.

[8] In this respect, the EUGS explicitly mentions "principled pragmatism" as the guiding principle for its external action at an international level, to be operationalised in four lines of action - namely *unity* between Member States and across EU institutions, *engagement* with the wider World, *responsibility* and *partnership*. See EEAS (2016), pp. 16 ff. In relation to "principled pragmatism", whose main aim was to balance EU values and interest, see *ex multis* GIUSTI (2020), BREMBERG (2020) and COLOMBO (2021).

[9] See *Infra*, *Chapter 1.1*.

1.1. "EU strategic autonomy": the elaboration of a concept

The idea of Europe acquiring some degree of autonomy in international affairs cannot be regarded as being purely contemporary and can even be traced back to the signing of the Treaty of Brussels, which established the *Western Union* in 1948.[10] However, as far as the current meaning of EU strategic autonomy is concerned, the relevant literature normally points to the Franco-British Saint-Malo Joint Declaration, issued in 1998, as the landmark document in this respect, which recognises the necessity for an enhanced room for manoeuvre for the EU in international affairs, to be supported by the deployment of "credible military forces".[11] As known, this objective was then operationalised through the launch of the European Security and Defence Policy (ESDP) at the Cologne European Council in 1999.[12]

Even though it seems to have been first formulated within the French defence *milieu*,[13] the concept of strategic autonomy has then been employed at the Union level, gradually becoming part of the "renewed international identity of the EU" itself.[14] The European Parliament appears to have been the first EU institution to have explicitly mentioned the term in one of its official documents, namely the 2010 Resolution on the implementation of the European Security Strategy and of the Common Security and Defence Policy (CSDP).[15] Here, the concept of EU strategic autonomy was linked to two main ideas, namely (i) the necessity for the EU to develop "a strong and effective foreign security and defence policy" in order to pursue its objectives, interests and values in the wider world and (ii) the opportunity to incorporate the principle of "European preference" in defence procurement "in some areas of defence equipment where it is important to maintain

[10] As does ČESNAKAS (2023), p. 14. The Western Union was a military alliance stipulated between the United Kingdom, France, Luxembourg, the Netherlands and Belgium, which was later complemented by a military agency, the Western Union Defence Organization (WUDO). The signature of the Modified Treaty of Brussels in 1956 allowed the entry of Italy and of the Federal Republic of Germany into the organization, which was then renamed Western European Union (WEU). The WEU terminated on 31 March 2010 following the entry into force of the Treaty of Lisbon (1 December 2009).
[11] *Ex multis*, HELWIG and SINKKONEN (2023), p. 3. The Saint-Malo Joint Declaration states 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, in order to respond to international crises".
[12] See EUROPEAN COUNCIL (1999), paras. 55-56 and Annex III.
[13] In this respect, ČESNAKAS (2023) and BEAUCILLON (2023) point to the French *Livre Blanc sur la Défense*, issued in 1994. See *Infra*, *Chapter III*.
[14] BEAUCILLON (2023), p. 428.
[15] ČESNAKAS (2023), p. 20.

strategic autonomy and *operational sovereignty* from a European perspective, and to sustain *European industrial and technological pre-eminence*" (emphasis added)[16]

However, it was necessary to wait until 2013 for this notion to be explicitly used by the other two most important EU institutions, namely the European Commission and the European Council. In the former case, the concept is first introduced in relation to the European Defence Technological and Industrial Base (EDTIB), which is regarded as "a key element for Europe's capacity to ensure the security of its citizens and to protect its values and interests".[17] The Communication acknowledges that, within this context, Europe has to work both for its own security and for international peace and stability and that, in order to do so, it requires a certain "*strategic autonomy*" defined in the following terms:

> "[…] to be a credible and reliable partner, Europe must be able to decide and to act without depending on the capabilities of third parties. Security of supply, access to critical technologies and operational sovereignty are therefore crucial".[18]

Moreover, the Commission takes the view that the contribution of the EU in the field of defence has the potential to allow Member States "to maintain *collectively* an appropriate level of strategic autonomy" (emphasis added) through the use of relevant EU policies and instruments capable of triggering "structural change".[19]

In the case of the European Council, the *Conclusions* of December 2013 only recall the defence industry-related aspects, which are regarded as enablers of EU strategic autonomy, highlighting the role that "a more integrated, sustainable, innovative and competitive […] EDTIB" plays with regards to the development of defensive capabilities, with significant impact on the EU's "*strategic autonomy* and its ability to act with partners" (emphasis added).[20]

As previously mentioned, the concept became of widespread use after the publication of the EU Global Strategy in 2016, which cultivated the "ambition of strategic autonomy for the European Union".[21] Consistently with the views that were expressed in the cited documents, the document confirms the EDTIB as being "essential for Europe's

[16] EUROPEAN PARLIAMENT (2010), paras. 3 and 68, respectively.
[17] *Ibid*.
[18] *Ivi*, p. 3.
[19] *Ivi*, p. 4.
[20] EUROPEAN COUNCIL (2013), p. 7.
[21] EEAS (2016), p. 4.

strategic autonomy and for a credible CSDP".[22] However, what is particularly interesting is that the notion of strategic autonomy is here linked to the pursuit of peace and security *within and beyond* Europe's borders and that the protection of security in the Union is mentioned in the document as being one of the priorities for the external action of the EU itself.[23]

At the time, the strategy was indeed meant to answer mainly to specific objectives, which are not normally indicated in the strategy itself even though they lie at the basis of it.[24] In relation to the EUGS, the drivers were both of a *political* and an *institutional* nature.[25] On the one hand, in relation to the former element, there was a growing awareness of the necessity of investing more in security in light of challenging transnational issues.[26] On the other hand, the strategy was meant to allow EU institutions to work together, especially after the entry into force of the Treaty of Lisbon and the institutional innovations it introduced.[27] Within this context, the EU internal security was considered as essentially encompassing (i) immigration and border control, (ii) terrorism and (iii) hybrid, cyber and disinformation.[28]

Subsequently, this notion has featured in a number of EU official documents pertaining to different Institutions.[29] In general terms, EU strategic autonomy can be essentially understood - consistently with the Greek origins of the term "autonomy" - as implying the ability of the EU to live by its own laws, while pursuing its own strategic interests.[30] In its "Conclusions on implementing the EU Global Strategy in the area of Security and Defence", the Council has indeed acknowledged that the strengthening of the EU's capacity to act in security and defence can "enhance its global strategic role and its capacity to act autonomously when and where necessary and with partners wherever

[22] *Ivi*, p. 46.
[23] See *Ivi*, pp. 9, 19 ff.
[24] Interview.
[25] Interview.
[26] In this regard, there was an important push from France, which at the time was also the target of terrorist attacks in its own territory (interview).
[27] Interview.
[28] Interview.
[29] For an overview in relation to the European Council and the Council, see DAMEN (2022), p. 12.
[30] TOCCI (2021), p. 8.

possible".[31] Paradigmatically, Kempin and Kunz (2017) have identified three dimensions of strategic autonomy, namely *political*, *operational* and *industrial*.[32]

It is interesting to note that, as formulated, this notion of "EU strategic autonomy" was the subject of dispute, the proof being that it was approved even when the United Kingdom (UK) was still an EU Member State.[33] The concept was contested afterwards, in particular when it was revived in the wake of the 2020 US Elections, which eventually saw the victory of President Biden.[34] This even required the HR/VP Borrell to issue a blog post clarifying the term and the rationale behind it.[35]

Moreover, even though security and defence dimension still represents a cornerstone of the concept of EU strategic autonomy,[36] this notion has nonetheless progressively enlarged, encompassing other domains in light of the evolving international context.[37] Against this backdrop, some authors have identified several "waves" as far as either the domains of application[38] or the public debate on the notion are concerned.[39] The impact of the evolving structural conditions of the international order have also prompted new debates concerning the actual definition of the concept, with Helvig and Sinkkonen (2022) understanding 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

[31] COUNCIL OF THE EUROPEAN UNION (2016b), p. 2. The *Implementation Plan on Security and Defence* adopts the same wording. See COUNCIL OF THE EUROPEAN UNION (2016a), p. 4.
[32] While *political* autonomy refers to "[t]he capacity to take security policy decisions and act upon them", *operational* autonomy means "[t]he capacity, based on the necessary institutional framework and the required capabilities, to independently plan for and conduct civilian and/or military operations" and *industrial* autonomy imply "[t]he capacity to develop and build the capabilities required to attain operational autonomy". KEMPIN and KUNZ (2017), p. 10.
[33] Interview.
[34] Interview. According to the interviewee, back then "the general atmosphere pointed to reach out to the U.S.; it was the worst possible moment to be talking about autonomy" (author's own translation).
[35] See BORRELL (2020b).
[36] For instance, the 2022 *EU strategic compass for security and defence* is aimed at "enhance[ing] the *EU's strategic autonomy* and its ability to work with partners to safeguard its values and interests" (emphasis added). See EEAS (2022a), p. 23.
[37] See the "360° strategic autonomy wheel - A visual support" in DAMEN (2022), p. 11.
[38] DAMEN (2022) acknowledges five turning points: the focus on security and defence (2013-2016), autonomy in a shifting geopolitical context (2017-2019), the shock of the COVID-19 pandemic (2020), the appearance of many terms, such as *open* strategic autonomy, referring to the same concept (2021), and the war in Ukraine (2022).
[39] HELWIG and SINKONNEN (2023) identified four waves relating to (i) the 1990s in light of the possible US disengagement from Europe, (ii) the 2010s following the Libyan, Syrian and Ukrainian crises, (iii) the election of Donald Trump as President of the United States and (iv) the Covid-19 crisis (pp. 3-4).

the well-being of their citizens and implementing self-determined policy decisions".[40] Within this debate, Mustasilta (2023) significantly acknowledges that the EU nowadays pursues a "more salient prioritization of *internal security* and *geopolitical needs* aside (and beyond) normative needs in motivating the intent".[41] This renewed focus on the internal dimension has been accompanied by the appearance of new terms related to the EU strategic autonomy, which will be analysed in the following paragraphs.

1.2. "EU *open* strategic autonomy": how the CCP protects EU security

The redefinition of the EU's role at the international level that has been ongoing in the past years has inevitably affected the exercise of EU exclusive competences, with particular reference to trade.[42] Indeed, in this period Europe has understood that what it has been built upon - openness, interdependence and connectivity - could also represent sources of insecurity.[43] As a result, the concept of "*open* strategic autonomy" was eventually developed by EU institutions, mainly in the context of the Common Commercial Policy (CCP).[44] As is known, this was formulated in the latest trade strategy issued by the European Commission, namely the 2021 "Trade Policy Review - An Open, Sustainable and Assertive Trade Policy".[45]

The document clearly defines *open* strategic autonomy as entailing "the EU's ability to make its own choices and shape the world around it through leadership and engagement, reflecting its strategic interests and values".[46] Actually, the term was mentioned for the first time one year earlier, in the Communication "Europe's moment: Repair and Prepare for the Next Generation",[47] which delineated it in the following terms:

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[40] *Ivi*, pp. 2-3.
[41] MUSTASILTA (2022), p. 49.
[42] According to Art. 3 TFEU, the Union enjoys exclusive competence in the following areas: (i) customs union; (ii) competition rules for the functioning of the internal market; (iii) monetary policy for the Member States that have adopted the Euro; (iv) conservation of marine resources in the context of the common fisheries policy; (v) *common commercial policy*.
[43] Interview.
[44] BEAUCILLON and POLI (2023), p. 412.
[45] EUROPEAN COMMISSION (2021a). This document was complemented by a Communication setting out the EU priorities and the action points in relation to the Trade and Sustainable Development (TSD) Chapters in the context of the EU FTAs. See EUROPEAN COMMISSION (2022c).
[46] EUROPEAN COMMISSION (2021a), p. 4.
[47] This document was issued in the context of the Covid-19 pandemic and announced the following 2021 Trade Policy Review.

> "[t]his will mean *shaping* the new system of global economic governance and developing *mutually beneficial* bilateral relations, while *protecting ourselves* from unfair and abusive practices. This will also help us diversify and solidify global supply chains to protect us from future crises and will help strengthen the international role of the euro" (emphasis added)[48].

The wording used appears to depart from the phrasing adopted in previous trade strategies issued by the EU; nevertheless, it must also be acknowledged that this change did not happen in a *vacuum* since these strategies have progressively adapted to the evolving international order and to the structural conditions relevant for trade policy. For instance, this can be seen in the gradual transition from the policy of "managed interdependence" pursued in the 1990s to the 2005 "Global Europe" strategy - which *inter alia* indicated market potential as a fundamental criterion for the conclusion of EU FTAs - and its 2010 Review, and finally to the 2015 "Trade for all" strategy.[49]

However, what emerges from the 2021 Communication is that the shift to *open* strategic autonomy appears to be significant from the *qualitative* point of view since, as Schmitz and Seidl (2022) argue, it points to the "renegotiation of Europe's 'embedded neoliberal' compromise".[50] In other words, Europe seems to be changing its DNA following the growing awareness that something needs to be done in order to protect EU's strategic industries.[51] Indeed, even if the 2021 Trade Policy Review heavily stresses the element of "openness", the document identifies new areas for EU action, which clearly do not fall within the concept of "free trade", embracing instead a protective stance *vis-à-vis* third countries.[52]

Within this context, the EU has adopted a plethora of unilateral instruments in order to promote the EU's security in the trade domain, so as to ensure a level playing field for EU and non-EU companies in the Single Market,[53] as well as to achieve several objectives that do not properly fall within the remit of the CCP.[54] *Table I* outlines the most important

[48] EUROPEAN COMMISSION (2020b), p. 13.
[49] In relation to the overview of EU trade policy documents, GSTÖHL (2019), pp. 121-127.
[50] SCHMITZ AND SEIDL (2022), p. 835.
[51] Interview. In the interviewee's opinion, this can also result in protectionism.
[52] For instance, the Trade Policy Review inter alia includes the necessity of fostering resilience and sustainability of value chains, to promote sustainability and fairness, and to adopt an assertive position.
[53] While also taking into account what happens in foreign jurisdictions in terms of access for EU companies to non-EU markets, for instance.
[54] Thereby forging "nexuses" between different EU policies. This mechanism is of paramount importance especially in the context of EU external action, in particular in the integration of policy

ones. In their recent analysis covering the mentioned EU unilateral instruments, De Ville, Happersberger and Kalimo (2023) find that they present, to a varying extent, five characteristics, namely (i) the emphasis on reciprocal openness with third countries, (ii) a supposed deterrent effect, (iii) the possibility for third parties to get in contact with the EU before the application of the unilateral measure, (iv) the expansion of the internal market logic to third countries, and (v) the self-representation of the EU as a "global force for good".[55]

objectives into external policies. For an overview regarding the forms of EU's external action, see SCHUNZ *et al.* (2018), pp. 18 ff.

[55] DE VILLE, HAPPERSBERGER AND KALIMO (2023), pp. 34.-35.

Table I. Recently-adopted or proposed unilateral instruments in the context of the EU CCP.

Name	Commission Proposal	Legal act	Date	Legal Basis
Anti-torture Regulation	COM(2018) 316 final 24 May 2018	Regulation (EU) 2019/125	16 January 2019	207(2) TFEU
Foreign Direct Investment (FDI) Regulation	COM(2017) 487 final 13 September 2017	Regulation (EU) 2019/452	13 March 2019	207(2) TFEU
Dual use Regulation	COM(2016) 616 final 28 September 2019	Regulation (EU) 2021/821	20 may 2021	207(2) TFEU
International Procurement Instrument (IPI)	COM(2012) 124 final 21 March 2012	Regulation (EU) 2022/1031	23 June 2022	207(2) TFEU
Foreign Subsidies Regulation (FSR)	COM(2021) 223 final 5 May 2021	Regulation (EU) 2022/2560	14 December 2022	114 TFEU 207 TFEU
Carbon Border Adjustment Regulation (CBAM)	COM(2021) 564 final 14 July 2021	Regulation (EU) 2023/956	10 May 2023	192(1) TFEU
EU Deforestation Regulation	COM(2021) 706 final 17 November 2021	Regulation (EU) 2023/1115	31 may 2023	192(1) TFEU
EU Directive on Corporate Sustainability Due Diligence (CSDD)	COM(2022) 71 final 23 February 2022	/	/	192(1) TFEU (proposed)
Anti-coercion Instrument (ACI)	COM(2021) 775 final 8 February 2021	/	/	207(2) TFEU (proposed)
Forced Labour Regulation	COM(2022) 453 final 14 September 2022	/	/	207 TFEU 114 TFEU (proposed)
Revision FDI Regulation	Announced	/	/	

Source: author's own elaboration based on existing and proposed legislation.

Against this backdrop, an interesting development has to be singled out. The concept of "European economic security" has been recently added to the toolkit available to EU institutions to guide their actions at the external and internal level. In this regard, the European Commission has published a Communication outlining a specific strategy, which

> "[…] builds on the work already started at European level, taking a critical look at the Union resilience and vulnerabilities in order to make the European economy and industry more competitive and resilient and strengthen our *open strategic autonomy*" (emphasis added).[56]

To this aim, this strategy proposes to identify, together with the other Institutions and the Member States, the key risks to EU economic security, as well as to act in accordance with three priorities, namely (i) the promotion of competitiveness, (ii) the protection from economic security risks and (iii) the necessity of working with international partners.[57] Within this context, it is noteworthy that access to key technologies features centre stage in the policy debate, with the President of the European Commission von der Leyen even stating that it represents an "economic and *national security* imperative" (emphasis added).[58]

That is perhaps the reason why the first deliverable - recalled in the strategy - that has been carried out by the Commission concerns the issuance of the first ever list of critical technology areas for the economic security of the Union. Ten technologies are here identified, whose risks are to be assessed jointly with the Member States, four of which are to be prioritised in this regard because of their "most sensitive and immediate risks related to technology security and technology leakage"[59] (see *Table II*):

[56] EUROPEAN COMMISSION (2023k), p. 3.
[57] *Ivi*, pp. 6 ff.
[58] VON DER LEYEN (2023).
[59] Commission Recommendation (EU) 2023/2113.

Table II. Ten critical technology areas for EU economic security

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
Advanced materials, manufacturing and recycling technologies

In bold, the four prioritised critical technology areas.
Source: author's own elaboration on the basis of Commission Recommendation (EU) 2023/2113.

This Communication represents the last document confirming the more assertive turn the EU has adopted in the trade, economic and technology domains. The reference that will be made to the concepts of "resilience" and "sovereignty" in the following paragraphs will help provide the overall picture of this new posture of the EU on the international scene.

1.3. The quest for resilience: towards a new paradigm?

As has mentioned in the previous paragraphs, the notion of "resilience" nowadays represents a well-known term in the discourse concerning the EU engagement in international relations. Even in this case, the widespread use of the concept is essentially due to the EUGS, which elevated it to a priority for EU external action. The document defines the term as "the ability of states and societies to reform, thus withstanding and recovering from internal and external crises"[60] and repeatedly asks the EU to invest in the resilience of states and societies both in the neighbourhood and in far regions.[61] This has to be done in light of the positive impact that the resilience has on sustainable growth, on security overall and, consequently, on prosperity and democracy.[62]

[60] EEAS (2016), p. 23.
[61] Up to Central Asia and Central Africa. For instance, See *Ivi*, pp. 23, 24.
[62] *Ivi*, pp. 23, 24.

In this respect, the reference to resilience entails a purely *external* dimension, whereby the EU commits itself to the promotion of this paradigm through its external policies, including enlargement.[63] However, on the basis of the more contested nature of the world in which the EU finds itself to act, the EUGS significantly focuses also upon the *internal* resilience of EU democracies, highlighting the importance of "living up to our values" and assuring the "resilience of critical infrastructures, networks and services".[64]

In a recently published article analysing the emergence and the practical use of this concept by EU institutions, Joseph and Juncos (2023) critically argue that "the effects of global politics and recent crises on the EU's concept of resilience has been to change it from an ambiguous but highly ambitious notion to a narrower one, *mainly concerned with internal security*" (emphasis added).[65] In their understanding, the concept of resilience "has come to reflect this feeling of ontological and epistemological insecurity in a more conservative and reactive way that *prioritize internal security* over external opportunity" (emphasis added).[66]

Indeed, the EU has recently adopted - or is planning to adopt - a series of legislative acts and policies, as well as set up *ad hoc* bodies, explicitly dealing with internal resilience, with particular reference to critical infrastructures and entities. The proposal for a Cyber Resilience Act,[67] the Critical Entities Resilience Directive,[68] the proposed EU Hybrid Rapid Response Teams and the EU Hybrid Toolbox[69] are significant examples in this respect. Indeed, as recognised by the authors, the Strategic Compass mainly cites the concept in relation to the *internal* dimension.[70] This trend appears to be overall consistent with the findings of this work, which points to the increasing *inward-looking* dimension in the context of EU strategic autonomy.[71]

[63] *Ivi*, p. 24.
[64] *Ivi*, pp. 15, 21, 22, 45.
[65] JOSEPH and JUNCOS (2023), p. 2.
[66] *Ivi*, p. 2.
[67] EUROPEAN COMMISSION (2022f).
[68] Directive (EU) 2022/2557.
[69] COUNCIL OF THE EUROPEAN UNION (2022c).
[70] JOSEPH and JUNCOS (2023), p. 15.
[71] See *Infra*, *Chaper III*.

1.4. Achieving EU sovereignty in the context of technological development

This tension towards the strengthening of European power is perhaps best captured by the concept of "European sovereignty", which gained importance after the well-known speech delivered by the President of the French Republic Emmanuel Macron at the Sorbonne University.[72] This reference, which was motivated by the evolving nature of international relations and the connected necessity for Europe to adapt to them, has spurred significant debates regarding its actual meaning given that it is ultimately related to modern statehood.[73] However, what can be taken overall from the above is that the nature of present-day challenges requires the close cooperation between Member States as well as the involvement of the supranational dimension in order to cope with them.

From that speech onwards, this term has given rise to a wide-ranging panopticon of concepts that have tried to interpret "sovereignty" in light of the most important issues relating to the security of the EU, with "digital sovereignty"[74] and "European technological sovereignty" being prominent examples in this respect. Indeed, keeping a technological edge represents nowadays one of the fundamental features of modern-day power both in terms of producing capabilities and of shaping related international standards.[75] Against this backdrop, the EU appears to be confronted with a "technological race" between the U.S. and the PRC, and has therefore tried to improve its position *vis-à-vis* the other main actors in this regard.

The notion of "European technological sovereignty" falls entirely within the context of this global race and implies the willingness to make the Union an entity capable of managing technology in an autonomous way, even though a proper definition of this term is not provided in any document.[76] However, following Poli (2023), it is possible to identify three meanings of the term. These are (i) the ability of the EU and its Member

[72] ÉLYSÉE (2017).
[73] See *Infra*. In this context, FIOTT (2021) distinguished between different dimensions, namely "strategic sovereignty *for*", "strategic sovereignty *from*" and "strategic sovereignty *through*". See FIOTT (2021), p. 9.
[74] See *ex multis* MADIEGA (2020).
[75] For a theorization of the role of technology in international relations, see ERIKSSON and NEWLOVE-ERIKKSON (2021).
[76] POLI (2021), p. 70.

States “to be self-sufficient in key technology intensive sectors”, (ii) the achievement of technological leadership and (iii) the development of resilience to incidents.[77] The overarching aim is therefore to keep the autonomous action of the Union in this domain as well as its security as regards the supply of critical material, following the so-called “de-risking” approach.

Employing the “language of power”,[78] even in this domain the Union has adopted - or intends to adopt - several instruments to deal with this rising challenge,[79] ranging from the European Chips Act,[80] to the Net-Zero Industry Act (NZIA)[81] and the Strategic Technology Europe Platform (STEP).[82] However, the achievement of coherent policies in these sectors largely depends on the sincere cooperation between the EU and Member States given that the relevant competences are shared between the EU and the Member States themselves. This raises questions about the actual organization of such “sovereignty” given that it eventually involves the configuration of political authority in Europe.[83]

[77] POLI (2023), p. 432.
[78] BORRELL (2020a).
[79] For a legal analysis of the adopted acts, see POLI (2021) and POLI and FAHEY (2022).
[80] Regulation (EU) 2023/1781.
[81] See *Infra*, *Chapter II*.
[82] EUROPEAN COMMISSION (2023j).
[83] FIOTT (2022), p. 15. On this point, see *Infra*, *Chapter III*.

Chapter II. "Public order and security" in EU law covering non-AFSJ areas

The reference to notions such as "public order", "national security" and "public interest" represents a constant in EU legislation and jurisprudence covering matters relating to the Area of Freedom, Security and Justice (AFSJ).[84] Within this domain, the focus is indeed to ensure "a high level of security"[85] in the EU through the development of sectoral policies covering *inter alia* migration and border checks, which have a direct impact on Member States' and EU (internal) security. However, the current international order - exemplified nowadays by the strategic competition[86] and the weaponization of economic interdependence[87] - has brought new challenges blurring the lines between the internal and external aspects of security and, consequently, requiring a general rethinking of the concept from a traditional meaning towards a broader and holistic understanding of it.[88]

Following the launch of the "geopolitical Commission" by President von der Leyen,[89] the EU has progressively adopted a firm stance in its relations with the wider world - also as a response to shifting international events[90] - in order to defend its interests and security against a broad spectrum of threats, ranging from the economic to the cyber and hybrid domains. As a result, a plethora of new instruments and strategies have been

[84] See, *e.g.*, in the Common European Asylum System (CEAS), Directive (EU) 2011/95 ("Qualification directive"), Artt. 23-25; Directive (EU) 2013/33 ("Receptions Conditions Directive"), Artt. 7, 8, 10; Directive (EU) 2013/32 ("Asylum procedures Directive"), Artt. 8, 25, 29, 31. In the field of border management, see for instance Regulation (EU) 2016/399 ("Schengen Borders Code"), Artt. 5, 6, 8.

[85] Art. 67(3) TFEU.

[86] In this respect, the Strategic Compass explicitly states that "[i]n this era of *growing strategic competition*, complex security threats and the direct attack on the European security order, the security of our citizens and our Union is at stake" (emphasis added) and that "[t]he return to power politics leads some countries to act in terms of historical rights and zones of influence, rather than adhering to internationally agreed rules and principles and uniting to promote international peace and security" (emphasis added). See EEAS (2022a), p. 14. From an international relations point of view, the discussion is centred around the supposed return of "great power competition", especially in the U.S.-PRC relations. For a complete overview, see DICICCO and ONEA (2023). For the role of Europe in this respect, *ex multis* BIBA and WOLF (2021).

[87] See paradigmatically FARRELL and NEWMAN (2019).

[88] In the same line of reasoning, ROBERT (2023), pp. 517-518. In this respect, the interviewee recalled that nowadays, when we think about *internal security*, we do not only refer to the three domains highlighted in *Chapter I* (immigration, terrorism, hybrid and cyber threats), but also to, for instance, technology, Russian and Chinese interference, strategic investments, export controls and investment screening. See *Infra*.

[89] See EUROPEAN COMMISSION (2019b).

[90] *E.g.*, the Covid-19 pandemic and the Russian war of aggression against Ukraine.

developed to cope with these rising challenges. Within this framework, it is possible to notice the recent emergence of a new concept - "public order and security" - in official EU documents relating to specific areas, which *per se* are not included in the AFSJ. This raises significant questions in relation to its actual meaning for the Member States and the EU as a whole.

Thus, the present chapter aims at providing a thorough analysis of this term as appeared in relevant EU legislation and jurisprudence. First, the study will delve into the EU foreign direct investment (FDI) screening mechanism, with an in-depth evaluation of Regulation 2019/452 (hereinafter the "FDI Regulation") and relating case-law. This case-study will also provide the opportunity to single out the recent appearance of the concept in the field of EU external relations law, namely in the context of the EU- U.S. Trade and Technology Council (TTC). Second, the chapter will examine the EU's response to specific hybrid threats, in particular to those related to Foreign Interference and Manipulation of Information (FIMI). The EU restrictive measures adopted against media outlets in the wake of the Russian aggression against Ukraine will be the focus of this paragraph. However, the analysis will also explore the provisions contained in the European Media Freedom Act (EMFA) proposal (hereinafter "EMFA proposal") with due regard to the broadcasting activities originating from outside the Union. This will be done in light of the close proximity of the circumstances that the restrictive measures and the EMFA proposal aim to address. Third, the research will recall the Net-Zero Industry Act (NZIA) proposal (hereinafter "NZIA proposal") in its understanding of the term "public order and security". In doing what has been outlined above, thanks to the adoption of a cross-domain perspective, the present work will try to comprehend the actual meaning of this term as appeared in the EU context; moreover, and from a hierarchical perspective, it will attempt to clarify whether and, if so to what extent, the use of this term by EU law points to the emergence of a new "EU security" that goes beyond and complements EU Member States' national security.

2.1 The protection of "public order and security" in the Foreign Direct Investment (FDI) Regulation. Towards an "EU economic security"?

Foreign direct investments (FDIs) represent a key feature of the global economy that is currently promoted in light of the supposed benefits it brings to society at large.[91] Leaving apart the debate concerning the actual correlation between FDIs and GDP growth,[92] which is outside the scope of the present work, it is nonetheless possible to point out that FDIs can have a significant impact on the national security of the hosting country, especially in strategic sectors.[93] Policymakers around the world have become increasingly aware of these risks and have thus promoted the establishment of national FDI screening mechanisms in order to cope with security-related challenges.[94] At the international level, there have also been attempts at regulating this phenomenon, including in the OECD area,[95] notably in order to foster the application of non-discriminatory standards among the countries.

The EU fits well within this trend. Indeed, with the issuance of a Reflection Paper in 2017,[96] the European Commission opened a debate concerning the place of the EU in the age of globalization, including the possible analysis of investments from non-EU countries in EU strategic sectors. This initiative was endorsed both by the European Council and the European Parliament.[97] As a result, in light of the Lisbon Treaty Provisions, which included FDIs as falling under the scope of the CCP,[98] the European Commission

[91] In the context of the EU, FDIs can be defined *prima facie* as "investments made by natural or legal persons of [a] third State in the European Union and vice versa which enable effective participation in the management or control of a company carrying out an economic activity". See Opinion 2/15 (*EU-Singapore Free Trade Agreement*), para. 82.
[92] For a comprehensive overview, see the study carried out BÉNÉTRIX, PALLAN and PANIZZA (2023), which points to the complementary inputs – such as human capital, financial depth and global value chain (GVC) activity – in conditioning the relationship between FDIs and economic growth.
[93] See, *e.g.*, CRISTIANI *et al.* (2021) on the security implications of Chinese investments in Europe.
[94] UNCTAD (2023) reveals that since 1995 at least 37 countries have established investment screening mechanisms on the grounds of national security, with a peak in the context of the COVID-19 pandemic.
[95] OECD (2022) [2009].
[96] See EUROPEAN COMMISSION (2017a).
[97] In particular, EUROPEAN COUNCIL (2017), para. 17; EUROPEAN PARLIAMENT (2017).
[98] According to Art. 207(1) TFEU, "The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, *foreign direct investment*, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or

published in 2017 a proposal for a Regulation establishing a framework for the screening of foreign direct investments into the European Union,[99] which was eventually adopted in 2019 as Regulation (EU) 2019/452 ("the FDI Regulation").

2.1.1. The notion of "public order and security" in the FDI Regulation

The FDI Regulation provides for a framework for the screening of *inward* FDI[100] on the grounds of security and public order and for a related mechanism of cooperation between the Commission and Member States.[101] The FDI Regulation does not explicitly indicate a clear-cut definition of the term "security and public order".[102] Although WTO law is not mentioned in the text of the Regulation, it is possible to recall some provisions contained in the General Agreement on Trade and Tariffs (GATS) that mention security interests or public order as exceptions to the prohibitions set out in this agreement.[103] First, Article XIV bis (1)(b) of the GATS Agreement empowers each WTO Member to take any action which it considers necessary for the protection of its *essential* security interests

> "(i) relating to the *supply of services* as carried out directly or indirectly for the purpose of *provisioning a military establishment*;
> (ii) relating to *fissionable and fusionable materials* or the materials from which they are derived;
> (iii) taken in time of *war* or other *emergency in international relations*" (emphasis added).[104]

subsidies […]" (emphasis added). Against this backdrop, Advocate General Ćapeta in her conclusions regarding the *Xella Magyarország* case (see *Infra*) mentions the thesis according to which the FDI Regulation may be regarded "as restoring the lawfulness of Member States' existing foreign direct investment screening mechanisms" and "'delegat[ing]' competences back to the Member States in an area in which they lost them with the entry into force of the Treaty of Lisbon". See Opinion of Advocate General Ćapeta (2023) related to Case C-106/22.

[99] See EUROPEAN COMMISSION (2017b).

[100] For the sake of clarity, Art. 2(1) of the FDI Regulation defines FDIs as "investment[s] of any kind by a foreign investor aiming to establish or to maintain lasting and direct links between the foreign investor and the entrepreneur to whom the undertaking to which the capital is made available in order to carry on an economic activity in a Member State, including investments which enable effective participation in the management or control of a company carrying out an economic activity". In other words, it covers *inward* FDIs and not *outward* FDIs, the latter being made by EU investors in third countries. Moreover, it does not cover portfolio investments.

[101] FDI Regulation, Art. 1.

[102] As observed by DE JONG and ZWARTKRUIS (2020), in the FDI Regulation the "wording used differs somewhat from Arts 2/65 TFEU that are aimed at "public security and public policy"", making it difficult to figure out the difference behind the choice (p. 463).

[103] As recalled by the FDI Regulation, Recital 35 and VELTEN (2022), pp. 59 ff.

[104] GATS, Art. XIV bis (1)(b).

As a result, according to this Article, WTO Members can derogate from GATS provisions only when its essential security interests arise in three specific areas, namely (i) supply of services for military purposes, (ii) fissionable and fusionable as well as related material, (iii) war or emergency in international relations. Second, as far as the notion of public order is concerned, Article XIV GATS allows WTO Members to adopt or enforce measures *inter alia* "necessary to […] *maintain public order*" (emphasis added). The GATS specifies that this term is to be invoked "only where a genuine and sufficiently serious threat is posed to one of the *fundamental interests of society*" (emphasis added).[105]

Against this backdrop, the Regulation specifies the circumstances in order for an FDI to be considered as affecting security or public order. Indeed, the EU act lays down an operational non-exhaustive list of factors that can be taken into consideration in this assessment, namely "potential effects" on (a) critical infrastructure,[106] (b) critical technologies and dual-use items[107], (c) supply of critical inputs[108] and food security, (d) access to sensitive information[109] as well as (e) freedom and pluralism of the media.[110] In addition, the context of the investment and other circumstances can be included by Member States and the European Commission in the evaluation process, including whether (a) the investor is directly or indirectly controlled by a third government or (b) has been linked to activities affecting security or public order *in a Member State* or (c) there is a *serious* risk that s/he is involved in illegal or criminal activities.[111] As a result, both elements pertaining to the investment itself and information relating to the subject involved can be considered in the screening mechanism.

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[105] GATS, Art. XIV (a).
[106] "[I]ncluding energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure, and sensitive facilities, as well as land and real estate crucial for the use of such infrastructure". FDI Regulation, Art. 4(1)(a). The public order- and security-related aspects of critical infrastructure were explicitly mentioned in the case of FDIs in the transport field, in particular in the context of the TEN-T networks. See paradigmatically EUROPEAN COMMISSION (2021j), p. 10: "[…] it has become apparent that under specific circumstances, [FDIs] could distort transport flows on the network by not complying with TEN-T standards and hence affect security or public order on critical infrastructure".
[107] As defined in Art. 2(1) of Council Regulation (EC) 428/2009: "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".
[108] Including energy or raw materials.
[109] Such as personal data, including the ability to control such information.
[110] FDI Regulation, Art. 4(1).
[111] FDI Regulation, Art. 4(2).

In this regard, the Court of Justice of the European Union has recently explained in *Xella Magyarország* (Case C-106/22) that the FDI Regulation does not apply to "investments made by undertakings organized in accordance with the laws of a Member State over which an undertaking of a third country has majority control",[112] in contrast with the conclusions reached by Advocate-General Ćapeta in the same case. The setting, which led to the request for preliminary ruling under consideration, involved the acquisition of Janes és Társa - a company defined as being of "strategic" nature under Hungarian law because of its significant market share in the region of its establishment as regards the production of certain raw materials (gravel, sand and clay) - by Xella Magyarország.[113] Through a corporate vertical structure, the latter company emerged as being *indirectly* owned by a Bermuda-based company. For this reason, the Hungarian authorities prohibited the acquisition, but the Court of Justice ultimately found that the FDI Regulation did not apply in this situation. Moreover, the Court stated that the prohibition at issue infringed the provisions on the freedom of establishment enshrined in EU law, since the aim of ensuring "the security of supply to the construction sector, in particular at the local level, as regards certain basic raw materials, namely gravel, sand and clay, resulting from extractive activities" does not fulfil the test of "fundamental interest of society" necessary to allow derogations in this respect.[114] Even though these findings fall into the case-law pertaining to the freedom of establishment, its impact on the interpretation of the notion of "public order and security" in the context of the FDI Regulation remains to be seen for the foreseeable future.

2.1.2. The cooperation mechanism between the European Commission and EU Member States: taking into account the EU interests

The FDI Regulation establishes a framework that is not meant to replace existing national FDI screening mechanisms, which are instead strongly encouraged; on the contrary, it aims at complementing EU Member States' efforts in this respect as well as to raise awareness in relation to common threats originating from FDIs likely to affect security and public order. In other words, as Recital 8 of the FDI Regulation highlights, the objective is to address risks "[…] in a comprehensive manner while maintaining the necessary

[112] Xella Magyarország, para. 37.
[113] For an overview of the case at issue, see ANDREOTTI (2023) and PÉREZ (2023).
[114] Xella Magyarország, para. 69.

flexibility for member States to screen […] taking into account their individual situations and national specificities".[115]

Even though the final decision concerning the FDIs is to be made by the hosting Member State,[116] it is however quite significant that the FDI Regulation allows supranational (EU or Member States') interests to be taken into account in national FDI screening procedures. This is provided for in the cooperation framework identified by the Regulation itself, which distinguishes between FDIs undergoing screening and FDIs not undergoing screening. In both cases, each Member State is allowed to provide "comments" to the Member State carrying out the screening in case (i) it considers such FDI likely to affect its own security or public order or (ii) has relevant information concerning the FDI.[117] In addition, the European Commission is also empowered to issue an opinion concerning the FDI undergoing the screening whenever (i) it considers that such FDI can likely affect security or public order in more than one Member State or (ii) has relevant information concerning the FDI at issue.[118] Moreover, the Regulation provides for the issuance of such opinions by the European Commission after at least one third of Member States have sent their comments.[119] Both comments and opinion can be requested by a Member State *duly* considering that an FDI in its territory is likely to affect its security or public order.[120] In these cases, in line with the principle of sincere cooperation as provided for in Article 4(3) TEU, the addressed Member State shall give due consideration to the aforementioned comments and opinions.[121]

As regards the EU dimension, the FDI Regulation significantly mentions the impact that FDIs planned or completed in member States can have on "projects or programmes of Union interest" in relation to which the European Commission can issue

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[115] FDI Regulation, Recital 8.
[116] FDI Regulation, Artt. 6(9), 8(2)(c). In the same line, Recitals 17 and 19: "[t]he final decision in relation to any foreign direct investment undergoing screening or any measure taken in relation to a foreign direct investment not undergoing screening remains the sole responsibility of the Member State where the foreign direct investment is planned or completed".
[117] FDI Regulation, Artt. 6(2) and 7(2). As regards FDIs undergoing screening, it is also specified that the notifying Member State can even include "a list of Member States whose security or public order is deemed likely to be affected". See FDI Regulation, Art. 6(1).
[118] FDI Regulation, Artt. 6(2) and 7(2).
[119] FDI Regulation, Artt. 6(3) and 7(3): "[…] The Commission *shall* issue such opinion where justified, after at least one third of Member States consider that a foreign direct investment is likely to affect their security or public order".
[120] FDI Regulation, Artt. 6(4) and 7(4).
[121] FDI Regulation, Artt. 6(9) and 7(7).

opinion to the concerned Member State on grounds of security or public order.[122] These *projects or programmes* are to be identified either according to the "substantial amount or […] significant share of Union funding" they receive or whether Union law covering "critical infrastructure, critical technologies or critical inputs" applies.[123] The list is outlined in a distinct delegated act, adopted on the basis of Article 288 TFEU.[124] The Member State has to take *utmost account* - not due consideration, as mentioned in the previous case - of the opinion concerning such projects or programmes.[125]

In addition to what has already been mentioned, it is possible to state that the reference to the EU dimension does not appear to be limited only to projects or programmes of European interests, as highlighted before, but takes note of the EU *as a whole*. This can be first demonstrated by Recital 13, which clarifies the provisions contained in Article 4(1) and referring to the factors to be taken into account in the FDI screening:

> "In determining whether a foreign direct investment may affect security or public order, it should be possible for Member States and the Commission to consider all relevant factors, including the effects on critical infrastructure, technologies (including key enabling technologies) and inputs which 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 in the Union* […]" (emphasis added).[126]

In other words, according to Recital 13, the assessment regarding the impact of FDIs on public order and security has to be carried out by Member States also in light of the effects on the EU level. In this regard, Robert (2023) proposes the concept of "EU national security" and observes that other EU official documents point to the same direction.[127] The reference here is first and foremost to Communication C(2020)1981 containing

[122] FDI Regulation, Art. 8(1).
[123] FDI Regulation, Art. 8(3).
[124] Commission Delegated Regulation (EU) 2021/2126 - modifying Commission Delegated Regulation (EU) 2020/1298 - identifies the following projects or programmes: European GNSS programmes (Galileo and EGNOS), Copernicus, Preparatory Action on Preparing the new EU GOVSATCOM Programme, Space Programme, Horizon 2020, Horizon Europe, Euratom Research and Training Programme 2021-25, Trans-European Networks for Transport (TEN-T), Trans-European Networks for Energy (TEN-E), Trans-European Networks for Telecommunications, Connecting Europe Facility, Digital Europe Programme, European Defence Industrial Development Programme, Preparatory Action on Defence Research, European Defence Fund, Permanent structured cooperation (PESCO), European Joint Undertaking for ITER, EU4Heath Programme.
[125] FDI Regulation, Art. 8(2)(c).
[126] FDI Regulation, Recital 13.
[127] ROBERT (2023), pp. 518 ff.

Commission guidance regarding FDI *vis-à-vis* the COVID-19 pandemic (hereinafter, the "2020 Commission Guidance"), whereby

> "[…] *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*. The risks to the EU's broader strategic capacities may be exacerbated by the volatility or undervaluation of European stock markets. Strategic assets are crucial to Europe's security, and are part of the backbone of its economy and, as a result, of its capability for a fast recovery" (emphasis added).[128]

This wording was then confirmed by subsequent Communication C(2022) 2316 containing Commission guidance on Russian and Belarussian FDIs in light of the war in Ukraine (hereinafter, the "2022 Commission Guidance").[129] Moreover, other documents issued by the Commission go further in proposing the concept of "collective security and public order". This is the case of the First and Second Annual Report on the screening of FDIs into the Union, whereby the Commission urges all Member States to set up national screening mechanisms so as

> "[…] [to] provide the necessary links for the cooperation mechanism under the FDI Screening Regulation, ensuring that all 27 Member States and the Commission screen relevant FDI, keeping in mind the *collective security of the Member States and Union* as well as the security of single market and the very high level of economic integration which it allows" (emphasis added).[130]

In light of the above, the different levels to be considered in the assessment pertaining to public order and security are broken down in *Table III*:

[128] EUROPEAN COMMISSION (2020a), p. 2 and partly cited in ROBERT (2023), p. 519.
[129] EUROPEAN COMMISSION (2022b), p. 2.
[130] EUROPEAN COMMISSION (2021g), p. 20. The Second Annual Report adopts a similar language. See EUROPEAN COMMISSION (2022d), p. 7 cited in ROBERT (2023), p. 519.

Table III. Levels to be considered in the public order and security analysis of FDIs.

<table>
<tr><th colspan="4">Levels</th></tr>
<tr><td rowspan="2">European Union</td><td colspan="2">Projects or programmes of Union interest</td><td>EU “as a whole”
Collective public order and security</td></tr>
<tr><td colspan="2">FDI Regulation, Art. 8</td><td>FDI Regulation, Recital 13
2020 Commission Guidance
2022 Commission Guidance
First Annual Report
Second Annual Report</td></tr>
<tr><td rowspan="2">Other Member States</td><td>Member States can individually provide comments</td><td>The Commission may issue an opinion inter alia if it considers <u>more than one Member State</u> likely to be affected</td><td>The Commission shall issue an opinion inter alia if at least <u>one third of Member States</u> consider to be affected</td></tr>
<tr><td>FDI Regulation, Articles 6(2) and 7(1)</td><td>FDI Regulation, Articles 6(3) and 7(2)</td><td>FDI Regulation, Articles 6(3) and 7(2)</td></tr>
<tr><td>National Level</td><td colspan="3">FDI Regulation, Art. 3</td></tr>
</table>

Source: author’s own elaboration on grounds of the cited documents.

However, as regards the opportunity to consider the EU dimension in the public order and security assessment, OECD (2022) clarifies that the origins of the FDI Regulation do not "require Member States to step in in the interest of their peers in the Union" and that the same FDI Regulation does not require the interests of other Member States to be "substantively protected".[131] Moreover, to this one must add that national provisions still play a pivotal role in this domain of EU law, also for the protection of supra-national interests. Indeed, the OECD (2022) found that, on the one hand, only three Member States (Germany, Lithuania and Slovak Republic) allow interests of other Member States to start the screening procedures or influence their outcomes while, on the other hand, only six Member States (Germany, Lithuania, Poland, Romania, Slovak Republic and Slovenia) explicitly mention "projects and programmes of Union interest" in relevant national legislation.[132]

That being said, it goes without saying that the FDI Regulation has included common standards in this domain of EU law and has allowed, albeit to a limited extent, interests pertaining to the EU and other Member States to be taken into account. This inevitably represents a step further towards the economic security strategy announced by the Commission in June 2023, to be complemented by the upcoming proposal regarding outward FDIs, due in October 2023.[133]

2.1.3 "EU Public order and security" in the external relations of the EU: the case of the EU-US Trade and Technology Council (TTC)

The discourse relating to investment screening has prominently featured in EU external relations,[134] particularly in the context of the recent EU-U.S. Trade and Technology Council (TTC). This forum was first proposed by the European Commission in its communication outlining a new transatlantic agenda issued in 2020, after the U.S. presidential elections, with the stated aim of encouraging market-driven cooperation, fostering the technological and industrial base as well as increasing bilateral trade and

[131] OECD (2022), p. 46.
[132] *Ivi*, pp. 47-48.
[133] The Commission has already set up an *Informal Commission Expert Group on Outbound Investment* to assist DG TRADE. See EUROPEAN COMMISSION (2023m).
[134] In this respect, Article 13 of the FDI Regulation empowers the Member States and the Commission to cooperate at the international level on matters pertaining to FDI "on grounds of security and public order".

investment.[135] Following the interest expressed by the U.S. side, the TTC was formally launched at the 2021 EU-US Summit in Pittsburgh with two objectives, namely "to coordinate approaches to key global technology, economic, and trade issues" and "to deepen transatlantic trade and economic relations, basing policies on shared democratic values".[136] From an organizational point of view, the work is divided into 10 Working Groups (WG) reporting to the TTC Ministerial level[137] with the aim of delivering concrete results from political agreements.[138]

Apart from the study of the tangible outcomes of the EU-U.S. TTC so far and likely in the future, which have been the focus of several analyses,[139] what interests in the framework of the present work concerns the explicit mention of the "EU's public order and security" in EU-U.S. TTC documents pertaining to FDI. More specifically, in the Pittsburgh Joint Statement, the EU and U.S. acknowledge the importance of maintaining

> "[…] investment screening in order to address risks to national security *and, within the European Union, public order*" (emphasis added).[140]

The other Joint Declarations adopt a similar wording. The Paris Statement recognises the need for an "effective"[141] and "robust"[142] screening mechanism, while the Washington and Luleå Statements call for a "comprehensive" and "robust" instrument in this respect.[143] In

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[135] EUROPEAN COMMISSION AND HIGH REPRESENTATIVE OF THE UNION FOR FOREIGN AFFAIRS AND SECURITY POLICY (2020), p. 7.
[136] EUROPEAN COMMISSION (2021e).
[137] Four TTCs have taken place so far in Pittsburgh (29 September 2021), Paris-Saclay (16 May 2022), Washington, DC (5 December 2022) and Luleå (31 May 2023).
[138] SZCZEPAŃSKI (2023), p. 2. As defined in the Pittsburgh Joint Statement, the Working Group (WG) dealing with investment screening is WG 8, while the others centre around: technology standards (WG 1), climate and clean tech (WG 2), secure supply chains (WG 3), Information and Communication Technology and Services (ICTS) security and competitiveness (WG 4), data governance and technology platforms (WG 5), misuse of technology threatening security and human rights (WG 6), export controls (WG 7), promoting Small- and Medium-sized Enterprises (SME) access to and use of digital tools (WG 9), global trade challenges (WG 10). See EUROPEAN COMMISSION (2021e). In light of the instructions enshrined in the Pittsburgh Declaration, the WG 8 held three meetings in 2022 focusing on (i) trends relating to FDIs, investments and strategies and implementation of the FDI screening mechanisms, (ii) sensitive technologies and data, (iii) holistic security in relation to sensitive technologies and needed policy instruments (included in light of export control regimes). See EUROPEAN COMMISSION (2022i), p. 1.
[139] Among others, DEMERTZIS (2021), HAMILTON (2022), HILLMAN and GRUNDHOEFER (2022), FAHEY (2023), SZCZEPAŃSKI (2023).
[140] EUROPEAN COMMISSION (2021e), para 2.
[141] COUNCIL OF THE EUROPEAN UNION (2022b), para. 16.
[142] COUNCIL OF THE EUROPEAN UNION (2022b), Annex VIII "Conclusions on Working Group 8 – Investment Screening", para. 1.
[143] EUROPEAN COMMISSION (2022i), para. F "Trade, Security and Economic Prosperity"; EUROPEAN COMMISSION (2023i), "Trade, Security and Economic Prosperity".

line with the Pittsburgh Statement, all the documents define the investment mechanisms as necessary to assess risks pertaining to (i) *national security* and (ii), within the European Union, *public order*.[144]

In light of the above, it is possible to point out that the expression "public order" is placed alongside "national security" as one of the criteria against which to assess the risks arising from inbound foreign investments. However, it seems to represent a different benchmark to be taken into account only when the EU is concerned. As a result, on the one hand, the EU "public order" appears to fulfil, for the EU, the same function as "national security" for the U.S. and EU Member States. On the other, the expression "public order" seems to be *qualitatively* different from "national security", and even a *sui generis* formulation, adopted in line with the provisions enshrined in the FDI Regulation. These documents have not provided a comprehensive understanding of this concept so far. However, quite interestingly, this demonstrates that this expression does not only appear in EU internal legislation and relevant Commission guidance, but also in documents pertaining to the EU external relations, albeit in non-binding instruments (NBIs), thereby assuming *external relevance*. Finally, from an institutional point of view, it is quite relevant that following inter-institutional arrangements,[145] the Council approved these NBIs, thus giving its explicit consent to the use of this concept in EU external relations.

[144] EUROPEAN COMMISSION (2021e), COUNCIL OF THE EUROPEAN UNION (2022b), EUROPEAN COMMISSION (2022i), EUROPEAN COMMISSION (2023i). The *Statement on Investment Screening*, provided for in Annex I of the Pittsburgh Joint Declaration, presents a slightly different version: "The European Union and the United States intend to continue to protect themselves from risk arising from certain foreign investment through investment screening focused on addressing risks to national security and, within the European Union, public order *as well*" (emphasis added). In the same line, the summary of the EU-US TTC Investment Screening Stakeholder Meeting (held in December 2021), whereby it is stated that "[…] cooperation on investment screening issues helps to improve capacity and identify and address foreign investment transactions that may pose a risk to national security or public order in the EU". See EUROPEAN COMMISSION (2021h), p. 1.

[145] By way of an example, see the communication regarding the approval of the Washington DC Joint Statement by the 27 Member States in COUNCIL OF THE EUROPEAN UNION (2021). For the legal framework, see *Arrangements for non-binding instruments* contained in COUNCIL OF THE EUROPEAN UNION (2017).

2.2. "EU Public order and security" in light of Foreign Information Manipulation and Interference (FIMI): preserving the integrity of the EU democratic debate?

Foreign Manipulation of Information and Interference (FIMI) has become one of the most troublesome threats to liberal and democratic societies. The multi-faced and ever-changing nature of its manifestations in the social and political arena has made it difficult for academics and practitioners to reach a common consensus on its actual meaning from a conceptual point of view.[146] However, for the sake of this study, we will turn to the EEAS's understanding of the term, which is defined as

> "a pattern of behaviour that threatens or has the potential to negatively impact values, procedures and political processes. Such activity is manipulative in character, conducted in an intentional and coordinated manner. Actors of such activity can be state or non-state actors, including their proxies inside and outside of their own territory".[147]

As is apparent from this passage, FIMI incidents can have a direct and significant impact on the security of the countries targeted by hostile actors. For the European Union, this has been confirmed by several relevant documents, including the Strategic Compass.[148] As a result, the EU - and particularly the EEAS - has stepped up action against this threat as well as against disinformation since 2015 in light of its concerns regarding both external and internal security.[149] Within this framework, interestingly, recently-published EU official documents acknowledge the need for the protection of "EU public order and security"

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[146] DOWLING (2021), p. 383.

[147] EEAS (2021), p. 2. The concept differentiates itself from *disinformation*, which is defined by the EUROPEAN COMMISSION (2018a) as "[v]erifiably false or misleading information that is created, presented and disseminated for economic gain or to intentionally deceive the public, and may cause public harm. Public harm comprises threats to democratic political and policy-making processes as well as public goods such as the protection of EU citizens' health, the environment or security" (pp. 3-4). Within this framework, the EEAS (2023b) acknowledges that, on the one hand, FIMI has a narrower scope of application with respect to disinformation since it applies only to foreign actors, while on the other it is a broader concept "insofar as it does not require the information spread by threat actors to be verifiably false or misleading" (p. 25).

[148] COUNCIL OF THE EUROPEAN UNION (2022d), pp. 34 ff.

[149] As regards disinformation, see *e.g.* EUROPEAN COMMISSION (2018a), EUROPEAN COMMISSION and HR/VR (2018), EUROPEAN COMMISSION (2020c) and the recently-approved Digital Services Act (DSA). For relevant documents concerning FIMI, see the following sub-paragraph as well as EUROPEAN PARLIAMENT (2023a). In relation to the work carried out by the EEAS in the field of FIMI, see paradigmatically EEAS (2022b) and EEAS (2023a), pp. 9 ff.

against FIMI threats. This represents a novelty from the previous wording chosen by EU institutions and will therefore be the focus of the following paragraph.

2.2.1 Addressing FIMI incidents for "EU public order and security": an analysis of relevant EU policy documents

Along with the protection *vis-à-vis* FDIs outlined in the previous paragraph, the EU commitment towards the defence of the public order and security has also prominently featured in the context of FIMI incidents, with particular emphasis after the war in Ukraine.[150] Since FIMI episodes can be regarded as instruments pertaining to so-called "hybrid warfare", the Council Conclusions on a framework for a coordinated EU response to hybrid campaigns made explicit reference to them, thereby asking the HR/VR and the Commission "to develop options for well-defined measures that could be taken against FIMI actors when it is necessary to protect *EU public order and security*" (emphasis added).[151] As can be seen from this passage, the EU dimension is quite significantly taken into account for the first time within this framework.

This call for action is explicitly endorsed by the Council conclusions on Foreign Information Manipulation and Interference (FIMI), issued in July 2023, including the reference to EU public order and security. This document ideally connects to the Council conclusions mentioned above, but adds up further elements which can help contextualise the threat represented by FIMI episodes. The Council indeed clarifies that FIMI

> "[…] aims at *misleading, deceiving and destabilizing our democratic societies*, creating and exploiting cultural and societal frictions, as well as negatively affecting our ability to conduct foreign and security policy. […] FIMI tactics, techniques and procedures also *undermine trust in the media* and *risk to compromise the vital role of free public debate for democracy and a healthy functioning of civil society*. Underlines that such behaviour can be observed in the activities of persistent as well as emerging foreign state and non-state actors trying to undermine democracies, distort civic discourse and weaken criticism" (emphasis added).[152]

This is a quite significant wording, also in light of the restrictive measures against Russian media outlets which had already been approved or were in the pipeline at that moment.[153] What is particularly interesting is that, in the Council's eyes, FIMI episodes have the

[150] For an overview of Russian FIMI tactics following the war of aggression against Ukraine, see EEAS (2023b).
[151] COUNCIL OF THE EUROPEAN UNION (2022c), para. 11.
[152] COUNCIL OF THE EUROPEAN UNION (2022d), para. 2.
[153] See *Infra*.

potential to affect EU public order and security in its entirety insofar as the democratic process and civil society is concerned. This characteristic does not seem to qualify the whole spectrum of hybrid threats, as in its conclusions regarding the hybrid domain the Council recognised that priority measures, falling within the envisaged coordinated EU response, should "facilitate the quick recovery of the targeted Member State or *EU institution, body or agency*" (emphasis added).[154] As a result, the EU dimension as a whole is not explicitly taken into account in the latter document.

It goes without saying that Council conclusions have no binding nature in EU law; however, they reflect the agreement reached by the Member States in the Council and, consequently, bear weight in the EU decision making-process since they express a political position. And indeed, the protection of EU public order and security in its entirety, despite statements affirming "the primary responsibility of countering FIMI, including in the context of broader hybrid campaigns lies with Member States",[155] was first enacted by the adoption of EU restrictive measures, once it became apparent that national approaches did not suffice.

2.2.2 EU restrictive measures in the context of the war in Ukraine: the case of Russian audiovisual media

The Russian war of aggression against Ukraine has required a timely response by the Union in all the domains of its competence, ranging from the CFSP/CSDP policies to the economic sphere and the energy policy.[156] The EU and its Member States supported Ukraine through a plethora of pre-existing and new tools, including a long-term macro-financial assistance[157] and – for the first time in the history of the EU – the financing of military ammunitions delivered to the Ukrainian Armed Forces (UAF).[158] Moreover, in order to bring the conflict to an end and impose heavy costs on Russia, the EU has

[154] COUNCIL OF THE EUROPEAN UNION (2022c), para 13.
[155] COUNCIL OF THE EUROPEAN UNION (2022d), para 3.
[156] See among others SANDOVAL VELASCO, BECK AND SCHLOSSE (2022) for developments concerning the economic and fiscal domain, FIOTT (2023) for EU integration in defence and GIULI and OBERTHÜR (2023) for climate and external energy policy.
[157] As of July 2023, the EU has mobilised 7.2 billion EUR in 2022 and 10.5 billion EUR in 2023 in macro-financial assistance. See EUROPEAN COMMISSION (2023a).
[158] Established by Council Decision (CFSP) 2021/509 as an off-budget instrument, the European Peace Facility (EPF) empowers the EU to finance lethal and non-lethal equipment to be furnished by Member States ("assistance measures") as well as certain common costs pertaining to CSDP operations. In the case of the war in Ukraine, the EU has committed 5.6 billion EUR under the EPF for the supply of military equipment to the UAF (as of August 2023). See COUNCIL OF THE EUROPEAN UNION (2023a).

implemented severe restrictive measures, in full coherence a well-established practice that the EU itself has followed in response to international crises or cross-cutting threats.[159] The eleven packages adopted so far encompass a wide range of sectors and provide for both traditional measures, such as visa bans and asset freeze, as well as innovative provisions.[160] Poli and Finelli (2023) show that these restrictive measures present significant elements of novelty, often related to the "context specific" nature of their adoption.[161] First, as regards the design, the individual restrictive measures were devised so as to "maximise the effects of preventing *natural persons* […] from providing revenues to the aggressor", while sectoral restrictive measures were adopted on a nationality-based restriction and also against media outlets.[162] Second, they present a stronger emphasis on implementation and enforcement, notably in relation to the possible circumvention.[163] Third, as far as decision-making is concerned, it is noteworthy that the Council has identified several derogations for the implementation of the measures in order to have unanimity.[164]

Within this context, the so-called "third package" is of particular interest to the aims of this work since it introduces a specific ban in relation to the broadcasting activities of selected Russia media outlets,[165] in full coherence with the aforementioned Council documents on the envisaged EU response to hybrid and FIMI threats, which are explicitly recalled in the recitals.[166] As Poli (2022) highlights, the "broadcasting ban" is of an *atypical* nature given that EU individual restrictive measures generally consist of asset freezes

[159] In this regard, see the work by GIUMELLI, HOFFMANN AND KSIĄŻCZAKOVÁ (2021), which focus on the use of restrictive measures in EU foreign policy from 1994, highlighting main trends and patterns.
[160] For a comprehensive overview of the restrictive measures adopted by the EU against Russia since 2014 see POLI and FINELLI (2023) and MEISSNER and GRAZIANI (2023).
[161] POLI and FINELLI (2023), p. 21.
[162] *Ivi*, p. 47. See *Infra*.
[163] *Ivi*, p. 36.
[164] *Ivi*, p. 45.
[165] Through Council Decision (CFSP) 2022/351 and Council Regulation (EU) 2022/350. Previous related practice included the Council imposing restrictive measures on individuals on grounds of their involvement in propaganda activities in the context of the illegal annexation of Crimea by the Russian Federation and several Member States suspending the retransmission of certain Russian and Belarussian TV channels under the AVMS Directive (Estonia, Latvia, Lithuania, Poland) or internal issues (Germany). See BAADE (2023), p. 259; EUROPEAN COMMISSION (2022h), p. 10; KOMMISSION FÜR ZULASSUNG UND AUFSICHT (2022).
[166] Council Decision (CFSP) 2022/351, Recital 5 and Council Regulation (EU) 2022/350, Recital 5; Council Decision (CFSP) 2022/884, Recital 15 and Council Regulation (EU) 2022/879, Recital 6; Council Decision (CFSP) 2022/2478, Recital 8 and Council Regulation (EU) 2022/2474, Recital 5; Council Decision (CFSP) 2023/434, Recital 10 and Council Regulation (EU) 2023/427, Recital 8; Council Decision (CFSP) 2023/1217, Recital 21 and Council Regulation (EU) 2023/1214, Recital 22.

and/or visa bans.[167] As a result, the restrictive measures at issue have spurred significant debates concerning their appropriateness;[168] however, they were eventually complemented by measures contained in subsequent packages,[169] which included other Russian media outlets in the list of the entities concerned, as outlined in *Table IV*:

[167] POLI (2022b), p. 134.
[168] For a critical stance towards the EU ban on Russian audiovisual media, see HELBERG and SCHUNZ (2022) and VOORHOOF (2022). On the opposite side, among others, BAADE (2022). For an overview of the debate, see POLI (2022a), p. 628 and POLI (2022b), pp. 133 ff.
[169] Namely, the so-called "sixth", "ninth", "tenth" and "eleventh".

Table IV. Breakdown of the media outlets targeted by EU restrictive measures against Russia.

Date	**Package**	**Relevant EU acts**	**Media outlets**
1 March 2022	Third	Council Decision (CFSP) 2022/351 Council Regulation (EU) 2022/350	RT – Russia Today English RT – Russia Today UK RT – Russia Today Germany RT – Russia Today France RT – Russia Today Spanish
3 June 2022	Sixth	Council Decision (CFSP) 2022/884 Council Regulation (EU) 2022/879	Rossiya RTR / RTR Planeta Rossiya 24 / Russia 24 TV Centre International
16 December 2022	Ninth	Council Decision (CFSP) 2022/2478 Council Regulation (EU) 2022/2474	NTV/NTV Mir Rossiya 1 REN TV Pervyi Kanal
25 February 2023	Tenth	Council Decision (CFSP) 2023/434 Council Regulation (EU) 2023/427	RT Arabic Sputnik Arabic
23 June 2023	Eleventh	Council Decision (CFSP) 2023/1217 Council Regulation (EU) 2023/1214	RT Balkan Oriental Review Tsargrad New Eastern Outlook Katehon

Source: author's own elaboration from cited EU legislation.

More specifically, in relation to the content of the restrictive measures, selected Russian media outlets are forbidden to broadcast, or contribute to broadcast, any content in the EU or directed to the EU by any technical means[170] until two conditions are satisfied, i.e. the end of the war and of the propaganda activities.[171] Indeed, the EU acts are very vocal in acknowledging the "continuous and concerted propaganda actions"[172] carried out by the Russian federation in support of its war of aggression that have been "channelled through a number of media outlets under the permanent direct or indirect control of [its] leadership".[173] As regards the targets of such propaganda activities, the restrictive measures mention "European political parties, especially during election periods, as well as […] civil society, asylum seekers, Russian ethnic minorities, gender minorities, and the functioning of democratic institutions in the Union and its Member States".[174] Noteworthy, Poli (2023) recognises that "[i]t is the first time that the Council has countered disinformation activities through restrictive measures".[175]

Quite noteworthy, for the first time, the Council states that such propaganda actions represent a "significant and direct threat to the *Union's public order and security*".[176] Although a clear-cut definition of the "Union's public order and security" is not provided by the restrictive measures themselves, it is nonetheless significant that the EU dimension is explicitly taken into account in this context. In this respect, Poli (2023) highlights the novelty of such a reference - pointing to a "collective expression of (27) national public orders"| - which has indeed "guaranteed a uniform approach to disinformation across the Union and has contributed to promoting the protection of the Union public order to the rank of a general interest of the organization".[177] In other words, the propaganda activities carried out by non-EU actors under the control of the leadership of the Russian Federation is for the first time considered as a threat that

[170] Council Decision (CFSP) 2022/351, Art. 1 and Council Regulation (EU) 2022/350, Art. 1.
[171] Council Decision (CFSP) 2022/351, Recital 10 and Council Regulation (EU) 2022/350), Recital 10; Council Decision (CFSP) 2022/884, Recital 20 and Council Regulation (EU) 2022/879, Recital 11; Council Decision (CFSP) 2022/2478, Recital 13 and Council Regulation (EU) 2022/2474, Recital 10; Council Decision (CFSP) 2023/434, Recital 15 and Council Regulation (EU) 2023/427, Recital 13; Council Decision (CFSP) 2023/1217, Recital 26 and Council Regulation (EU) 2023/1214, Recital 27.
[172] Council Decision (CFSP) 2022/351, Recital 7 and Council Regulation (EU) 2022/350), Recital 7; Council Decision (CFSP) 2022/884, Recital 18 and Council Regulation (EU) 2022/879, Recital 9; Council Decision (CFSP) 2022/2478, Recital 11 and Council Regulation (EU) 2022/2474, Recital 8; Council Decision (CFSP) 2023/434, Recital 13 and Council Regulation (EU) 2023/427, Recital 11; Council Decision (CFSP) 2023/1217, Recital 24 and Council Regulation (EU) 2023/1214, Recital 25.
[173] Council Decision (CFSP) 2022/351, Recital 8 and Council Regulation (EU) 2022/350), Recital 8; Council Decision (CFSP) 2022/884, Recital 19 and Council Regulation (EU) 2022/879, Recital 10; Council Decision (CFSP) 2022/2478, Recital 12 and Council Regulation (EU) 2022/2474, Recital 9; Council Decision (CFSP) 2023/434, Recital 14 and Council Regulation (EU) 2023/427, Recital 12; Council Decision (CFSP) 2023/1217, Recital 25 and Council Regulation (EU) 2023/1214, Recital 26.
[174] See note 171.
[175] POLI (2023), p. 32.
[176] See note 172.
[177] POLI (2023), p. 33.

can jeopardise the public order and security at the internal level of the Union *as a whole*. This assessment was eventually confirmed by the (only, so far) landmark case in this respect, *RT France* (Case T-125/22),[178] which preserved the measures contained in the "third package" as regards the so-called "broadcasting ban" and analysed the use of the term "Union's public order and security" by the Council.

2.2.3 EU public order and security in *RT France v. Council* (Case T-125/22)

As mentioned in the previous paragraph, Council Decision (CFSP) 2022/351 and related Council Regulation 2022/350 were challenged by *RT France*, one of the targeted media outlets, before the General Court of the European Union (Case T-125/22) on the basis of Article 263 TFEU. The rendered judgement, which eventually dismissed the proposed action for annulment, was delivered by the Grand Chamber of the General Court[179] on 27 July 2022 and has been analysed by several commentators in light of the arising legal and policy issues.[180] This ruling is of particular interest in the context of this study since it represents the first decision explicitly dealing with the prohibition of "broadcasting activities" introduced by the above-mentioned EU restrictive measures and clarifying - at least to some extent[181] - the rationale behind the protection of the "Union's public order and security" pursued by the Council in its sanctions policy covering Russia.

The General Court acknowledged that, by way of its actions, the Council aimed at pursuing two different objectives: it intended, on the one hand, to preserve peace and strengthen international security while, on the other, to protect the EU's public order and security.[182] The Tribunal does not dwell on the "public order and security" clause supporting the EU restrictive measure, but recognises the discretion of the Council in this respect.[183] More specifically, as regards the former point, the Court found the contested acts to be fully in line with Article 21(2)(c) TEU, according to which the EU's external action shall "preserve peace, prevent conflicts and *strengthen international security*, in accordance with the purposes and the principles of the United Nations Charter […]" (emphasis added). By these measures, the Council's action was indeed

[178] Judgement of 27 July 2022, RT France v. Council of the European Union and others, Case T-125/22, ECLI:EU:T:2022:483.
[179] For an in-depth analysis of the judgement, see POLI (2022a) and POLI (2022b). On 30 March 2022, the General Court had already dismissed an action for interim measures brought forward by RT France according to Articles 278 and 279 TFEU. See Ordonnance du Président du Tribunal du 30 mars 2022, RT France v. Conseil de l'Union européenne, Case T-125/22 R.
[180] By way of an example, see the work of Ó FATHAIGH and VOORHOOF (2022), which analyses the Court's understanding of the right to freedom of expression and media freedom.
[181] For a critical stance in this respect see LONARDO (2022), p. 71.
[182] *RT France*, paras. 46 ff. and paras. 202, 226.
[183] POLI (2022b), p. 142.

directed at responding to the Russian military aggression "in a rapid, united, graduated and coordinated manner, implemented by the Union".[184] In the Court's reasoning, Article 3(5) TEU also appears to be relevant in this respect.[185]

As far as the latter point is concerned, the General Court first recalled Article 21(2)(a) TEU, which empowers the EU to "safeguard its values, fundamental interests, security, independence and *integrity*" (emphasis added) on the international level. Second, it held that the contested acts meet the objectives conferred upon the Union by Article 3(1)[186] - namely the promotion of peace, EU values and the well-being of EU peoples - since the Council's purpose was to protect the Union and its Member States against disinformation and destabilisation campaigns.[187]

In other terms, the General Court ruled in favour of the Council having acted in full compliance both with the general objectives attributed to the EU itself by the Treaties - as defined in Article 3(1) and (5) TEU - as well as with the CFSP objectives laid out in Article 21(2)(a) and (c) TEU, which the General Court considered altogether as "objectives of general interest".[188] Moreover, the temporary "broadcasting ban" imposed by the EU was judged to be coherent with the Treaties in light of the broad discretion recognised upon the Council in relation to its powers for the drafting of EU restrictive measures[189] and for the achievement of the objectives of the EU external action, as confirmed by consistent case-law.[190]

As regards the Union's public order and security, the General Court interestingly acknowledged the argument brought forwards by the Council, in line with the contested acts, stating that the EU at that time was

> "[…] under threat from the systematic international propaganda campaign put in place by the Russian Federation, channelled through media outlets under the permanent direct or indirect

[184] *RT France*, para. 163.
[185] *RT France*, para. 164. Article 3(5) TEU entrusts the EU *inter alia* to "uphold and promote its values and interests and to contribute to the protection of its citizens" and to "contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples […] as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter" in the relations with the wider world. In this regard, the General Court admitted the possibility of the adopted EU restrictive measures being considered, from an international law standpoint, as an answer to the violation of the prohibition on the use of force laid out in Article 2(4) of the United Nations Charter.
[186] As well as on Article 3(5) TEU. See *RT France*, para. 56.
[187] *RT France*, paras. 55, 56, 162.
[188] BAADE (2023), pp. 260, 269.
[189] *RT France*, para. 52.
[190] POLI (2022a), p. 630.

> control of its leadership, in order to destabilise neighbouring countries, the Union and its Member States and to support military aggression against Ukraine […]".[191]

More precisely, the EU was considered to be targeted by "disinformation and destabilisation campaigns", which were deemed to threaten the Union's public order and security.[192] Against this backdrop, in the Court's reasoning the Council's action aimed at stopping the "continuous and concerted activity of disinformation and manipulation of the fact […] became overriding and urgent, in order to *preserve the integrity of the democratic debate in European society*" (emphasis added),[193] especially at a time when such propaganda was "liable to have a *significant harmful effect on public opinion* (emphasis added).[194] This is quite interesting since the Court seems explicitly to recognize the existence of a fully-fledged *European society*, which can overall be the subject of propaganda and disinformation campaigns when conceived as *public opinion*. Those propaganda and disinformation campaigns are considered by the judges to be capable of undermining the foundations of democratic societies and to be an integral part of the arsenal of modern warfare".[195]

When it comes to the specific activities pursued by RT France (and, more generally, by the targeted media outlets), the General Court held that

> "in the context of its activity during the period preceding the Russian federation's military aggression against Ukraine and, above all, during the days following that aggression, [it] engaged in a systematic action of broadcasting *'selected' information, including manifestly false or misleading information*, revealing a *manifest imbalance* in the presentation of the different opposing viewpoints, with the specific aim of justifying and supporting that aggression" (emphasis added).[196]

As Lonardo (2022) points out, the crucial reason justifying the contested EU restrictive measures was not that RT France presented the "Russian version" of the war, but more importantly the fact that it did not sufficiently expose the opposite point of view in relation to the unfolding events.[197] These actions, which even included the dissemination of "manifestly false or misleading information", were considered by the General Court as not abiding by the responsibilities falling upon audiovisual media from existing legislation and case-law.[198] This is all the more relevant

[191] *RT France*, para. 161
[192] *RT France*, para. 55.
[193] *RT France*, para. 88.
[194] *RT France*, para. 89.
[195] *RT France*, paras. 56, 162.
[196] *RT France*, para. 211.
[197] LONARDO (2022), p. 72.
[198] *RT France*, §189.

since the Court confirmed the Council's assessment concerning RT France as under the permanent direct or indirect control of the leadership of the Russian Federation.[199]

Overall, on the basis of the contested acts as interpreted by the General Court, it is possible to uphold that, at the time of the events, the threat to the Union's public order and security stemmed from: (i) media outlets (ii) under the permanent direct or indirect control of the leadership of a non-EU country (the Russian Federation), (iii) which were responsible of a systematic and concerted disinformation campaign (iv) consisting in the broadcasting of selected - and even false - information and (v) resulting in a "manifestly imbalanced" presentation of the events, (vi) with the aim of supporting the war in Ukraine and destabilising the EU as well as its neighbouring countries, (vii) in particular the democratic debate in European society. In addition, this ruling is all the more important since it is the first time that the Court relies upon Article 40 TEU in order to safeguard the exercise of the CFSP competences from non-CFSP competences, in particular those that relate to audiovisual services.[200]

RT France brought appeals against the judgement before the Court of Justice on 27 September 2022 (Case C-620/22).[201] However, on 6 June 2023 it notified the Court of its intention not to continue the proceedings.[202] As a result, the judgement rendered by the General Court definitely ruled in the present case. Another action for annulment, lodged by *A2B Connect and others*, is currently pending before the General Court and focuses on the validity of the above mentioned CFSP restrictive measures in light of Articles 29 and 215 TFEU as well as Articles 11, 41 and 52 of the Charter of Fundamental Rights of the European Union.[203] As a result, it remains to be seen whether the General Court will uphold the findings presented in RT France or will overturn them in the future and whether, as Poli and Finelli (2023) mention, "the perception of the threat to the Union's public order and security posed by the disinformation campaign of Russian media outlets will change after the end of the war".[204]

[199] See *RT France*, para. 172: "[…] it is apparent […] that the RT Group is a Russian State news outlet, 'an international channel representing the country', whose mission is, in particular, to build up a large audience beginning with the countries where its channels are operational and to be used, at crucial moments, for example in time of war, as an 'information arm' against the Western world. In that context, the function of the RT Group has been compared, in essence, with that of the Russian Defence Ministry".
[200] POLI (2022a), p. 630 and POLI (2022b), p. 147.
[201] See COURT OF JUSTICE OF THE EUROPEAN UNION (2022).
[202] See Ordonnance du Président du Tribunal du 28 Juillet 2023, *RT France et autres v. Conseil de l'Union européenne*, Affaire C-620/22 P.
[203] See COURT OF JUSTICE OF THE EUROPEAN UNION (2022).
[204] POLI and FINELLI (2023), p. 34.

2.2.4 The European Media Freedom Act (EMFA): protecting *public security* against non-EU media services

Risks stemming from the dissemination of content broadcast by media outlets set up outside the EU, such as the ones indicated above, are also taken into account in the recent proposal for the European Media Freedom Act (hereinafter, the EMFA proposal) presented by the Commission on the 16 September 2022.[205] The EMFA proposal, which was announced by President von der Leyen in her 2021 State of the Union address,[206] aims at contributing to Union legislation on media and the digital market, encompassing the Audiovisual Media Services Directive (AVMSD),[207] the Digital Services Act (DSA)[208] the Digital Markets Act (DMA)[209] and the Directive on copyright and related rights in the Digital Single Market (Copyright Directive).[210] The objective of the EMFA proposal is to improve the functioning of the internal media market by achieving four objectives: (a) increasing cross-border activity and investment, (b) promoting regulatory cooperation and convergence; (c) promoting free provision of quality media services and (d) fostering transparent and fair allocation of economic resources in the market.[211]

The reference to the EMFA proposal appears to be relevant in this context since the act introduces specific provisions covering public security, notably in circumstances similar to those having prompted the EU restrictive measures outlined in the previous paragraph. More specifically, the EMFA proposal provides for the establishment of the European Board for Media Services (EBMS), replacing and succeeding the European Regulators Group for Audiovisual Media Services (ERGA) introduced by the AVMSD Directive (Article 8). In relation to the conferred tasks, the Board is significantly entrusted *inter alia* to

> "[…] coordinate national measures related to the dissemination of or access to content of media service providers established outside the Union that target audiences in the Union, where their activities prejudice or present a serious and grave risk of prejudice to *public security and defence*, in accordance with Article 16(1) of this Regulation" (emphasis added).[212]

Article 16(1) of the EMFA proposal clarifies that *the control exercised by third countries over media service providers established outside the Union* is a factor that is to be taken into account

[205] EUROPEAN COMMISSION (2022g). The EMFA proposal is complemented by Commission Recommendation (EU) 2022/1634 focusing on editorial independence and ownership transparency.
[206] VON DER LEYEN (2021).
[207] Directive 2010/13/EU.
[208] Regulation (EU) 2022/2065.
[209] Regulation (EU) 2022/1925.
[210] Directive (EU) 2019/790.
[211] EUROPEAN COMMISSION (2022g), pp. 29, 30.
[212] EMFA proposal, Art. 12(k).

for assessment as regards the mentioned "serious and grave risk or prejudice to public security and defence".[213] To this end, the Board, acting in agreement with the Commission, is empowered to issue opinions on appropriate measures to be adopted at national level, which the competent national authorities have to do their utmost to take into account.[214] Moreover, the proposal envisages a structured cooperation[215] between the different national regulatory authorities or bodies "for the purposes of exchange of information or taking measures relevant for the […] application of this Regulation or […] Directive 2010/13/EU".[216] Against this background, the requesting national authority can trigger the mechanism while it envisages "a serious and grave risk of prejudice to the functioning of the internal market or a serious and grave risk of prejudice to *public security and defence*".[217] These measures are meant to overcome the difficulties that emerged in the coordination process between national regulatory authorities, notably in the context of the Russian aggression against Ukraine, whereby Russian and Belarussian TV channels banned by several Member States continued to be accessible.[218]

Against this backdrop, what is particularly significant is the provision contained in Recital 30 of the EMFA proposal, according to which the assessment of the relevant threats in relation to public security and defence and posed by non-EU media outlets targeting audiences in the Union[219] has to consider "all relevant factual and legal elements, *at national and European level*" (emphasis added).[220] In other words, in the Commission's view, not only the national level, but also the European dimension has to be taken into account when evaluating those threats, and this represents quite a significant departure from previous legislation.[221]

As a result, in light of the Commission's viewpoint, it is possible to acknowledge the emergence of a fully-fledged interest in the protection of the Union, in particular with regard to threats stemming from media services established outside the Union and targeting audience within

[213] EMFA proposal, Art. 16(1). The explanatory memorandum to the EMFA proposal clarifies that both financial and editorial control are relevant in this regard.
[214] EMFA proposal, Art. 16(2).
[215] National Regulatory Authorities who are ERGA members signed an MoU for enhanced cooperation in 2020. See ERGA (2020).
[216] EMFA proposal, Art. 13(1).
[217] EMFA proposal, Art. 13(2).
[218] EUROPEAN COMMISSION (2022g), pp. 10, 11.
[219] EMFA proposal, Art. 12(k). See *Supra*.
[220] EMFA proposal, Recital 30.
[221] See AVMSD, Artt. 3(3) and (5), which only mention the national level.

the Union.[222] This orientation seems to be confirmed by the Council's mandate for negotiation with the European Parliament, albeit with some differences, as outlined below.[223]

As regards the chosen wording, the Commission quite significantly employed the term "public security and defence" instead of "public order and security", which featured above in the CFSP restrictive measures targeting Russian media outlets. On the one hand, this appears to be coherent with aforementioned Recital 30 of the proposal, according to which the assessment regarding risks to public security and defence "is without prejudice to the competence of the Union under Article 215 of the Treaty on the Functioning of the European Union", according to which it is possible to choose a different wording for the two different tools under consideration. On the other, it is nonetheless possible to envisage some issues regarding the clarity of Union legislation in the media domain. A reference to the Impact Assessment Report accompanying the EMFA proposal can help illustrate this point. There, the broadcasting activity carried out by "Russian propaganda channels" is purported to endanger only "public security".[224] This represents somewhat different phrasing in respect to the "public order and security" mentioned in CFSP restrictive measures, albeit the events at issue appear to be the same.

Moreover, legal uncertainties can arise in the interpretation of "public security" in light of both the EMFA, as currently formulated, and the revised AVSMD Directive, which the EMFA explicitly refers to. In the latter case, Member States are allowed to restrict freedom of reception and retransmission on their territory of audiovisual media services originating from other Member States on the grounds inter alia of a "serious and grave risk of prejudice to public security, *including the safeguarding of national security and defence*" (emphasis added).[225] As a result, while in the revised AVMSD Directive, public security (at the national level) seems to encompass both national security and defence, in the EMFA proposal the notion of "public security" seems to point to a different definition, whereby defence is not precisely included within "public security". It remains to be seen whether the current wording of the EMFA proposal will be kept in the final act, given that the Council only foresees "public security" – and not "defence" – as a factor to be taken into account in the afore-mentioned assessment.[226] However, if those

[222] However, as the act is currently formulated, the enforcement of these measures could result in some issues, due to the non-binding nature of the opinions issued by the EBMS and non-harmonised national provisions. As COLE and ETTELDORF (2022) emphasize, "[a] mandatory solution in form of a common approach of national measures would not be achieved with this approach, thereby leaving the problems that have been identified under the AVMSD rules in the context of satellite broadcasting unresolved" (p. 52).
[223] COUNCIL OF THE EUROPEAN UNION (2023b). See *Infra*.
[224] EUROPEAN COMMISSION (2022h), p. 10.
[225] AVMSD Directive, Artt. 3(3) and (5). At the early stages of the war, these provisions were referred to by Estonia, Latvia, Lithuania and Poland in their suspension of the broadcasting activities carried out by Russian and Belarussian media outlets.
[226] COUNCIL OF THE EUROPEAN UNION (2023b), Recitals 30, 30a, 30b as well as Artt. 12(k), 13(8) and 16(1).

expressions are to be used, it goes without saying that there is need for further clarification, so as to apply correctly both the CFSP restrictive measures and the EMFA (once adopted) and the AVSMD Directive.[227] In this respect, the Council's efforts in clarifying the terms employed by the acts are to be welcomed, since it proposes to links the "risks or prejudice to public security" to "systematic, international campaigns of media manipulation and distortion of facts in view of destabilising the Union as a whole or particular Member States" and it calls for a list of criteria to be used in this assessment as regards media outlets established outside the Union.[228] The recently-adopted position of the European Parliament does not significantly depart for what has already been mentioned.[229]

In addition to what has already been mentioned, the notion of "public security" features also in the Digital Services Act (DSA), cited above, which has been legally enforceable for very large online platforms (VLOP) and very large online research engines (VLORE)[230] since 25 August 2023. Among the main features introduced, the EU act establishes a crisis response mechanism, whereby the Commission can ask VLOP or VLORE providers to implement specific measures in the event of a crisis.[231] For the sake of clarity, Article 36(2) specifies that "a crisis shall be deemed to have occurred where extraordinary circumstances lead to a serious threat to *public security* or public health *in the Union or significant parts of it*" (emphasis added). For this study, this provision seems to be quite significant since, first and foremost, the supranational level is fully taken into account both as a whole ("in the Union") and in its subsets ("or significant parts of it"). Moreover, as regards the "extraordinary circumstances" capable of having an impact on "public security" or "public health", Recital 91 explains that

> "[…] Such crises could result from *armed conflicts* or *acts of terrorism*, including emerging conflicts or acts of terrorism, *natural disasters* such as earthquakes and hurricanes, as well as from *pandemics* and other serious cross-border threats to public health […]" (emphasis added).[232]

In this understanding, the notions of "public health" and "public security" appear to be connected to armed conflicts, acts of terrorism, natural disasters as well as health threats.[233] Taking all the

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[227] This is in line with COLE and ETTELDORF (2023), who call *inter alia* for a further clarification of the legal basis and of the definitions contained in the proposed act.
[228] Respectively, COUNCIL OF THE EUROPEAN UNION (2023b), Recital 30 and Article 16(3).
[229] See EUROPEAN PARLIAMENT (2023b).
[230] As defined in DSA, Artt. 33(1) and (4).
[231] DSA, Art. 36(1).
[232] DSA, Recital 91.
[233] In addition to these circumstances, VLOP and VLORE providers have to carry out risk assessments originating from the execution of their services and systems against identified systemic risks, including "any actual or foreseeable negative effects on civic discourse and electoral process, and public security". However, these terms do not appear to be defined in the Regulation. See DSA, Art. 34(1)(c).

above into consideration, it is fair to say that the perspective adopted in the DSA inevitably complements the provisions contained in the EMFA proposal as regards the protection of EU public security; however, the semantic choices that have been made in the two acts seem to be different and, consequently, another effort in clarity appears to be necessary for further legal certainty.

2.3 "Public order and security" and the Net Zero Industry Act (NZIA). Net-zero technologies as an enabler of the EU security of energy supply?

Delivering on the green transition requires the timely development and production of net-zero technologies in order to meet the objectives enshrined in relevant international instruments.[234] Indeed, several global powers have adopted legislation supporting the respective national clean industries in an effort to meet the agreed emission reduction targets as well as to consolidate the respective national industrial landscapes having due regard to "security of supply" risks.[235] Overall, this has led to a *de facto* "subsidy race"[236] and has inevitably fed an already ongoing race for technological superiority among global powers.[237]

The EU is deeply affected by this process, if only because of its budget constraints, its stricter and more binding commitments relating to the green transition[238] as well as its considerable dependency *vis-à-vis* third countries as regards the supply of several technologies and raw materials.[239] Consequently, in an effort to cope with these rising challenges, on 16 March 2023 the European Commission issued a proposal for a Regulation establishing a framework of measures for strengthening Europe's net-zero technology products manufacturing ecosystem (*Net Zero Industry Act*, hereinafter the "NZIA proposal").[240] As part of the Green Deal Industrial Plan,[241] the NZIA proposal aims at increasing the EU's manufacturing capacity in relation to specific net-zero technologies as well as to foster the "Union's resilience and security of

[234] See paradigmatically EKHOLM and ROCKSTRÖM (2019).
[235] For instance, in the United States the Inflation Reduction Act (IRA) aims at mobilising USD 369 billion by 2032 for the development of the domestic green industry.
[236] See, *e.g.*, ESPINOZA and FLEMING (2023).
[237] See, paradigmatically, RUGGE (2019).
[238] For instance, the EU is currently under legal obligation to cut its net greenhouse gas emissions by at least 55% compared to 1990 levels by 2030 as well as to achieve climate-neutrality by 2050. See, respectively, Regulation (EU) 2021/1119 (the "European Climate Law"), Artt. 4(1) and 1.
[239] The 2021 update to the 2020 New Industrial Strategy identifies 137 products on which the EU is highly dependent on non-EU countries, mainly from the PRC, Vietnam and Brazil. EUROPEAN COMMISSION (2021), p. 11.
[240] EUROPEAN COMMISSION (2023e).
[241] EUROPEAN COMMISSION (2023b).

supply"[242] - also in the energy sector - by acting across seven pillars[243] in full complementarity with the proposed *Critical Raw Materials Act* and the reform of the electricity market design.[244]

The NZIA proposal is of interest in the context of this study since it explicitly invokes the Union's public order and security in one of its provisions. Indeed, it acknowledges that while, on the one hand, net-zero technologies "play a key role in the Union's open strategic autonomy, ensuring that citizens have access to clean affordable, secure energy",[245] on the other,

> "[…] net-zero technology products will contribute to the Union's resilience and security of supply of clean energy. *A secure supply of clean energy is a prerequisite for economic development, as well as for public order and security* […]" (emphasis added).[246]

This passage appears to be quite significant from several points of view. First, it explicitly mentions the expression "public order and security", which can be understood as being at the EU level once the reference to the aforementioned "Union's resilience and security of supply" in the previous sentence is fully taken into account. Second, it explicitly links the EU's public order and security to the energy domain. Consequently, it is possible to assume that, in the Commission's eyes, a disruption in energy supply can have a (significant) impact on the EU at the internal level and, more specifically, on the internal order at the basis of the EU *as a whole*. This can perhaps be explained by the paramount importance that energy plays in all aspects of modern life. Third, the NZIA proposal is clear in mentioning only security of supply in *clean energy* - and not from all sources of energy - as a way to achieve the above-mentioned public order and security.

In relation to the last point, one can indirectly recognise - as a key element underpinning this paragraph - the EU strategy of diversification and reduction of dependences in the energy sector, which has been given new impetus since the Russian war of aggression against Ukraine. In this respect, the recent EU external energy policy explicitly links the green energy transition to EU energy independence, albeit recognising the need for replacing Russian fossil fuels in the short run.[247] Indeed, Regulation (EU) 2023/435 (hereinafter, "REPowerEU Regulation"), the landmark piece of EU legislation within this sector, provides for the possibility to include REPowerEU chapters within Member States' National Recovery and Resilience Plans (NNRPs) with a view *inter alia* to contribute to the improvement of the

[242] NZIA proposal, Recital 2.
[243] The seven pillars include (i) headline benchmark, (ii) accelerating permitting procedures, (iii) net-zero strategic projects and access to finance, (iv) CO_2 injection capacity target, (v) access to markets, (vi) skills and (vii) innovation. See EUROPEAN COMMISSION (2023i), pp. 32 ff.
[244] See EUROPEAN COMMISSION (2023f) and EUROPEAN COMMISSION (2023c).
[245] NZIA proposal, Recital 10.
[246] NZIA proposal, Recital 20.
[247] See EUROPEAN COMMISSION and HR/VR (2022), pp. 2 ff.

> "[…] energy infrastructure and facilities to meet immediate security of supply needs for gas, including liquified natural gas, notably to enable diversification of supply *in the interest of the Union as a whole* […]" (emphasis added).[248]

Thus, the interest to be protected by the REPowerEU measures has to be related to the EU *as a whole*. More specifically, in the evaluation of the revised NRRPs, the Commission is explicitly entrusted by the Regulation with the task of assessing the cross-border or multi-country dimension of those investments, including the contribution to securing energy "in the interest of the Union as a whole", whenever applicable.[249] This has already been recognised in relation to several revised NRRPs presented by Member States.[250]

In addition, as regards the clean energy dimension, another Union act adopted in the field of energy to deliver on the diversification strategy - Council Regulation (EU) 2022/2577 - has to be recalled in this context since it explicitly states that

> "[…] Renewable energy plants, including heat pumps or wind energy, are crucial to fight climate change and pollution, reduce energy prices, decrease the Union's dependence on fossil fuels and ensure the Union's security of supply […]".[251]

In full coherence with what has already been mentioned in relation to the EU external energy policy, the diversification strategy towards renewable energy is understood in terms of making the EU resilient and independent of unreliable foreign providers.

Against this background, as highlighted above, the NZIA proposal identifies the development of net-zero technologies as a key driver towards the EU's resiliency and security of supply of clean energy to the EU. To this aim, it introduces specific targets in relation to the manufacturing capacity of specific strategic net-zero technologies,[252] namely to approach or to reach the production of at least 40% of the EU's projected needs in light of its climate and energy targets.[253] Moreover, it proposes the introduction of "net-zero strategic projects", as defined in Article 10(1). These are manufacturing projects related to a strategic net-zero technology, which must be located in the Union and either have to increase the manufacturing capacity of a part or component that the Union greatly imports from a single third country or contribute to the

[248] REPowerEU Regulation, Article 1(8) inserting Article 21c(a) in Regulation (EU) 2021/241.
[249] See REPowerEU Regulation, Annex II amending Annex V of Regulation (EU) 2021/241, and EUROPEAN COMMISSION (2023d), pp. 21 ff.
[250] As an example, this assessment appears in the Commission's evaluation of revised NRRPs submitted by Malta and Estonia. See EUROPEAN COMMISSION (2023l) and EUROPEAN COMMISSION (2023g).
[251] Council Regulation (EU) 2022/2577, Recital 2.
[252] These are listed in Annex I of the proposal: solar photovoltaic and solar thermal technologies, onshore wind and offshore renewable technologies, battery/storage technologies, heat pumps and geothermal energy technologies, electrolysers and fuel cells, sustainable biogas/biomethane technologies, carbon capture and storage (CCS) technologies, grid technologies.
[253] NZIA proposal, Art. 1.

"competitiveness and quality job creation" by fostering the reference supply chain or downstream sectors "beyond the project promoter and the Member States concerned".[254] These projects should be considered - by competent national authorities - not only to contribute to the EU's security of supply, but also to be *in the public interest* and even *having an overriding public interest*, provided some conditions set out in Article 12(3) are met.[255]

Overall, in light of the above, it is possible to sustain that the EU's public order and security in the NZIA proposal is inextricably linked to the energy dimension, with specific reference to security of supply of clean energy to the EU. Within this framework, the ramping-up of the manufacturing capacity in the net-zero sector within the EU is instrumental for the achievement of the security of energy supply, ultimately contributing to European public order and security (at the internal level). A clear-cut definition of this term is not, however, provided by the Commission; nevertheless, the elements set out above can contribute to a possible understanding of it in the energy and technology domains for the green transition.

[254] NZIA proposal Artt. 10(1)(a) and (b).
[255] As defined in EUROPEAN COMMISSION (2023i), pp. 36 ff., these provisions have been inspired by Regulation (EU) 2022/869 (the "revised TEN-E Regulation").

Chapter III. EU strategic autonomy in the pursuit of an internal "EU strategic security"

An initial analysis

As the enquiry carried out in the previous paragraphs has tried to show, the concept of EU strategic autonomy - with the panopticon of notions it has spurred, ranging from "EU resilience" to "EU technological sovereignty" - has undoubtedly represented a game-changer for the EU action in several policy fields and its stance *vis-à-vis* third actors. Even if Member States' differing priorities and budgets still have a considerable impact on the achievement of coherent policies at the EU level,[256] this notion has nonetheless provided the EU at least with a general framework for its action, and even prompted a new policy agenda conditioning those of Member States. Against this backdrop, we believe that EU strategic autonomy has increasingly seen its external purpose, essentially consisting of the capacity of the Union itself to act autonomously and live by its own rules on the international scene, as being complemented by the achievement of more internal purposes. This is best exemplified by the explicit reference of the protection of "EU public order and security" in documents pertaining to non-AFSJ matters, as we have seen in Chapter III. In our vision, this process can be regarded as the progressive framing of an "EU strategic security" at the internal level, *de facto* complementing Member States' national security in specific fields.

This Chapter aims at illustrating this phenomenon and at clarifying the concepts under analysis. In order to do so, the work will first focus on the internal component of EU strategic autonomy and on its interaction with its external counterpart, with the stated aim of highlighting an "internal-external-internal" nexus between the two. We will then delve into the proposed concept of "EU strategic security" in order to single out its main components and provide an initial typology. Afterwards, the analysis will take into account the legal issues which are relevant in this respect and finally we will investigate the interplay between the EU dimension and the Member States' level as far as the notions of "EU strategic security" and "national security" are concerned.

[256] For instance, LAVERY, MCDANIEL and SCHMID (2022) highlight several constraints that limit EU strategic autonomy in the geoeconomic domain.

3.1 The "internal-external-internal" nexus in the context of EU Strategic autonomy

The concept of EU strategic autonomy has prominently featured in the public debate as regards its external dimension. However, it also presents an internal component, which has been highlighted by the relevant literature. In this respect, Tocci (2021) significantly acknowledges that "the prerequisite for European strategic autonomy is internal unity, strength and resilience: the EU's global role starts at home".[257] Within this framework, before projecting itself on the international scene, the EU has to achieve several objectives, starting from what the author calls "the resilience of our democracies".[258] In this line of reasoning, this notion has to be understood as the protection, at the internal level, of democratic standards, human rights and rule of law, "that constitute the core of the European project".[259] In addition to that, several other factors, namely the EU's economic resilience - including research and innovation - as well as the need to tackle intra-European fragmentation, have to be taken into account.[260]

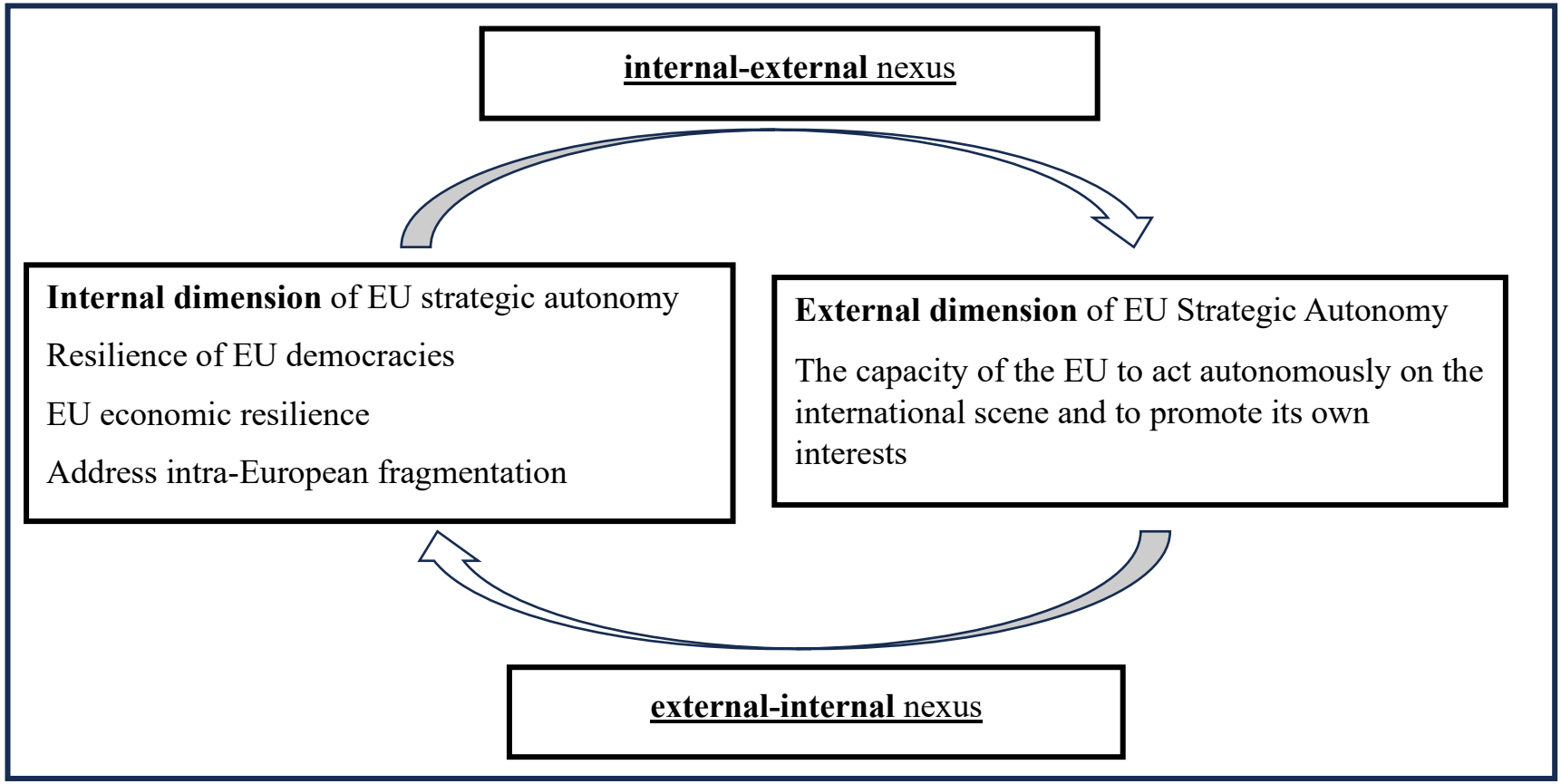
Other authors have more recently highlighted the internal component of EU strategic autonomy. For instance, in her analysis concerning the historical development of "EU strategic autonomy", Beaucillon (2023) recalls the French *Livre blanc sur la défense*, issued in 1994,[261] where this term features "as a cursor to find the appropriate balance between an *inward-looking* defence strategy aiming solely at defence of the national territory, and an *outward-looking* one focusing all efforts on external military action in support of international peace and security"[262] (emphasis added). This Janus-faced orientation is also confirmed in the context of the *open* strategic autonomy, which the author defines as providing "the conditions *for the EU to be a resilient global actor* (inward-looking) capable of upholding strong choices in the fields of its external action (outward-looking)"[263] (emphasis added).

In light of the above, the internal dimension of EU strategic autonomy can be seen as a tool and as an enabler for the EU to act more autonomously on the global stage

[257] TOCCI (2021), p. 5.
[258] *Ivi*, p. 24.
[259] *Ibidem*.
[260] TOCCI (2021), p. 25.
[261] See MINISTÈRE DE LA DÉFENSE (1994).
[262] BEAUCILLON (2023), p. 418.
[263] *Ivi*, p. 420.

following a multilateral approach in international affairs. We propose this to be described as the "internal-external nexus" of EU strategic autonomy. However, as seems apparent from the analysis carried out in the previous paragraphs, the relationship between these two components can be regarded as also running in the opposite direction, thereby forging a complementary "external-internal" nexus. By this concept we mean that actions carried out by the EU - making full use of its legal tools pertaining to external action - as a response to international events and/or external threats are increasingly understood in terms of protecting the Union at the internal level. In other words, and more clearly, the strategic autonomy that the EU is pursuing in its external relations nowadays appears to be increasingly employed for the internal resilience of the EU bloc *as a whole*, with particular emphasis on specific policy fields. This dynamic, which is supposed to reinforce the EU internal dimension, can also act as a catalyst for a more assertive action of the Union on the international scene, thereby enhancing the "internal-external" nexus set out above. These two dimensions being complementary, this can result in a specific dynamic, which can be described as the "internal-external-internal" nexus in EU strategic autonomy. This is outlined in *Table IV*. Taking all the above into account, it seems that a qualitative change is currently underway as regards the definition of EU internal security, which nowadays also encompasses issues normally pertaining to the realm of EU strategic autonomy. The following paragraph will analyse this matter in greater detail.

Table IV. The "internal-external-internal" nexus in EU strategic autonomy.



Source: author's own elaboration following TOCCI (2021), DAMEN (2022) and BEAUCILLON (2023)

3.2. Towards the framing of "EU strategic security". A critical appraisal

As mentioned in the previous paragraph, a strengthened focus on the internal dimension of EU strategic autonomy triggered by the contested international environment has prompted a renewed broadening of the meaning of "EU security". This appears to be fully in coherence with the general trend concerning the concept of "security", which has been the subject of a process of re-defining in the past decades, notably in connection with specific threats and/or events.[264] However, from a qualitative point of view, in our understanding it seems that a *de facto* "EU strategic security"[265] - on top of and complementing the *de jure* Member States' national security - is currently seeing the light. As it appears, this new development seems to be limited to determined policy areas, but it cannot be excluded that it may be extended to other domains.

More specifically, "EU strategic security" can be envisaged as composed of two different dimensions, with the objective of protecting either (i) the EU *as a system* or (ii) the EU *as a whole*. By the former term we mean that EU strategic autonomy can be conceived as a tool to enable the EU to perform its tasks and/or to protect its components or its essential interests pertaining to different domains, including the economic and technological domains. The reference we made to the protection of critical infrastructures in Chapter I can help exemplify this point. Indeed, critical infrastructures and entities are vital for the EU in its entirety or in specific sectoral areas (including the single market), thereby the correct functioning of each one is of paramount importance in this respect.

Coming to the second term, the EU *as a whole*, this can be regarded as the *core* element of what we call "EU strategic security". As it can be easily inferred from the above, this expression points to the impact that threats or events could have on the EU in its entirety and/or one of its foundational components. Within this context, the term is inevitably linked to the notion of "EU public order and security" - the object of the analysis in Chapter II - and can be considered as being strongly connected to the internal security of the EU, in

[264] In this respect, see ROBERT (2023), p. 517.
[265] Other authors have recently spoken about the framing of a "EU national security" as regards the screening of inbound FDIs (*Ivi*, p. 518). While our work inevitably draws from this strand of literature, it makes the case for a broader concept encompassing other domains and inextricably linked to the concept of EU strategic autonomy. For a discussion regarding "strategic security" in the EU *vis-à-vis* Critical Raw Materials (CRMs), see MÜNCHMEYER (2023).

particular to the potential effects of threats upon EU citizens. However, at current stage it does not represent an all-encompassing concept given that, as mentioned before, “EU strategic security” is currently applied to specific policy fields, particularly when it concerns the EU *as a whole*. *Table V* outlines its main features, on the basis of the analysis carried out in Chapter III, including the employed legal bases and the main Institutions which have approved the relevant documents or are involved in each specific area:

Table V. *Core* "EU strategic security": an initial breakdown.

Policy field	Foreign Direct Investments (FDIs)	Foreign Information Manipulation and Interference (FIMI)	Net-Zero Industry Act
Legal basis and relevant Treaty provisions	Article 207 TFEU	**EU restrictive measures**: Article 29 TEU and Article 215 TFEU Articles 3(1) and (5) TEU Article 21(2)(a) TEU **EMFA**: Article 114 TFEU	Article 114 TFEU
Purpose(s)	Protecting the EU and its Member States against risks originating from inbound FDIs	Protecting the democratic functioning of the EU and of its Member States against disinformation	Fostering the production of net-zero technologies *inter alia* in order to meet EU energy needs
Current status	Approved (OLP)	**EU restrictive measures**: approved **EMFA**: in the pipeline	In the pipeline
Institutions involved in this act (at the time of writing)	Commission Council European Parliament	**EU restrictive measures** European Commission HR/VR Council **EMFA** European Commission Council European Parliament	Commission Council

Source: author's own elaboration on the basis of the analysis conducted in Chapter II.

4.2.1. Introducing the concept of "EU Strategic security". A legal analysis

Introducing a new concept which clearly recalls and somewhat overlaps with the notion of national security inevitably requires the clarification of several legal issues that fall within the realm of EU law. From a general perspective, the EU Treaties make explicit reference to the Member States' national (or internal) security, although no definition is provided in this regard. According to Article 4(2) TEU, the safeguard of national security is defined as being one of the "essential security functions" of the Member States, along with the protection of the territorial integrity of the State as well as the maintenance of law and order.[266] The last sentence of the cited article clarifies that "national security remains the sole responsibility of each Member State".[267] In other words, as regards the division of competences between the EU and its Member States, it emerges from this Article that, as a general remark, national security remains a strictly national prerogative and is left unaffected by the attribution of some competences to the EU level.

However, this general position has been nuanced by the CJEU, which has clarified that disapplication of EU law can occur only in exceptional circumstances. This has been recalled *inter alia* in *Ministrstvo za obrambo*, where the CJEU stated that

> "the mere fact that a national measure has been taken for the purpose of protecting national security cannot render EU law inapplicable and exempt the Member States from their obligation to comply with that law".[268]

This doctrine has been recently employed *inter alia* in *Commission v Poland, Hungary and Czech Republic*, where the CJEU did not find, in the specific cases at issue, any reasons connected to national security allowing the concerned Member States to disregard relevant EU legislation.[269] In general terms, as Boková (2022) put forward,

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[266] According to Article 4(2) TEU, "[t]he Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential state functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State".

[267] *Ibidem*.

[268] *Ministrstvo za obrambo*, para. 40 and case-law cited there, namely *Sirdar*, para 15; *Kreil*, para. 15; *Privacy International*, para. 44.

[269] See *Commission v Poland, Hungary and Czech Republic*, para. 170: "As the Advocate General also essentially observed, in points 226 and 227 of her Opinion, the arguments derived from a

> "[i]t is apparent the CJEU put emphasis on respect for essential state functions as an interpretive principle of EU law, which can only justify non-applicability of EU law in extraordinary circumstances, when it is impossible to interpret EU law in a way not adversely affecting the performance of essential state functions".[270]

Other Treaty provisions add up to this general framework. First, according to Article 72 TFEU the clauses enshrined in Title V TFEU, relating to the Area of Freedom, Security and Justice (ASFJ), cannot "affect" Member States' responsibilities in relation to the "safeguarding of internal security" as well as the "maintenance of law and order".[271] However, as Kellerbauer (2019) highlights, the derogation introduced by Article 72 has to be interpreted narrowly and requiring the concerned Member State to provide substantial evidence, in case it wants to invoke this clause in proceedings before the CJEU.[272] In full coherence with this provision, Article 276 then limits the jurisdiction of the Court into specific domains under the AFSJ, namely in judicial cooperation in criminal matters (Chapter 4) and police cooperation (Chapter 5). The envisaged exception clause covers the tests of validity and proportionality in relation to "operations carried out by the police or other law-enforcement services of a Member State" as well as "the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and *the safeguarding of internal security*" (emphasis added).[273]

In addition to that, the EU primary law features a derogation clause applying to Member States under certain circumstances. The reference here is to Article 346 TFEU, which allows each Member State (i) not to disclose information in case it considers such an act as being "contrary to the essential interests of its security" and (ii) to take the measures it considers necessary for the protection of the essential interests of its security "connected to the production of trade in arms, munitions and war material".[274] Relevant case-law has clarified the scope of this provision, starting from *Commission v Spain*, where

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reading of Article 72 TFEU in conjunction with Article 4(2) TEU are not such as to call into question that finding. There is nothing to indicate that effectively safeguarding the essential State functions to which the latter provision refers, such as that of protecting national security, could not be carried out other than by disapplying Decisions 2015/1523 and 2015/1601".

[270] BOKOVÁ (2022), p. 787.

[271] Art. 72 TFEU.

[272] KELLERBAUER (2019), p. 791.

[273] Art. 276 TFEU.

[274] Respectively, Art. 346(1)(a) and (b) TFEU.

the CJEU stated that the burden of proof rests upon Member States as regards the evidence pointing to the necessity of the invoked derogation.[275]

Finally, a couple of provisions are to be considered because of their significance from a practical point of view. On the one hand, the first one concerns Article 73 TFEU, which allows Member States to set up administrative arrangements for "cooperation and coordination" in the area of *national* security.[276] On the other hand, Article 71 TFEU envisages the creation of a standing committee within the Council for cooperation on *internal* security between the Member States.[277] Thus, these articles foresee the use of different settings for cooperation between the Member States within or outside the EU legal framework depending on the nature of the matter involved, respectively national security or internal security.[278]

Taken all from the above, the cited provisions seem to suggest that national security falls entirely within the remit of Member States, whose activities in this regard are unaffected by the specific provisions stemming from Title V TEU and by the related judicial review of the CJEU, although they have to comply with EU law. Thus, it is possible to affirm that the concept of "national security" is explicitly and *de jure* recognised by EU primary law, even though a clear-cut definition of this term is not provided by the Treaties.

Against this backdrop, we argue that a "EU strategic security" - having some affinities with the traditional notion of "national security" - is currently emerging, *de facto* complementing Member States' activity in national security-related matters. This appears to be interesting especially when one takes into account that the Treaties are silent in this respect and explicitly recall only the EU Member States' national security, as previously mentioned. However, from a legal point of view, these new developments are enshrined in and make full use of specific Treaty provisions and instruments, which have sometimes

[275] "Accordingly, it is for the Member State which seeks to rely on those exceptions to furnish evidence that the exemptions in question do not go beyond the limits of such cases". See *Commission v Spain*, para. 22.
[276] OLLER RUBERT and GARCÍA MACHO (2021) recall that "cooperation and coordination" stem from the principle of sincere cooperation enshrined in Art. 4(3) TEU (p. 1413).
[277] The *Standing Committee on Internal Security* (COSI) was set up by Council Decision 2010/131/EU.
[278] From a theoretical point of view, it is difficult to draw a clear line between national and internal security, given that internal security matters normally are encompassed by the concept of national security *lato sensu*.

acquired a new meaning in relation to their specific use. The following part of the paragraph will delve into this aspect to highlight the main emerging trends.

First, the increasing use of instruments traditionally pertaining to the EU external action for the achievement of internal purposes can be regarded as a significant development. In general terms, this practice is without doubt consistent with the relevant *acquis* of the Union regarding external action. The reference here is in particular to Article 21(2) TEU, which lays down a list of objectives that the EU has to pursue in its relations with the wider world, insofar as it mentions the "safeguard [of EU] values, *fundamental interests*, *security*, independence and *integrity*" (emphasis added).[279] However, this phenomenon seems to have assumed a new dimension over the last years.

As regards EU restrictive measures, the mobilization of Article 29 TEU and Article 215 TFEU for the protection of "EU public order and security", as mentioned before, represents a significant step forward, which points to the fact that this instrument has been progressively geared towards new objectives.[280] Indeed, from a general point of view, the *Guidelines on implementation and evaluation of restrictive measures*, issued by the Council in 2003 and revised in 2018, suggest the use of this instrument in order to "bring about a change in policy by the target country, part of country, government, entities or in individuals".[281] While this remains valid for the vertical and horizontal restrictive measures regimes adopted by the EU, the measures analysed in Chapter II undoubtedly present an innovative inward-looking dimension that is meant to protect the democratic debate of the EU and, therefore, to preserve the integrity of the Union. While this represents a novel development, it remains to be seen whether this will be confirmed by the relevant practice in the future.

Another provision that has emerged in the context of the present analysis is Article 207(2) TFEU, which lays down the general decision-making process related to the

[279] Art. 21(2)(a) TEU.
[280] This has also been recognised by BAADE (2023), p. 262.
[281] COUNCIL OF THE EUROPEAN UNION (2003b), para. II.2 and COUNCIL OF THE EUROPEAN UNION (2018), para. II.A.4. However, the latter document also recognises that "[…] the EU will adapt the restrictive measures as a result of developments with regard to the objectives of the CFSP Council Decision".

measures implementing the Common Commercial Policy (CCP).[282] This clause has been used for the adoption of a wide-range spectrum of instruments falling within the so-called "autonomous trade policy" of the Union, including the recent wave of trade measures aimed at ensuring a level playing field, which were adopted as a result of the "*open* strategic autonomy" approach adopted by the European Commission and analysed in Chapter I. In that way, Article 207(2) TFEU has not only provided the legal basis for trade initiatives pursuing different objectives, showing thus its flexibility, but has also allowed the "unilateral turn"[283] characterising the most recent trade policy of the EU, which clearly manifests an overriding internal component. This is best exemplified by the FDI Screening Regulation, whereby the protection of "EU public order and security" features at the core. Also in light of this instrument, Article 207(2) TFEU can be nowadays regarded as one of emerging legal basis contributing to the emergence of what we have called "EU strategic security".

Having said that, it must also be acknowledged that the emergence of "EU strategic security" is also strongly connected to the extensive use of Article 114 TFEU for the achievement of security-related purposes.[284] This trend was presented in this work and, in relation to the so-called "European technological sovereignty", has been well highlighted in the work of Poli and Fahey (2022), which eventually maintains that "this practice is criticisable in order to increase the security of network and information services since the concerned legal basis is stretched to cover security-related measures".[285] Indeed, Article 26 TFEU, which Article 114 TFEU explicitly refers to, does not explicitly introduce the achievement of a higher security within the internal market as one of its objectives.[286]

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[282] According to Art. 207(2) TFEU, "[t]he European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the measures defining the framework for implementing the common commercial policy".

[283] See VERELLEN and HOFER (2023) and DE VILLE *et al.* (2023).

[284] Art. 118(1) TFEU allows for the approximation of national provisions for the achievement of specific objectives in the context of the internal market (see *Infra*): "[s]ave where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, *adopt the measures for the approximation of the provisions* laid down by law, regulation or administrative action *in Member States which have as their object the establishment and functioning of the internal market*" (emphasis added).

[285] POLI and FAHEY (2022), p. 164.

[286] Art. 26 TFEU states that "1. [t]he Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties. 2. The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of

However, as it is currently employed, Article 114 remains perhaps the only main provision the EU has used to cover (national) security-related aspects in the internal market and, as such, *de facto* acts as an enabler of the EU strategic security.

4.2.2. Introducing the concept of "EU strategic security". A political evaluation

Thinking of EU internal security in terms of "EU strategic security", in the sense that we have proposed, carries significant political implications. Indeed, national security touches upon the foundational nature of modern statehood and, consequently, it comes as no surprise that EU Member States have included specific provisions covering this aspect in the Treaties, as mentioned in the previous paragraph. This is also the reason why, for the formulation of our concept, we have opted for a more nuanced wording - "EU strategic security" – that is also meant to single out the specificities of the EU as a *sui generis* political project *vis-à-vis* states as well as to highlight the role that EU strategic autonomy plays in this regard.

Against this background, the concept of sovereignty is fundamentally called into question when referring to the European project. In European philosophy, a first complete elaboration of this notion can be traced back to Jean Bodin and to his *Les six Livres de la République* (1576), which defines sovereignty as "la puissance absolue et perpétuelle d'une république",[287] thereby highlighting its inextricable link to the modern state. However, challenges pertaining to the different historical periods and related structural dynamics have constantly questioned the traditional meaning of the term and its conceptual utility. This holds true in particular for the recent phenomenon consisting in the conferral of competences by states to international and regional organization,[288] which has spurred significant debates with the EU featuring centre stage. In light of the current events and their impact on the nature of the EU, the literature has consequently delved into this phenomenon, even proposing several adaptations to the concept in order to capture its changing meaning. For instance, Fiott (2021) has analysed the notion of "strategic sovereignty" as applied to the EU, finding *inter alia* that it represents a broader concept

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the Treaties. 3. The Council, on a proposal from the Commission, shall determine the guidelines and the conditions necessary to ensure balanced progress in all the sectors concerned".

[287] "The absolute and perpetual power of a State" (author's translation), BODIN (1599), p. 122. The term "république" has to be understood in the Roman sense, meaning "state".

[288] In this respect see paradigmatically SAROOSHI (2007).

than "EU strategic autonomy" and is contingent on political and economic circumstances.[289]

However, the magnitude of the present challenges requires the concept to be analysed not only from a general perspective, but also taking due account of *intra-EU* relations. For instance, Poli (2023) introduced the notion of "shared sovereignty" between the EU and its Member States, with the Dutch export control mechanism regarding DUV lithography systems being an example in this respect.[290] This implies that, especially for domains pertaining to shared or complementary competences under EU law, a thorough cooperation among Member States and with the EU is of paramount importance, whenever possible, in the interests of both national security and the strategic security of the EU *as a whole*. In line with the conclusions of the cited work, this is best exemplified by Article 9(4) of the dual-use export control Regulation, which allows Member States to adapt their export control mechanisms to specific items,[291] included by other Member States in their national export control mechanisms.[292] The application of such clauses is of fundamental importance, not only to guarantee the coherence and unity of the EU single market, but also to ensure that measures taken at the national level for national security cannot be circumvented through other Member States.

In other words, the transnational nature of modern-day challenges, combined with the attribution of competences from the national level to the EU, entails a redefinition of the concept of sovereignty and national security for EU Member States. Indeed, if national security cannot be guaranteed by the national level, then exclusive competences are *de facto* transferred to the EU level because there is no alternative.[293] This is not to say that national sovereignty and national security have lost their importance. On the contrary, the

[289] FIOTT (2021), pp. 10-13.
[290] POLI (2023), p. 568. The measure was announced in a letter of the Dutch trade minister addressed to the Dutch Parliament on 8 March 2023. See GOVERNMENT OF THE NETHERLANDS (2023).
[291] Not included in Annex I of the Regulation.
[292] POLI (2023), p. 444. According to Art. 9(4) of Regulation (EU) 2021/821 "The Commission shall publish the measures notified to it pursuant to paragraphs 2 and 3 in the C series of the *Official Journal of the European Union*. The Commission shall publish separately, without delay and in all the official languages of the Union, a compilation of national control lists in force in the Member States. The Commission shall, upon notification by a Member State of any amendment to its national control list, publish, without delay and in all the official languages of the Union, an update to the compilation of national control lists in force in the Member States".
[293] Interview. In the interviewee's perspective, this does not happen because Member States have an "afflatus of Europeanism", but because there is no alternative, as occurred for the common procurement of vaccines in the context of the Covid-19 pandemic.

protection of EU citizens at the national level can be fully accomplished only when taking into account the EU dimension in relation to issues that, according to the principle of subsidiarity, have to be tackled at the EU level. In that way, it is possible to find appropriate synergies between Member States' national security and the EU strategic security, as we have defined it.

Conclusion

This work has tried to shed some light on the current use of the concept of "EU strategic autonomy", with particular regard to its effect on the protection of EU security at the internal level. It has found that, along with the focus on the external dimension, the concept has recently known an "inward turn", which was prompted in response to external events and international dynamics capable of having a profound impact on the EU itself. The new "unilateral" instruments in the context of the CCP following the adoption of the "*open* strategic autonomy" agenda represent a significant example in this regard, since they are essentially directed at protecting EU's interests in the economic and trade sphere as well as ensuring a level playing field within the Single Market. The elaboration of specific measures ensuring the resilience of the EU *vis-à-vis* non-conventional threats and the tools promoting what has been called the "European technological sovereignty" point to the same direction, being geared towards the protection of the integrity and the autonomy of the EU in highly sensitive sectors. Drawing from the relevant literature, this thesis has proposed to adopt the notion of the "internal-external-internal nexus" in order to explain the interplay between the different dimensions of the EU strategic autonomy, with the specific aim of highlighting the relationship between its internal and external components.

On top of that, the recent use of a new concept - "EU public order and security" - as a benchmark to highlight the possible consequences on the Union of specific events or trends at the international level needs careful consideration. Indeed, this phenomenon appears to be connected to domains that do not form part of the "EU internal security" *stricto sensu* and, therefore, raises specific questions regarding its actual meaning. Although a fully-fledged definition of what "EU public order" and "EU public security" actually mean in this respect has not been provided yet, this work has tried to highlight their main characteristics within the policy fields where they have recently appeared. The analysis of specific EU documents and legislation, in force or yet to be adopted, has allowed to single out several areas of interest, namely the control of inbound (and, likely in the future, outbound) FDIs into (or from) the Union, FIMI threats originating from third actors outside the EU and the security of energy supply into the Union.

On the basis of both concepts - "EU strategic autonomy" and "EU public order and security" - as well as related practice, the thesis has argued that, from a theoretical point of view, the elaboration of a deepened EU security within these selected domains seems to be

currently underway. The adoption of a new concept - "EU strategic security" - represents the main conceptual contribution of this work, which has tried to include under one umbrella the multiple developments that have been analysed. In the understanding that has been proposed, this new notion *de facto* complements Member States' national security, which is *de jure* recognised by the Treaties, and raises specific questions concerning the European project and EU sovereignty as a whole. As has been clarified, this does not hinder the importance of national security within the EU; on the contrary, it implies that the impact of specific transnational challenges could be on the EU *as a whole* and that, by means of *subsidiarity*, the intervention of the EU is required in this respect, also to avoid the circumvention of national measures adopted in the interest of national security or public security, as recalled in the case of FIMI.

From a research-oriented point of view, the themes that have been raised in the context of this work as well as the framework of analysis herein employed can potentially be of interest in other academic contexts and suggest possible avenues for future research. For instance, from a political science point of view, it could be interesting to analyse whether, and if so to what extent, the theory of Europeanisation - both in its "top-down" and "bottom-up" formulations[294] - can help to explain the interplay between Member States' national security and what this work has called "EU strategic security" within the policy areas that have been addressed.

However, it remains that these new developments undoubtedly represent a consequence of the launch of "geopolitical Commission" that President von der Leyen announced in 2019,[295] whose main premises were actually laid down before, in particular during the Juncker Commission.[296] Nevertheless, it is still to be seen whether this approach will hold following the next European elections scheduled for 2024, which will result in the appointment of a new European Commission and in the start of the next institutional cycle. Moreover, the EU enlargement, which has recently gained renewed attention also following the war in Ukraine,[297] will add further elements of complexity to this framework

[294] From a comprehensive point of view, see BÖRZEL and PANKE (2022).
[295] EUROPEAN COMMISSION (2019a).
[296] Among others, the issuance of the EU Global Strategy (EUGS) in 2016 and the launch of the *Preparatory Action on Defence Research* (PADR) programme and of the *European Defence Industrial Development Programme* (EDIDP) - the two precursor schemes of the *European Defence Fund* (EDF) - represent significant examples in this regard.
[297] For instance, this theme has prominently featured in the recent speech of President of the European Council Charles Michel at the Bled Strategic Forum and in the 2023 State of the Union

since it will require significant work in terms of defining a common European interest and a "EU strategic security", especially when Member States' positions on key strategic decisions diverge. Yet the genuine composition of national and European interest remains a fundamental objective to be achieved in order for the Union and its Member States to keep deliver for their citizens in uncharted waters.

(SOTEU) of President of the European Commission Ursula von der Leyen. See in this regard MICHEL (2023) and VON DER LEYEN (2023). Moreover, the recent report of the Franco-German Working Group on EU Institutional Reform, issued on September 2023, identifies specific reforms to be adopted in order to make the EU ready for future enlargements. See COSTA *et al*. (2023).

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