Supranational Security and National Security in Light of the EU Strategic Autonomy Doctrine: The EU-Member States Security Nexus Revisited

Federico CASOLARI*

Even though security issues are structural elements of the EU legal order since a while, it is undisputed that the reorientation of the EU's approach towards a more assertive stance in defending its values and interests has determined a relevant reshaping of the way in which the Union and its Member States interact in security matters – the EU-Member States security nexus.

The present paper aims to identify both the reasons and the legal implications of this phenomenon, moving from a reconstruction of the doctrine elaborated by EU institutions to support this new approach, that is, the Strategic Autonomy Doctrine (SAD). Building on the assumption that the Union is now facing evolving threats, requiring a stronger capacity to protect the supranational interests and values, the paper argues that the reshaping of the EU-Member States security nexus has led to the creation of a buffer zone, where EU's and Member States' prerogatives for the protection of both (supra)national security and sovereignty are significantly blurred. This, in turn, produces significant consequencces for the EU constitutional framework, namely a hybridization of both the supranational competences and legal instruments concerned.

Keywords: supranational security, national security, strategic autonomy doctrine, principle of conferral, principle of sincere cooperation, EU constitutional framework, common commercial policy, investments screening, economic coercion

1 THE EMERSION OF A EU-MEMBER STATES SECURITY NEXUS

As is well-known, EU primary law preserves the exclusive competence of Member States for *national security* matters. Pursuant to Article 4(2), TEU, 'national security remains the sole responsibility of each Member State'.[1] Also significantly, Article 346 TFEU enshrines a without prejudice clause (or a 'national defence privilege', as stressed by some commentators[2]), allowing Member States to invoke the

* Prof. Dr Federico Casolari is Full Prof. of EU Law, *Alma Mater Studiorum* – University of Bologna. Email: federico.casolari@unibo.it.

1 *See* M. Klamert, *Article 4 TEU*, in *The EU Treaties and the Charter of Fundamental Rights: A Commentary* 35–60, at 45 (M. Kellerbauer, M. Klamert & J. Tomkin eds, Oxford University Press 2019).

2 M. Kellerbaruer, *Article 346 TFEU*, in Kellerbauer, Klamert & Tomkin eds, *supra* n. 1, at 2050–2053.

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protection of their essential interests and security in order to set aside EU obligations imposing information disclosure or concerning the production of (or trade in) arms, munitions and war materials. Viewed from this perspective the European Union should therefore be devoid of any power affecting Member States' prerogatives as far as national security is concerned. A similar conclusion could be drawn as far as Member States' powers exercised to safeguard *internal security* are concerned. In fact, while the EU Treaties allow the Union to elaborate cooperation schemes to promote and strengthen internal security,[3] its safeguarding solely rests with the Member States,[4] thus preventing the Court of Justice to exercise its jurisdiction to assess the validity or proportionality of operations carried out by Member States to protect their internal security.[5] A different reasoning can be made with regard to *public security* issues. It is true that the EU Treaties[6] (as well as EU secondary law[7]) contain several 'public security clauses', which are heavily invoked by Member States to preserve specific prerogatives, thereby limiting the effectiveness of EU law provisions concerned. However, the case-law of the European Court of Justice has contributed to made it clear that such clauses cannot be conceived as general reservations to EU law. On the contrary, the Court has showed a growing attitude in shaping the limits Member States shall encounter in invoking the notion of 'public security' to restrict the effectiveness of EU law. In particular, the proportionality principle has gained a pivotal role in guiding national authorities and courts.[8]

On closer inspection, however, the legal framework mentioned above becomes less clear. This is due, on the one hand, to the growing marginalization of the distinction between the concepts of 'national security', 'internal security' and 'public security', which is visible in the activity of the EU institutions. For instance, in a 2015 Communication on the implementation of the so-called 'EU citizenship Directive', the European Commission stated that '[p]ublic security is generally interpreted to cover both internal and external security along the lines of preserving the integrity of the territory of a Member State and its institutions'.[9]

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3 Article 71 TFEU.
4 Article 72 TFEU.
5 Article 276 TFEU.
6 Articles 36, 45(3), 52, 65(1)(c), 202 TFEU.
7 For instance: *Directive 2004/38/EC of the European Parliament and of the Council on the Right of Citizens of the Union and Their Family Members to Move and Reside Freely within the Territory of the Members States* (29 Apr. 2004).
8 Compare S. Peers, *National Security and European Law*, 16 YB. Eur. L. (1996), doi: 10.1093/yel/16.1.363; P. Koutrakos, *Public Security Exceptions and EU Free Movement Law*, in *Exceptions from EU Free Movement Law: Derogation, Justification, and Proportionality* 190–217 (P. Koutrakos, N. Nic Shuibhne & P. Syrpis eds, Hart Publishing 2016).
9 *Communication on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of Member States*, COM(2009) 313 final, at 10 (2 Jul. 2009).

Not only this EU institution seems to suggest that the distinction between public security and internal security may be overcome (the latter being included in the former), but it also leads to a blurring of the difference between public security and national security. In fact, by affirming that public security may imply activities related to essential interests of Member States, such as the protection of their territorial integrity, the EU Commission applies to the concept of 'public security' the same definition the Court of Justice has elaborated for the activities aiming at safeguarding national security, that is, the protection of 'essential State functions and [of] the fundamental interests of the society'.[10]

On the other hand, the CJEU itself has been instrumental in making Member States' prerogatives concerning security issues less and less autonomous. Such a result has mainly been achieved by applying the so called 'framing of powers theory' to the domain at stake.[11] Pursuant to that theory, which is heavily built upon the (abstention) loyalty duties flowing from Article 4(3) TEU,[12] Member States are entitled to exercise their sovereign prerogatives 'having due regard to [… EU] law',[13] meaning that the exercise of their retained powers – including those implying the safeguarding of state security – cannot jeopardize their membership to the Union.

The CJEU's approach was already visible in *Commission v. France*, decided by the Court in 1997.[14] In this case, the Court was asked to assess whether or not France violated the free movement of goods protected under EU primary law by failing to take all appropriate measures to prevent the free movement of agricultural products originating in other Member States (namely, strawberries from Spain and tomatoes from Belgium) from being obstructed by criminal acts of groupings of French farmers. While recognizing that Member States unquestionably retain exclusive powers in preserving their internal security, enjoying thus a margin of discretion in determining what measures may be adopted to eliminate possible

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[10] *See* CJEU, Case C-204/21, *Commission v. Poland*, ECLI:EU:C:2023:442, para. 318. As rightly stressed in the literature, the CJEU's case-law is not completely immune from some terminological and conceptual confusion as far as the notion of 'security' is concerned: *see* D. Kostakopoulou & N. Ferreira, *Testing Liberal Norms: The Public Policy and Public Security Derogations and the Cracks in European Union Citizenship*, 20 Columbia J. Eur. L. (2014), doi: 10.2139/ssrn.2271722.

[11] The expression 'framing of powers theory' was firstly introduced by Advocate General Pikamäe in his opinion to Case C-457/18, *Slovenia v. Croatia*, ECLI:EU:C:2019:1067, para. 138. For further discussion, *see* F. Casolari, *Inter se Agreements between Member States, and the Outer Limits of the Court's Jurisdiction in Infringement Proceedings: Slovenia v. Croatia*, in *EU External Relations Law: The Cases in Context* 981–990 (G. Butler & R. A. Wessel eds, Hart Publishing 2022).

[12] 'The Member States shall […] refrain from any measure which could jeopardize the attainment of the Union's objectives'.

[13] These are the words used by the Court of Justice in *Micheletti* to describe the Member States' prerogatives in the citizenship domain in light of their participation to the EU legal order: CJEU, Case C-369/90, *Micheletti*, ECLI:EU:C:1992:295, para. 10.

[14] CJEU, Case C-265/95, *Commission v. France*, ECLI:EU:C:1997:595.

barriers to the importation of products,[15] the Court has also affirmed its power, 'taking due account of the discretion referred to above, to verify […] whether the Member State concerned has adopted appropriate measures for ensuring the free movement of goods'.[16]

More recently, the CJEU's approach has become even more visible. For instance: in *La Quadrature du Net and Others*, concerning the lawfulness of Member States' legislation imposing an obligation on providers of electronic communications services to forwards users' traffic and location data to a public authority or to retain such data in a general or indiscriminate way, the Luxembourg judges have clarified that:

> although it is for the Member States to define their essential security interests and to adopt appropriate measures to ensure their internal and external security, 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.[17]

Likewise, in an infringement procedure concerning the Member States' implementation of the EU relocation schemes adopted in 2015 to face the unprecedented number of migrants and refugees, the Court of Justice, in considering the argument made by Poland and Hungary in light of Article 4(2) TEU, that is, the possibility for Member States to rely on the Treaty provision to disapply the EU schemes, concluded that nothing in the Treaties indicates that protecting national security should imply a general reservation to the concerned pieces of EU legislation.[18]

The elements of practice mentioned above have progressively led to blurring the divide between the Union and Member States when security issues are concerned. Not surprisingly, such a phenomenon has been illustrated in the peer-reviewed literature in terms of 'intersection',[19] 'encroachment'[20] or 'struggle of competence[s]'.[21] Against this background, the present paper intends to explore

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15 *Ibid.*, para. 33.

16 *Ibid.*, para. 35.

17 CJEU, Joined Cases C-511/18, C-512/18 and C-520/18, *La Quadrature du Net and Others*, ECLI:EU:C:2020:791, para. 99. As it is well-known, this ruling follows other CJEU's judgments where the Court assessed Member States' prerogatives on traffic and location data retention: *see* inter alia, CJEU, Joined Cases C-293/12 & C-594/12, *Digital Rights Ireland and Others*, ECLI:EU:C:2014:238; Joined Cases C-203/15 & C-698/15, *Tele2 Sverige and Watson and Others*, ECLI:EU:C:2016:970.

18 CJEU, Joined Cases C-715/17, C-718/17 and C-719/17, *Commission v Poland, Hungary and Czech Republic*, ECLI:EU:C:2020:257, para. 170.

19 A. Alì, *The Intersection of EU and Its Member States' Security in Light of the Foreign Direct Investments Screening Regulation*, 75 La Comunità internazionale (2020).

20 Y. Miadzvetskaya & R. A. Wessel, *The Externalisation of EU's Cybersecurity Regime: The Cyber Diplomacy Toolbox*, 7 Eur. Papers 414 (2022), doi: 10.15166/2499-8249/570.

21 M. Zalnieriute, *A Struggle for Competence: National Security, Surveillance and the Scope of EU Law at the Court of Justice of European Union*, 85 Modern L. Rev. (2022), doi: 10.1111/1468-2230.12652.

how the recent developments related to the implementation of the Strategic Autonomy Doctrine (SAD) have contributed to reshape what will be called here the EU-Member States' security nexus.[22] As will be better illustrated in the following section,[23] today the SAD constitutes a veritable mantra in the supranational debate, expressing the idea that the Union shall be ready to play a more assertive geopolitical role to preserve its interests and values. Emerged in the sphere of the Common Foreign Security Policy (CFSP),[24] the SAD has modified its rationale, progressively shifting towards the affirmation of a (self-proclaimed) European sovereignty. Also importantly, the scope of application of the SAD has been significantly extended. In a 2021 strategic document, presenting a forward-looking and multidisciplinary perspective on relevant trends affecting the EU's capacity and freedom to act in the coming decades, the European Commission has identified ten priority areas where that doctrine should exercise its influence: the creation of a European Health Union; the digital transition; an affordable, reliable and clean energy transition; a secured and diversified supply of critical raw materials; the promotion of EU values while playing a global position in standard-setting; the establishment of resilient and sustainable economic and financial systems; the promotion of talents and skills; the strengthening of security and defence capacity and access to space; the promotion of peace, security and prosperity for all; the strengthening of the resilience of institutions.[25]

Far from representing a pure theoretical concept, or a fancy notion *en vogue* in the 'EU bubble', the SAD has demonstrated its capacity to influence the development of the EU legal order[26]: in particular, it has significantly contributed to reshaping the allocation of competences among the Union and the Member States in cases where the protection of core interests of the Union is at stake.[27] Needless to say, this is not irrelevant when the time comes to assess the actual state of the art of the EU-Member States security nexus. In fact, to borrow from the words of the Court of Justice, the protection of the 'essential [… Union's] functions and [of]

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22 The present author has already had the opportunity to analyse the intertwinement between the Union and its Member States in the security domain with specific regard to CBRN activities: *see* F. Casolari, *Regional Perspective: Distribution of Powers and Cooperation Patterns under EU Law as Applicable to CBRN Protection*, in *International Law and Chemical, Biological, Radio-Nuclear (CBRN) Events. Towards an All-Hazards Approach* 91–105 (A. de Guttry, M. Frulli, F. Casolari & L. Poli eds, Brill Nijhoff 2022).

23 *Infra*, s. 2.

24 N. Tocci, *European Strategic Autonomy. What It Is, Why We Need It, How to Achieve It*, Istituto Affari Internazionali (2021), https://www.iai.it/sites/default/files/9788893681780.pdf (accessed 9 Aug. 2023).

25 *European Commission Communication 2021 Strategic Foresight Report – The EU's Capacity and Freedom to Act*, COM(2021) 750 final, at 21 (8 Sep. 2021).

26 F. Hoffmeister, *Strategic Autonomy in the European Union's External Relations Law*, 60 Com. Mkt. L. Rev. (2023), doi: 10.54648/COLA2023048.

27 Compare Editorial Comments, *Keeping Europeanisation at Bay? Strategic Autonomy as a Constitutional Problem*, 59 Com. Mkt. L. Rev. 319–321 (2022), doi: 10.54648/cola2022026, and *infra*, s. 3.

the fundamental interests of the [European] society'[28] – protection which is strongly urged by the SAD – inevitably implies the recognition of the existence of a 'supranational security' to be preserved by the EU institutions. Therefore, the question arises as to how such supranational security may interact with Member States' security.

With this in mind, the present contribution has been organized as follows. Section 2 briefly describes the evolution of the SAD; in particular, the growing emphasis on the need of an assertive (and sovereign) position of the Union on the international scene emerging from the relevant practice is stressed, so as to better understand the legal implications the doctrine may determine for the EU-Member States security nexus. Those implications are analysed in depth in Section 3. In particular, express reference is made here to some pieces of legislation proposed to/adopted by the EU legislature in trade domain. Indeed, such a domain appears to be one of the policy fields where the emergence of a supranational security is more evident. This is not only due to the more assertive approach towards trade inaugurated by the Union in 2021 with the review of its trade strategy.[29] As recently stressed by the European Commission and the High Representative for foreign affairs and security policy in the *European Economic Security Strategy*,[30] the existing geopolitical tensions have also revealed the need to face unprecedented risks to EU security determined by economic flows and activities.[31] Section 4 provides a conclusion.

2 THE PARADIGM SHIFT OF THE STRATEGIC AUTONOMY DOCTRINE …

As already said, the SAD was originally introduced in strategic documents of the EU institutions in the context of the CFSP. In 2013, after having organized its first ever debate on defence in the wave of conflicts in Libya and Syria, the European Council concluded that:

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[28] Kostakopoulou & Ferreira, *supra* n. 10.

[29] *Commission Communication Trade Policy Review – An Open, Sustainable and Assertive Trade Policy*, doc. COM(2021) 66 final (18 Feb. 2021). *See also* T. Verellen & A. Hofer, *The Unilateral Turn in EU Trade and Investment Policy*, 28 (Special Issue) Eur. For. Affairs Rev. (2023), doi: 10.54648/EERR2023011.

[30] *European Commission and High Representative of the Union for Foreign Affairs and Security Policy Joint Communication, European Economic Security Strategy*, doc. JOIN(2023) 20 final (20 Jun. 2023).

[31] Interestingly enough, a similar trend is also visible at international level: A. Nguyen, *The G7's Fear of Economic Coercion through Weaponised Interdependence – Geopolitical Competition Cloaked in International Law?, EJIL: Talk!* (22 Jun. 2023), https://www.ejiltalk.org/the-g7s-fear-of-economic-coercion-through-weaponised-interdependence-geopolitical-competition-cloaked-in-international-law (accessed 9 Aug. 2023).

> Europe needs a more integrated, sustainable, innovative and competitive defence technological and industrial base […] to develop and sustain defence capabilities. This can also enhance its *strategic autonomy* and its ability to act within partners.[32]

The role the SAD can play in enforcing peace and security in a multilateral context is also mentioned in the Global Strategy for the European Union's Foreign and Security Policy adopted in 2016. Here such a doctrine is considered 'necessary to promote the common interests of [… EU] citizens, as well as [… the EU] principles and values'.[33] Quite significantly, in the foreword to the Strategy, the former High Representative of the Union for Foreign Affairs and Security Policy and Vice-president of the European Commission, Federica Mogherini, also recognized that such priorities 'are best served in an international system based on rules and on multilateralism'.[34]

The emphasis on the multilateral approach towards the EU's autonomy is also present in the strategic documents elaborated by EU institutions after the outbreak of COVID-19. While paving the way to the most effective tool adopted at supranational level to face the economic crisis caused by COVID-19, that is, Next Generation EU, the European Commission recognizes that the strengthening of the EU strategic autonomy should be realized supporting the EU's 'partners around the world and lead[ing] a renewed and reinvigorated form of multilateralism the world needs'.[35] The same approach was confirmed in October 2020 by the European Council, stressing that '[a]chieving strategic autonomy while preserving an open economy is a key objective of the Union'.[36]

Viewed from this perspective, the fact that the doctrine at stake was renamed 'open strategic autonomy' does not come as a surprise. As maintained by the European Commission in its 2021 Communication on the EU's economic and financial system:

> [the] need for the EU […] to build and maintain its 'open strategic autonomy' […] goes hand in hand with the EU's commitment to a more resilient and open global economy, well-functioning international financial markets, and the rules-based multilateral system.[37]

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[32] *European Council Conclusions*, doc. EUCO 217/13 (19–20 Oct. 2013), para. 16; emphasis added. For a general discussion on the legal implications of the SAD, *see* the contributions to the 2022 Special Issue of the *European Foreign Affairs Review*.

[33] *Shared Vision, Common Action: A Stronger Europe. A Global Strategy for the European Union's Foreign and Security Policy* 7, https://www.eeas.europa.eu/sites/default/files/eugs_review_web_0.pdf (accessed 9 Aug. 2023).

[34] *Ibid*.

[35] *European Commission Communication Europe's moment: Repair and Prepare for the Next Generation*, doc. COM(2020) 456 final, at 2 (27 May 2020).

[36] *European Council Conclusions*, doc. EUCO 13/20 (1–2 Oct. 2020), para. 3.

[37] *European Commission Communication The European Economic and Financial System: Fostering openness, strength and resilience*, doc. COM(2021) 32 final, at 1 (19 Jan. 2021). *See also* N. Helwig & V. Sinkkonen, *Strategic Autonomy and the EU as a Global Actor: The Evolution, Debate and Theory of a Contested Term*, 27 (Special Issue) Eur. For. Affairs Rev. 4 (2022), doi: 10.54648/eerr2022009.

The openness to rules-based cooperation – coupled with the EU's ability to make its own choices – was then mentioned in the EU Trade strategy as a crucial factor upon which strategic autonomy should be based.[38] Likewise, on 23 February 2022, just a few hours before the Russian aggression against Ukraine, the Commission adopted a Communication on decent work where the role of the Union as a responsible global player, supporting the universal values of human rights in line with the concept of open strategic autonomy was stressed.[39]

The Russian aggression of Ukraine has led the Union and other global players to significantly reconsider their position in the international environment. Interestingly enough, such a reconsideration has caused at EU level a major shift in the implementation of the SAD, with a specific emphasis on the importance of a more assertive position of the Union on the international scene. Such a change is clearly illustrated in the *Strategic Compass for Security and Defence*, adopted by the Council of the European Union in March 2022, where it is maintained that:

> the EU urgently needs to take more responsibility for its own security by acting in its neighbourhood and beyond, *with partners whenever possible and alone when necessary*.[40]

Even more importantly, in the *2022 Versailles Declaration*, adopted by the Heads of Stated or Government of the Member States two weeks after Russia's military aggression, the EU States' leaders solemnly:

> decided to take more responsibility for […] security and take further decisive steps towards building [… the] *European sovereignty*, reducing […] dependencies and designing a new growth and investment model for 2030.[41]

As it has been noted, the recurring use of the term 'sovereignty' instead of 'strategic autonomy' in the EU post-invasion jargon is not a case.[42] Such a change illustrates the decision to adopt a more assertive and defensive approach *vis-à-vis* global challenges. This shift has been confirmed by European Council President Charles Michel in a speech given at Sciences Po, Paris, on 28 March 2022. His words couldn't be clearer: '[t]his strategic autonomy, *the sovereignty of*

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38 *Commission Communication Trade Policy Review, supra* n. 29, at 4.

39 *European Commission Communication Decent work worldwide for a global just transition and a sustainable recovery*, doc. COM(2022) 66 final, at 2 (23 Feb. 2022). For a general survey on the role played by the Union as a 'good global actor', *see Understanding the EU as a Good Global Actor. Ambitions, Values and Metrics* (E. Fahey & I. Mancini eds, Edward Elgar Publishing 2022).

40 *A Strategic Compass for Security and Defence. For a European Union that protects its citizens, values and interests and contributes to international peace and security*, at 23, https://www.eeas.europa.eu/sites/default/files/documents/strategic_compass_en3_web.pdf (accessed 9 Aug. 2023), emphasis added.

41 Compare *Informal meeting of the Heads of State or Government, Versailles Declaration* (10–11 Mar. 2022), https://www.consilium.europa.eu/media/54773/20220311-versailles-declaration-en.pdf (accessed 9 Aug. 2023); emphasis added.

42 Hoffmeister, *supra* n. 26, at 670.

Europe […] is, I believe, the challenge of our generation and of your generation'.[43]

It is true that, as rightly emphasized in the literature,[44] the notion of 'European sovereignty' was already present in the EU vocabulary since 2017, when the French President Macron, in a speech given at the Sorbonne University, stressed the need to build a 'sovereign Europe'.[45] Moreover, in the 2018 State of the Union speech, the former President of the European Commission, Jean-Claude Juncker, explained that:

> the time for European sovereignty has come. It is time Europe took its destiny into its own hands. It is time Europe developed what I coined 'Weltpolitikfähigkeit' – the capacity to play a role, as a Union, in shaping global affairs.[46]

Since then, the concept of 'European sovereignty' started permeating the EU discourse.[47] There is no doubt, however, that the events of 2022 have determined a major step change. Not only references to the notion of EU's sovereignty have started systematically spreading in the EU documents and legislation,[48] but its

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[43] Compare *Speech by President Charles Michel on the main challenges facing Europe, at Sciences Po, Paris*, https://www.consilium.europa.eu/en/press/press-releases/2022/03/28/intervention-du-president-charles-michel-lors-de-la-conference-sur-les-grands-enjeux-europeens-a-sciences-po-paris (accessed 9 Aug. 2023); emphasis added.

[44] s. Barbou des Places, *Taking the Language of 'European sovereignty' Seriously*, 5 Eur. Papers (2020), doi: 10.15166/2499-8249/392.

[45] *Presidency of the French Republic, Initiative pour l'Europe – Speech of Emmanuel Macron pour une Europe souveraine, un*ie, *démocratique* (26 Sep. 2017), https://www.elysee.fr/emmanuel-macron/2017/09/26/initiative-pour-l-europe-discours-d-emmanuel-macron-pour-une-europe-souveraine-unie-democratique (accessed 9 Aug. 2023).

[46] *State of the Union 2018. The Hour of European Sovereignty* (12 Sep. 2018), https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_18_5808 (accessed 9 Aug. 2023).

[47] For instance, references to the EU sovereignty are present in strategic documents related to the approach to be taken by the European Union towards the technological and digital transitions. Compare *European Commission Communication Secure 5G deployment in the EU – Implementing the EU toolbox*, doc. COM(2020) 50 final (29 Jan. 2020), and T. Madiega, *Digital sovereignty for Europe, European Parliamentary Research Service Ideas Paper Towards a more resilient EU* (Jul. 2020), https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/651992/EPRS_BRI(2020)651992_EN.pdf (accessed 9 Aug. 2023). For further discussion, *see* T. Verellen, *European Sovereignty Now? A Reflection on What It Means to Speak of 'European Sovereignty'*, 5 Eur. Papers (2020), doi: 10.15166/2499-8249/383; H. Roberts, J. Cowls, F. Casolari, J. Morley, M. Taddeo & L. Floridi, *Safeguarding European Values with Digital Sovereignty. An Analysis of Statements and Policies*, 10 Internet Policy Rev. (2022), doi: 10.14763/2021.3.1575; S. Poli & E. Fahey, *The Strengthening of the European Technological Sovereignty and Its Legal Bases in the Treaties*, 9 Eurojus.it (2022); S. Yakovleva, *On Digital Sovereignty, New European Data Rules, and the Future of Free Data Flows*, 49 Legal Issues Eco. Integ. (2023), doi: 10.54648/LEIE2022016.

[48] *See* inter alia, *European Commission Digital Strategy. Next Generation Digital Commission*, doc. C(2022) 4388 final (30 Jun. 2022); *European Commission and High Representative of the Union for Foreign Affairs and Security Policy Joint Communication EU Policy on Cyber Defence*, doc. JOIN(2022) 49 final (10 Nov. 2022); *European Commission and High Representative of the Union for Foreign Affairs and Security Policy Joint Communication, European Union Space Strategy for Security and Defence*, doc. JOIN(2023) 9 final (10 Mar. 2023); *European Commission Communication The Single Market at 30*, doc. COM(2023) 162 final (16 Mar. 2023); *European Commission Proposal for a Regulation on establishing the Act in Support of Ammunition*

meaning has been significantly elaborated building upon the notion of strategic autonomy. By so doing, a new unitary approach towards the political autonomy – meaning, the security – of the Union *vis-à-vis* evolving threats has emerged.[49] Needless to say, such a change is not without consequences when it comes to the EU legal order. As rightly noted:

> [t]he Union's geopolitical turn goes hand in hand with a stronger emphasis on unilateral action on the international stage, creating risks of a conflict with international law on a broader scale than before.[50]

Also importantly, the emphasis on the protection of EU's interests could trigger tensions with the way in which Member States' legal orders preserve national interests.[51] Some of these tensions are already visible in recent decisions adopted by supreme/constitutional courts of EU countries, invoking both the *ultra vires* review and the counterlimits doctrine against EU law, and the risk of a further escalation is therefore real.[52] It is thus time to consider how the SAD – and its recent developments – have (re)shaped the legal framework surrounding the EU-Member States security nexus.

3 … AND ITS IMPACT ON THE EU-MEMBER STATES SECURITY NEXUS

As far as the EU constitutional framework is concerned,[53] three major points are noteworthy. The first is that the reorientation of the SAD described above has

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Production, doc. COM(2023) 237 final (3 May 2023); *European Commission and High Representative of the Union for Foreign Affairs and Security Policy Joint Communication, European Economic Security Strategy, supra* n. 30.

49 Particularly illustrative of such a trend is the position adopted by the European Council on Foreign Relations (ECFR) that has recently launched the idea of the EU 'strategic sovereignty'. According to the ECFR, such an idea should permeate the EU's action in five different domains: security, health, economy, digital, and climate. Compare European Council on Foreign Relations, *European Sovereignty*, https://ecfr.eu/europeanpower/european_sovereignty/ (accessed 9 Aug. 2023).

50 Editorial Comments, *supra* n. 27, at 322.

51 *Between Compliance and Particularism. Member State Interests and European Union Law* (M. Varju ed., Springer 2019).

52 L. Armati, *Acts of Rebellion, or the Enemy Within? A Consideration of the Combative Ruling of the Supreme Court of Denmark and the Imperative of Genuine Judicial Dialogue*, in *An Ever-Changing Union? Perspectives on the Future of EU Law in Honour of Allan Rosas* 145–162 (K. Lenaerts, J.-C. Bonichot, H. Kanninen, C. Naômé & P. Pohjankoski eds, Hart Publishing 2019); S. Poli, *The German Federal Court and Its First* Ultra Vires *Review: A Critique and a Preliminary Assessment of Its Consequences*, 7 Eurojus.it (2020); A. Bobić, *The Jurisprudence of Constitutional Conflict in the European Union* (Oxford University Press 2022); F. Casolari, *Equality of States and Mutual Membership in European Union: Contemporary Reflections*, in *More Equal than Others? Perspectives on the Principle of Equality from International and EU Law* 39–51 (D. Amoroso, L. Marotti, P. Rossi A. Spagnolo & G. Zarra eds, T.M.C. Asser Press, The Hague 2022).

53 As clarified by the Court of Justice, such expression refers to the circumstance that 'EU law is characterized by the fact that it stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States, and by the direct effect of a whole series of provisions which are

realized a reshaping of the allocation of competences between the EU and its Member States. In particular, the affirmation of a more assertive capacity of the Union seems to determine (a) a weakening of Member States' security prerogatives, and (b) a strengthening of EU competences in the domain at stake. A crystal-clear affirmation of such evolution may be found in a passage of the *2022 Strategic Compass for Security and Defence* where it is maintained that:

> European security is indivisible and any challenge to the European security order affects the security of the EU and its Member States.[54]

No doubt, the imperative of the indivisibility of the European security mentioned in the *Strategic Compass* refers first to the need to protect the Union and its Member States from *external* threats and interferences undermining the integrity of the European process. At a closer inspection, however, such indivisibility is also referring to the need of blurring the *internal* division of competences between the Union and its Member States when the time comes to preserve the European security. The EU-Member States security nexus envisaged in the *Strategic Compass* is not stable, though. Put it in other words, the centre of gravity of the action carried out by EU's and Member States' actors to face relevant threats may vary according to both the nature and the features of the threats at stake.[55]

Due to space constraints, it is not possible to enter here in an in-depth analysis of the different ways in which the EU's and Member States' competences may be combined for maintaining European security. This said, two major trends can be easily discerned in the EU's action. In particular, it is possible to identify a minimalist approach, where the EU's action is ancillary to the Member States' prerogatives, and a maximalist attitude, the latter being characterized by the prevailing role exercised by the Union. As anticipated, reference will be made in the followings to some selected developments occurred in the trade policy, which seems to be particularly representative of the two trends just mentioned.[56]

A clear example of the minimalistic attitude showed by the EU legislature to reshape the EU-Member States security nexus is represented by the *Foreign Direct*

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applicable to their nationals and to the Member States themselves. Those characteristics have given rise to a structured network of principles, rules and mutually interdependent legal relations binding the EU and its Member States reciprocally and binding its Member States to each other': CJEU, Case C-284/16, *Achmea*, ECLI:EU:C:2018:158, para. 33.

54 *A Strategic Compass for Security and Defence, supra* n. 40, at 5.

55 Compare also *European Commission and High Representative of the Union for Foreign Affairs and Security Policy Joint Communication, European Economic Security Strategy, supra* n. 30, at 5.

56 *See also* L. Mola, *The Securitisation of International Economic Law and 'Global Security': An Analysis of the EU Law Approach Through the Prism of the Common Commercial Policy*, 12 Cambridge Int'l L.J. (2023), doi: 10.4337/cilj.2023.01.07.

Investment (FDI) Screening Regulation.[57] Based on Article 207(2) TFEU, the Regulation creates a (light) common cooperation framework between the Union and its Member States for the screening of foreign direct investments. Significantly, the framework can only be used for the purpose of protecting the security and public order at both national and supranational level. In particular, as for the Union, only 'foreign direct investments likely to affect projects and programmes of Union interest on grounds of security or public order' may be subject to restrictions. While resulting from the exercise of a supranational exclusive competence (namely, the EU Common Commercial Policy, CCP), the EU instrument states that the framework it introduces shall be implemented:

> without prejudice to sole responsibility of Member States for safeguarding their national security, as provided for in Article 4(2) TEU. It is also without prejudice to the protection of their essential security interests in accordance with Article 346 TFEU.[58]

The recognition of the Member States' prerogatives is well reflected in the screening mechanism: the Regulation recognizes, indeed, the right of each Member State to take the final decision as to whether a particular foreign direct investment shall be screened. Having said, this, however, the Regulation also requires that:

> when a Member State receives comments from other Member States or an opinion from the Commission, it should give such comments or opinion due consideration through, where appropriate, measures available under its national law, or in its broader policy-making, in line with its duty of sincere cooperation laid down in Article 4(3) TEU.[59]

The Regulation introduces therefore specific Member States' loyalty duties (namely, information duties and obligations to state reasons) to preserve a cooperation platform even when national prerogatives enter into the picture.

A particularly illustrative example of the maximalist attitude the EU may show to protect its security and vital interests is represented by the proposal of an *Anti-Coercion Instrument* (ACI), meaning a deterrent instrument against the use of

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[57] *Regulation (EU) 2019/452 of the European Parliament and of the Council Establishing a Framework for the Screening of Foreign Direct Investments into the Union* (19 Mar. 2019). More indications on the possible justification for restrictions to foreign direct investments are present in a Guidance adopted by the European Commission in the light of the COVID-19: cf. *Guidance to the Member States Concerning Foreign Direct Investments and Free Movement of Capital from Third Countries, and the Protection of Europe's Strategic Assets, ahead of the Application of Regulation (EU) 2019/452 (FDI Screening Regulation)*, 2020/C 99 I/01. On the Regulation, *see* S. Schill, *The European Union's Foreign Direct Investment Screening Paradox: Tightening Inward Investment Control to Further External Investment Liberalization*, 46 Legal Issues Eco. Integ. (2019), doi: 10.54648/leie2019007; *EU Framework for Foreign Direct Investment Control* (J. H. J. Bourgeois ed., Wolters Kluwer 2020); J. Velten, *Screening Foreign Direct Investments in the EU. Political Rational, Legal Limitations, Legislative Options* (Springer 2022); M. Sattorova, *EU Investment Law at a Crossroads: Open Strategic Autonomy in Times of Heightened Security Concerns*, 60 Com. Mkt. L. Rev. (2023), doi: 10.54648/cola2023049.

[58] Regulation (EU) 2019/452, *supra* n. 57, Recital 7 and Art. 1(2).

[59] *Ibid.*, Recital 17.

economic coercion by third countries.[60] Even though the instrument is caught by the very same Treaty provisions upon which the *FDI Screening Regulation* is based (Article 207 TFEU), the EU's powers it envisages are significantly stronger. Pursuant to the ACI, indeed, in the event that the Commission considers that an economic coercion occurs,[61] it is for the Council to define a common response against the third country responsible of the contested actions. That response may also lead to the adoption of countermeasures. Significantly, the compromise text of the ACI elaborated by the European Parliament and by the Council clarifies that the Council's power 'is limited to and addresses the circumstances arising from the economic coercion and is not to be considered as a precedent'.[62] Also importantly, the text clarifies that the ACI's machinery is in line with 'the Union principles of solidarity between Member States and of sincere cooperation'.[63] The role loyalty duties may play in the context of the EU-Member States security nexus is thus confirmed.

Not only the shifting towards a more assertive attitude of the Union requires a permanent balancing among EU's and Member States' prerogatives: it also redefines the understanding and scope of well-established EU competences. This is the second point to be stressed. To borrow from Takis Tridimas' words, it is undisputed that 'the existentialist conception of EU competences'[64] – that is, their reshaping with the aim to protect the European integration process from major threats – has significantly influenced the way in which the CCP legal basis (Article 207 TFEU) has been used by the EU legislature to face today's multiple challenges.[65] In particular, it appears clear that the intention is to progressively

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60 The European Parliament and the Council have reached a final political agreement on the Anti-Coercion Instrument on 6 Jun. 2023: *see Political agreement on new Anti-Coercion Instrument to better defend EU interests on global stage*, IP/23/3046 (6 Jun. 2023), https://ec.europa.eu/commission/presscorner/detail/en/IP_23_3046 (accessed 9 Aug. 2023). For the compromise text, *see Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union and its Member States from economic coercion by third countries (2021/0406 (COD)) – First reading agreement*, SGS 23/002613 and SGD 23/002614 (14 Jun. 2023). On the ACI, *see* P. Tüttő, *An Eye For An Eye? The European Commission's Proposal for an Anti-Coercion Instrument and What It Means for Member States*, 10 ELTE L.J. (2022), doi: 10.54148/ELTELJ.2022.2.103; C.-H. Wu, *The EU's Proposed Anti-coercion Instrument: Legality and Effectiveness*, 57 J. World Trade (2023).

61 According to the ACI an economic coercion may consist of an interference 'in the legitimate sovereign choices of the Union or a Member State by seeking to prevent or obtain the cessation, modification or adoption of a particular act by the Union or a Member State' and 'by applying or threatening to apply measures affecting trade or investment'.

62 *Proposal for a Regulation, supra* n. 60, Recital 13a.

63 *Ibid.*, Recital 13b.

64 D. Sardo, *European Rights and European Wrongs: Some Short Notes from Professor Takis Tridimas' Inaugural Lecture*, KSLR EU L. Blog (8 Apr. 2015), https://blogs.kcl.ac.uk/kslreuropeanlawblog/?p=890 (accessed 9 Aug. 2023). *See also* L. Lonardo, *EU Law Against Hybrid Threats: A First Assessment*, 6 European Papers 1095 (2021), doi: 10.15166/2499-8249/514.

65 For similar remarks with regard to the use made by EU institutions of the Internal Market General Clause (Art. 114 TFEU), *see* Miadzvetskaya & Wessel, *supra* n. 20, at 418.

stretch the outer limits of such EU's competence in order to elaborate a more effective reaction to possible threats to supranational security.

Such a reshaping of EU competences determines a further consequence for the EU constitutional framework – the third point that must be stressed in this paper: it is able to produce a change in both the nature and the effectiveness of the legal tools adopted by the Union to face security threats. The *FDI Screening Regulation* is a vivid illustration of this further trend. As stressed by AG Ćapeta in the first case brought before the Court of Justice concerning the (possible) implementation of the Regulation, that piece of legislation may be described 'as a kind of a platypus, a strange creature when compared to the "ordinary" type of regulations envisaged by Article 288 TFEU'.[66] The oddity of the Regulation is given by the fact that, despite the use of an exclusive competence of the Union, it does not create an harmonized cooperation platform on investments' screening: it rather authorizes Member States to introduce national screening mechanisms and establishes some general rules that must be respected in elaborating such mechanisms. According to AG Ćapeta, the main reason behind this machinery is related to the circumstance that Article 207 TFEU has been used in order to adopt a tool:

> bridging the gap between the shared competence of regulating (foreign) direct investment from the internal market angle and that of establishing a uniform approach to the screening of "foreign direct investments" in the exercise of the European Union's exclusive competence in the field of common commercial policy.[67]

A similar reasoning may be made for the ACI. Particularly interesting, in this respect, is a (rather unusual) Joint Statement of the European Parliament, the Council and the Commission annexed to the text of the proposed Regulation, providing that the Regulation itself 'has no precedent' and 'shall not be considered as a precedent for other [EU] acts'.[68] This Statement has to be read with Recital 13a, stating that the powers conferred upon the Council by the ACI for the determination of the existence of an economic coercion and of the possible response to be adopted cannot be considered as a precedent. Viewed in light of this 'No Precedent Clause', the ACI would thus concretize an exceptional manifestation of the CCP at disposal of the EU institutions to face unprecedented economic threats against the EU's and Member States' security.

Not only the new EU's assertiveness may produce changes (if not tensions) in the supranational constitutional framework; it may also lead to clashes with the international law obligations incumbent upon both the Union and its

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[66] CJEU, Case C-106/22, *Xella Magyarország Építőanyagipari Kft.*, ECLI:EU:C:2023:267, para. 32.
[67] *Ibid.*, para. 33.
[68] *Proposal for a Regulation, supra* n. 60, Annex II.

Member States. Here it suffices to mention (again) the proposed ACI. Even though the agreed text of the ACI repeatedly affirms the need to respect the principles of the UN Charter and international law – in line with the imperative enshrined in Article 21(1) TEU –,[69] it is difficult to ignore some weaknesses in the general presumption upon which the mechanism established by the EU institutions is based.[70] The argument behind the ACI may be resumed as follows: economic coercion carried out by third countries against the Union and its Member States represents *per se* a breach of customary international law. More to the point, economic coercion is inconsistent with the duty not to intervene in matters within the domestic jurisdiction of any State.[71] In the light of this, the Union is fully entitled to act within international law:

> to deter and counteract economic coercion by third countries in order to safeguard its rights and interests and those of its Member States.[72]

This straightforward explanation, however, does not consider the circumstance that the debate surrounding the legality of economic coercion under international law is far from reaching an end.[73] Significantly, some authors have concluded that current international law prevents from identifying a standalone right of states to be free from economic coercion.[74] Against this

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[69] *Ibid*., Recitals 1–4a, 6–7, 10, 10a, 10ter, 11–12, 13bis, 14–15, and Art. 1(2).

[70] Criticisms have also been raised with regard to the ACI's consistency with the WTO law: *see* Wu, *supra* n. 60, at 306–311.

[71] *Proposal for a Regulation, supra* n. 60, Recital 4a. For a general reflection on the economic coercion in international law, *see Economic Coercion and the New International Economic Order* (R. B. Lillich ed., The Michie Company Law Publishers 1976); T. J. Farer, *Political and Economic Coercion in Contemporary International Law*, 49 Am. J. Int'l. L. (1985), doi: 10.2307/2201710; R. D. Porotsky, *Economic Coercion and the General Assembly: A Post-Cold War Assessment of the Legality and Utility of the Thirty-Five-Year Old Embargo Against Cuba*, 28 Vanderbilt J. Transnational L. (1995); B. E. Carter, *Economic Coercion*, in *Max Planck Encyclopedia of Public International Law* (Sep. 2009); M. Happold, *Economic Sanctions and International Law: An Introduction*, in *Sanctions and International Law* 1–16 (P. Eden & M. Happold eds, Hart Publishing 2016).

[72] *Proposal for a Regulation, supra* n. 60, Recital 6.

[73] Compare Carter, *supra* n. 71, arguing that the existence of customary rules concerning economic coercion is far from being undisputed. *See also* M. Jamneajad & M. Wood, *The Principle of Non-intervention*, 22 Leiden J. Int'l. L. 370 (2009), doi: 10.1017/S0922156509005858. The Authors make reference to a passage of the *Nicaragua* case where the International Court of Justice (ICJ) said that economic measures adopted by the US against Nicaragua (namely, the cessation of economic aid, the reduction in sugar quota imports, and the trade embargo) could not be considered as a breach of the customary-law principle of non-intervention: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)*, Merits, Judgment of 27 Jun. 1986, [1986] *ICJ Rep*. 14, paras 244–245. N. Aloupi, *The Right to Non-intervention and Non-interferences*, 4 Cambridge J. Intl. & Comp. L. 577 (2015), doi: 10.7574/cjicl.04.03.566, maintains that 'there is still great uncertainty regarding the element of coercion and its definition as regards illegal interference'. N. Ronzitti, *Sanctions as Instruments of Coercive Diplomacy: An International Law Perspective*, in *Coercive Diplomacy, Sanctions and International Law* 1–32, at 2–3 (N. Ronzitti ed., Brill Nijhoff 2016), emphasizes the controversial nature of economic coercion.

[74] A. Tzanakopoulos, *The Right to be Free from Economic Coercion*, 4 Cambridge J. Int'l & Comp. L. (2015), doi: 10.7574/cjicl.04.03.616.

background, it is not unlikely to foresee that the implementation of the ACI could lead to disputes among the Union, its Member States and third countries affected by supranational measures, further undermining the stability of the international (economic) order.

On a different note, such developments may emphasize what has been named the 'sandwich effect', meaning the scenario where Member States have to decide as to whether or not they will respect EU binding provisions that could be inconsistent with international obligations incumbent upon them.[75] As it is well-known, such a scenario was originally evoked with regard to the Member States' implementation of UN sanctions incompatible with the EU constitutional framework. In the judicial saga related to the notorious UN sanctions regime against Al Qaida, AG Poiares Maduro stressed the role that the principle of sincere cooperation should play to prevent a similar situation. In particular, he maintained that loyalty duties incumbent upon the Member States require that they exercise their powers and prerogatives 'to minimise the risk of conflicts between the [EU …] legal order and international law'.[76] Nothing prevents from applying the very same approach when the Union is exercising its powers to preserve its vital interests. Indeed, the mutual nature of the principle of sincere cooperation – mutual nature that is today codified in Article 4(3) TEU ('Pursuant to the principle of sincere cooperation, the Union and the Member States shall, *in full mutual respect*, assist each other in carrying out tasks which flow from the Treaties'[77]) – should lead the Union to prevent, as far as possible, the adoption of decisions that are likely to be inconsistent with the international law obligations of its Member States.

Lastly, tensions may derive at national level from the maximalist attitude showed by EU institutions in identifying the EU's prerogatives in the security domain. Member States' political and judicial institutions could indeed claim that such an approach is inconsistent with the allocation of competences codified in the EU's Treaties, invoking thus the *ultra vires* argument to block the implementation of the contested measures. Here again the principle of sincere cooperation should play a relevant role, urging all actors (including courts) in finding cooperative solutions to face the common threats.

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75 C. Eckes, *EU Counter-Terrorist Sanctions against Individuals: Problems and Perils*, 17(1) Eur. For. Affairs Rev. 130 (2012), doi: 10.54648/eerr2012006.

76 CJEU, Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat Foundation*, ECLI:EU:C:2008:11, para. 32. compare F. Casolari, *The Principle of Loyal Cooperation: A 'Master Key' for EU External Representation?*, in *The European Union and International Law* 91–125, at 115–116 (S. Besson, N. Levrat eds, Schulthess Éditions Romandes 2015).

77 Emphasis added.

4 CONCLUDING REMARKS

Even though security issues are structural elements of the EU legal order since a while,[78] it is undisputed that the reorientation of the EU approach towards a more assertive stance in defending its values and interests has determined a relevant reshaping of the EU-Member States security nexus.

The present paper has tried to identify both the reasons and the legal implications of this phenomenon, moving from a reconstruction of the doctrine elaborated by EU institutions to support this new approach, that is, the SAD. Building on the assumption that the Union is now facing evolving threats, requiring a stronger capacity to protect the supranational interests and values, the paper argues that the reshaping of the way in which the EU-Member States security nexus is conceived has led to the creation of a buffer zone, where EU's and Member States' prerogatives for the protection of both (supra)national security and sovereignty are significantly blurred. What is also noteworthy is that the hybridization of the cooperation between the Union and its Member States in security matters also implies a hybridization of both the supranational competences and the legal instruments concerned, determining thus a direct impact on the EU constitutional framework. Moreover, the emphasis put on the assertiveness – meaning, the autonomy – behind this new trend seems replicating the same issues resulting from the straightforward affirmation of the principle of autonomy of the EU legal order with respect both to international law and the law of Member States. In other words, there is also a concrete risk of multiplying the situations where EU law obligations may collide with international and national law obligations.

The paper has stressed the (potential) role that the principle of sincere cooperation could play in trying to solve some of the tensions resulting from the re-orientation of the EU-Member States security nexus. Time will tell if both the EU institutions and the Member States will be really able – and willing – to assist each other, 'in full mutual respect', in making the Union stronger and safer.

[78] The term 'security' is also present in the name of two major policy areas of the Union: the Common Foreign Security Policy and the Area of Freedom, Security and Justice.