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Legal Foundations of EU Economic Security: Shaping the Imaginable

ARTICLES

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ABSTRACT

As exemplified by the EU's Economic Security Strategy, security has emerged as a guiding objective across a growing number of legislative fields. Yet the instruments through which this agenda is pursued continue to rely on pre-existing Treaty competences. This raises the question of how these inherited legal bases shape, enable or constrain the EU's emerging economic security paradigm. This article examines that relationship by analysing the legislative initiatives adopted under the Economic Security Strategy's 'promote' and 'protect' pillars, focusing on their legal bases. It argues that the legal foundations used, particularly Articles 114, 173 and 207 of the Treaty of the Functioning of the EU (TFEU), while not predetermining policy action, subtly influence the scope and ambition of resulting policy outputs. Harmonisation measures based on Article 114 TFEU tend to be more comprehensive when their objective remains regulatory. Industrial policy instruments under Article 173 TFEU, by contrast, face more legal and political friction due to their relatively underdeveloped scope. Finally, trade-related measures under Article 207 TFEU may benefit from a robust and broad legal mandate. While these legal bases do not impose strict limits, they shape what is politically and legally conceivable, thus shaping EU economic security policy alongside the political process.

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1. INTRODUCTION

The earlier contributions in this special issue have taken a close look at different aspects of the European Economic Security Strategy.[1] Together, they show how economic security is shaping policies across various areas and, in turn, driving legal innovation in the EU. Although the individual developments are often issue-specific, collectively they indicate the emergence of a broader security paradigm within the EU. In this emerging paradigm, security connects different areas of EU law-making that used to address separate policy objectives. Driven by an increasingly complex geopolitical landscape, the Economic Security Strategy reflects the aim to develop a more coherent and integrated approach to these challenges.

This contribution takes a closer look at the broader impact of the EU's emerging security paradigm on the role of law within the EU. In this context, the economic security paradigm unsettles what were long held to be certainties of EU law, arising already from the semantic of the terminology. While economic integration long lay at the heart of European integration, security remained at the margins of it. This division is not least reflected by the different legal bases and governance structures that apply for the Common Foreign and Security Policy (CFSP) in the EU.[2] Article 4 of the Treaty of the EU (TEU) underscores this point with particular clarity: competences not conferred upon the Union remain with the Member States, and among these, core state functions – explicitly including national security – are affirmed as essential attributes of national sovereignty.

Such a strict distinction, of course, ignores the messy realities of European integration. What may seem like a straightforward exercise of dividing responsibilities within the EU's multilevel governance system has, from the very beginning of European integration, given rise to contestation. In fact, far from being merely secondary to politics, interpretative gaps within EU law have long been understood as both an 'agent and object'[3] of integration.[4] In this capacity, the law has shaped and re-shaped the division of sovereign powers between the Member States and the supranational level again and again. With the emergence of the economic security paradigm in the EU, we are witnessing yet another redistribution of powers between the Member State and the supranational EU level.

The literature has long noted a growing tendency to frame policies through the logic of security, relying on existing economic competences, rather than hard security powers. In the EU, different labels such as (open) strategic autonomy,[5] technological sovereignty[6] and, more recently, industrial competitiveness and economic security have come to denote economic policy approaches that are increasingly driven by broadly defined security considerations rather than conventional economic logic.[7] The convergence has been especially pronounced in the EU's increasing use of trade policy tools for geopolitical ends, such as in the case of economic sanctions.[8] In response to the war in Ukraine, the EU further started to compensate for its lack of defence-industrial competence by relying on internal market and industrial policy legal bases to justify new defence-related initiatives, as was the case when ramping up the capacities for

1 European Commission, 'Joint Communication to the European Parliament, the European Council and the Council on "European Economic Security Strategy"' (2023) JOIN(2023) 20 final <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52023JC0020&qid=1731488340326> accessed 13 November 2024.

2 Article 24(1) of the Treaty on European Union (TEU) [2012] OJ C326/13 sets out that 'specific rules and procedures' apply for the CFSP, among others requiring unanimity in decision-making in the Council and limiting the role of the Court of Justice.

3 Renaud Dehousse and Joseph HH Weiler, 'The Legal Dimension' in William Wallace (ed), *The Dynamics of European Integration* (Pinter Publishers for the Royal Institute of International Affairs 1990) 243.

4 Miguel Poiares Maduro, *We the Court: The European Court of Justice and the European Economic Constitution : A Critical Reading of Article 30 of the EC Treaty* (1st edn, Hart Publishing 1998).

5 Tobias Gehrke, 'EU Open Strategic Autonomy and the Trappings of Geoeconomics' (2022) 27 European Foreign Affairs Review 61.

6 Sara Poli, 'Reinforcing Europe's Technological Sovereignty Through Trade Measures: The EU and Member States' Shared Sovereignty' (2023) 8 European Papers – A Journal on Law and Integration 429.

7 Sarah Bauerle Danzman and Sophie Meunier, 'The EU's Geoeconomic Turn: From Policy Laggard to Institutional Innovator' (2024) 62(4) JCMS: Journal of Common Market Studies 1097.

8 Luigi Lonardo and Viktor Szép, 'The Use of Sanctions to Achieve EU Strategic Autonomy: Restrictive Measures, the Blocking Statute and the Anti-Coercion Instrument' (2023) 28 European Foreign Affairs Review 363; Viktor Szép, 'The Geopoliticization of EU Trade Policy: Exploring the Growing Links Between the Common Foreign and Security Policy and the Common Commercial Policy' (2024) 29 European Foreign Affairs Review 427.

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ammunitions production in the EU.[9] Taken together, these developments paint a picture of a more strategic engagement with the law, driven by the necessities of increased geopolitical pressure on the EU legislator in a variety of policy areas.[10]

Although more comprehensive accounts on economic security in the EU are still missing, previous academic engagement with these individual developments point to a broader trend: the geopoliticisation of various domains of EU law, reflected by a shift in the telos of legislative instruments.[11] In trade policy, the focus appears to be moving from liberalisation to securitisation, in industrial policy and state aid, from internal market discipline to external competitiveness. As the Economic Security Strategy makes clear, security has become a guiding objective, but the legal instruments used to pursue it continue to rest on pre-existing Treaty competences. This raises a central question: how do these inherited legal bases shape, facilitate or constrain the EU's emerging economic security agenda? Using the example of the legislative initiatives included in the EU's Economic Security Strategy, this contribution seeks to analyse the relationship between the EU's underlying legal bases and the resulting policy outputs, engaging not merely with the question what the EU can do in the context of security, but rather how its legal competences shape these actions.

It will do so by revisiting the EU's Economic Security Strategy to identify the underlying legal competences that support the individual legislative measures. To start with, I will return to the legislative initiatives adopted in the context of EU economic security, considering the underlying legal competences of the promote and the protect pillar (Section 2). This is followed by an analysis of how these different legal bases may shape the law within both pillars of the strategy (Section 3). Here, I will start by considering those measures based on Article 114 of the Treaty on the Functioning of the EU (TFEU),[12] the legal basis for internal market harmonisation, arguing that while this is adequate for those measures which merely aim to harmonise, it is not for those that pursue more far-reaching industrial policy goals (Section 3.1). Using the example of semiconductor subsidies, I will then argue that those measures based on Article 173 TFEU rest on historically weaker legal foundations which, while not precluding action, tend to result in less comprehensive policy solutions (Section 3.2). In contrast, I argue that those measures based on the Common Commercial Policy (CCP) under Article 207 TFEU benefit from a comprehensive mandate, rooted in the EU's substantive competence for trade liberalisation, which now also provides broad procedural and material powers to support a more assertive policy (Section 3.3). Lastly, I will conclude that while these differing legal starting points do not impose hard constraints on the policy space, they appear to shape the level of ambition within each dimension – framing what is conceivable in legal terms and thereby subtly influencing the operationalisation of the EU's economic security paradigm (Section 4).

2. UNDERLYING LEGAL FRAMEWORKS OF THE EU ECONOMIC SECURITY STRATEGY

Before examining the role of law within the economic security paradigm, it is necessary to first clarify what the term actually refers to. The EU's Economic Security Strategy outlines three core pillars of economic security: promote, protect and partner.[13] Each pillar represents a different dimension of the economic security. The promote dimension focuses on enhancing the EU's economic strength by boosting competitiveness and growth, reinforcing the Single Market and supporting a resilient economy.[14] It also includes investing in the EU's research, technological

9 Federico Fabbrini, 'European Defence Union ASAP: The Act in Support of Ammunition Production and the Development of EU Defence Capabilities in Response to the War in Ukraine' (2024) 29 European Foreign Affairs Review 67.

10 For an analysis of this sort of strategic approach to the law in various policy domains, see Miguel Mota Delgado, 'Towards an Economic Law of the Enemy in the European Union?' (2024) EUI LAW Working Paper 2024/12.

11 In contrast, the debate of what this means on a more systemic level for the US has been ongoing for longer. See for example Henry Farrell and Abraham Newman, 'The New Economic Security State: How De-Risking Will Remake Geopolitics' (2023) 102 Foreign Affairs 106.

12 Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47.

13 European Commission, 'Joint Communication to the European Parliament, the European Council and the Council on "European Economic Security Strategy"' (n 1).

14 ibid 6.

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and industrial capacities to ensure long-term strategic capabilities.[15] The protect aspect of the strategy centres on safeguarding the EU's interests against the weaponisation of economic dependencies.[16] It aims to address specific risks to economic security by reinforcing the EU's capacity to respond to strategic dependencies, vulnerabilities and external threats.[17] Finally, the pillar emphasises international cooperation, aiming to build and deepen partnerships with countries around the world.[18] This includes working collaboratively to uphold a rules-based international economic order and to jointly address global economic security challenges with partner countries.[19]

For the purpose of analysing the role of law in the EU Economic Security Strategy, I will focus exclusively on the promote and protect pillars. While the partner pillar shares the same overarching economic security objectives, it primarily centres on building new bi- and multilateral initiatives and improving existing engagements,[20] such as within the World Trade Organization (WTO) framework.[21] It consists of strategic orientations rather than concrete legislative measures. This makes it a more elusive object of legal study. Unlike the promote and protect pillars, which contain a range of initiatives where legal implementation is either already underway or was foreseeable at the time of writing the strategy, the partner pillar operates in a domain where lawmaking follows a different logic. Legal commitments under international treaties are structurally distinct from internal EU legislation, both in their procedural dynamics and their enforceability.

Moreover, the partner pillar must be read against the backdrop of the EU's cautious adaptation to a shifting global order, marked by the retreat from comprehensive multilateralism,[22] and a global turn toward smaller, often sector-specific 'mini-deals'.[23] While analysing the partner pillar would certainly speak to the role of law in global governance – the current retreat of rules-based institutions, norms and the idea of a global rule of law – this dimension remains, at the current point in time, harder to pin down analytically and institutionally than the more codified measures pursued under the other two pillars.[24] In order to be able to engage meaningful with the role of law, I will further exclude those initiatives that remain vague or preliminary, such as outbound investment screening, which is currently only outlined in a white paper and lacks a clear path toward adoption under EU law.[25]

This leaves a total of 14 concrete legislative instruments mentioned,[26] five from within the promote pillar and a total of nine from within the protect pillar. The promote pillar of the EU Economic Security Strategy includes the following legislative initiatives (pictured in Table 1): (i) the European Chips Act ensuring a secure supply of semiconductors;[27] (ii) the Critical Raw

15 ibid.

16 ibid 7.

17 ibid 8–11.

18 ibid 11.

19 ibid 13.

20 The partner pillar thus represents the collaborative dimension of the economic security strategy, whereby the EU positions itself as a global partner (and an alternative to China), for example by means of its flagship Global Gateway programme. See European Commission, 'Global Gateway – European Commission' (1 March 2023) <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/stronger-europe-world/global-gateway_en> accessed 15 July 2024.

21 European Commission, 'Joint Communication to the European Parliament, the European Council and the Council on "European Economic Security Strategy"' (n 1) 11–13.

22 For the relationship between the WTO and economic security more broadly, see Mona Paulsen, 'The Past, Present, and Potential of Economic Security' (Social Science Research Network, 26 May 2024).

23 Kathleen Claussen, 'Trade's Mini-Deals' (2022) 62 Virgina Journal of International Law 315.

24 See on this more generally Gregory Shaffer and Wayne Sandholtz, 'The Rule of Law under Pressure: The Enmeshment of National and International Trends' in Gregory Shaffer and Wayne Sandholtz (eds), *The Rule of Law under Pressure* (1st edn, CUP 2025).

25 European Commission, 'White Paper on Outbound Investments' COM (2024) 24 final <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52024DC0024> accessed 20 November 2025.

26 This leaves out mentions such as 'toolboxes' which in practice consist of a mix of different elements, such as strategy guidelines, communications, reports as well as actual legislation.

27 Regulation (EU) 2023/1781 establishing a framework of measures for strengthening Europe's semiconductor ecosystem (Chips Act) [2023] OJ L229/1.

Materials Act (CRMA), aimed at securing access to critical raw materials;[28] (iii) the Net-Zero Industry Act (NZIA), boosting EU clean tech manufacturing;[29] (iv) the Strategic Technologies for Europe Platform (STEP) supporting research and development and manufacturing in strategic sectors[30] and (v) the Single Market Emergency Instrument, to safeguard the functioning of the internal market in times of crisis.[31]

Table 1 Promote pillar legal instruments, based on European Commission (n 1).

LEGISLATION	LEGAL BASIS
Chips Act (Regulation (EU) 2023/1781)	Arts 114 and 173(3) TFEU
Critical Raw Materials Act (Regulation (EU) 2024/1252)	Art 114 TFEU
Net-Zero Industry Act (Regulation (EU) 2024/1735)	Art 114 TFEU
STEP (Regulation (EU) 2024/795)	Arts 164, 173, 175(3), 176, 177, 178, 182(1), 183 and 188 TFEU
Single Market Emergency Instrument (Regulation (EU) 2024/2747)	Arts 21, 46 and 114 TFEU

All but one legislative act under the promote pillar of the Economic Security Strategy are based on Article 114 TFEU, which serves as the primary legal foundation for harmonising national laws to ensure the functioning of the internal market.[32] By enabling measures that enhance the free movement of goods, services, persons and capital, Article 114 TFEU underpins efforts to foster resilience and competitiveness within the EU economy.[33] While the use of Article 114 has facilitated broad secondary legislation in the past, it has at times also been accused of pushing the boundaries of EU competence.[34] In addition, Article 173 TFEU, the self-standing legal basis for EU industrial policy, provides the EU's competence to act for both the Chips Act and STEP, signalling a potential shift toward a more active and coordinated EU industrial policy.

The protect pillar of the European Economic Security Strategy comprises nine key legislative acts aimed at safeguarding the Union's economic and technological base against exogenous risks and threats (pictured in Table 2). These include (i) the EU's updated Trade Defence Instruments (consisting of the basic Anti-Subsidy[35] and Anti-Dumping[36] Regulations);[37] (ii) the Foreign Direct Investments Screening Regulation, which screens foreign investments that may affect security or public order;[38] (iii) the Anti-Coercion Instrument (ACI), designed to respond to economic

28 Regulation (EU) 2024/1252 establishing a framework for ensuring a secure and sustainable supply of critical raw materials (Critical Raw Materials Act) [2024] OJ L125/1.

29 Regulation (EU) 2024/1735 on establishing a framework of measures for strengthening Europe's net-zero technology manufacturing ecosystem (Net-Zero Industry Act) [2024] OJ L177/1.

30 Regulation (EU) 2024/795 establishing the Strategic Technologies for Europe Platform (STEP) [2024] OJ L2/1.

31 Regulation (EU) 2024/2747 establishing a framework of measures related to an internal market emergency and to the resilience of the internal market (Internal Market Emergency and Resilience Act) [2024] OJ L308/1.

32 STEP constitutes a derogation, as it does not rely on Art 114 TFEU for internal market harmonisation but instead draws on a mix of provisions related to cohesion, industrial and research policy, reflecting its broader investment and support function beyond market regulation.

33 Manuel Kellerbauer, 'Article 114 TFEU' in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (OUP 2019).

34 S Garben, 'Confronting the Competence Conundrum: Democratising the European Union through an Expansion of Its Legislative Powers' (2015) 35 Oxford Journal of Legal Studies 55.

35 Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union [2016] OJ L176/21.

36 Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union 2016 [2016] OJ L176/55.

37 Regulation (EU) 2018/825 amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union [2018] OJ L143/1.

38 Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments into the Union 2019 [2019] OJ L79I/1.

coercion by third countries;[39] (iv) the Foreign Subsidies Regulation, which addresses market distortions caused by foreign subsidies;[40] (v) the Dual-Use Export Control Regulation, aimed at controlling exports of sensitive dual-use items;[41] (vi) the Directive on the Resilience of Critical Entities, which enhances the physical resilience of critical infrastructure;[42] (vii) the NIS2 Directive, which strengthens cybersecurity in essential sectors;[43] (viii) the Cyber Resilience Act, focused on improving the security of digital products and supply chains[44] and (ix) the Cyber Solidarity Act, which seeks to bolster solidarity and coordinated capacity in response to cyberthreats.[45]

Table 2 Protect pillar legal instruments, based on European Commission (n 1).

LEGISLATION	LEGAL BASIS
Trade Defence Instruments (Regulation (EU) 2018/825 and Regulation (EU) 2016/1037)	Art 207(2) TFEU
FDI Screening Regulation (Regulation (EU) 2019/452)	Art 207(2) TFEU
Anti-Coercion Instrument (Regulation (EU) 2023/2675)	Art 207(2) TFEU
Foreign Subsidies Regulation (Regulation (EU) 2022/2560)	Arts 114 and 207 TFEU
Dual-Use Export Control Regulation (Regulation (EU) 2021/821)	Art 207(2) TFEU
Directive on Resilience of Critical Entities (Directive (EU) 2022/2557)	Art 114 TFEU
NIS2 Directive (Directive (EU) 2022/2555)	Art 114 TFEU
Cyber Resilience Act (Regulation (EU) 2024/2847)	Art 114 TFEU
Cyber Solidarity Act (Regulation (EU) 2025/38)	Arts 173(3) and 322(1)(a) TFEU

Within the protect pillar of the Economic Security Strategy, a key distinction emerges between instruments that are based on the EU's exclusive trade competence under Article 207 TFEU, and those adopted on the basis of Article 114 TFEU as internal market harmonisation measures, especially within the cyber domain.[46] This divide highlights the dual nature of the EU's external economic security approach: one that actively projects power through trade instruments, and another that aims to protect the internal market against vulnerabilities arising from an interconnected global economy. Taken together, measures of both the promote and protect pillar are in line with global trends, whereby economic interdependencies are increasingly weaponised through trade measures,[47] prompting large scale industrial policy responses that aim to de-risk the vulnerabilities through ensuring a degree of self-sufficiency.[48]

39 Regulation (EU) 2023/2675 on the protection of the Union and its Member States from economic coercion by third countries [2023] OJ L329/1.

40 Regulation (EU) 2022/2560 on foreign subsidies distorting the internal market [2022] OJ L330/1.

41 Regulation (EU) 2021/821 setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items (recast) [2021] OJ L206/1.

42 Directive (EU) 2022/2557 on the resilience of critical entities [2022] OJ L333/164.

43 Directive (EU) 2022/2555 on measures for a high common level of cybersecurity across the Union 2022 [OJ L 333/80.

44 Regulation (EU) 2024/2847 on horizontal cybersecurity requirements for products with digital elements (Cyber Resilience Act) [2024] OJ L324/1.

45 Regulation (EU) 2025/38 laying down measures to strengthen solidarity and capacities in the Union to detect, prepare for and respond to cyber threats and incidents (Cyber Solidarity Act) [2024] OJ L10/1.

46 The Cyber Solidarity Act is somewhat of an outlier within the Economic Security Strategy. The Cyber Solidarity Act's dual legal basis in Arts 173(3) and 322(1)(a) TFEU reflects its hybrid nature as both an industrial policy initiative – aiming to support Member State actions through non-harmonising measures like the European Cyber Shield – and a funding instrument governed by EU financial rules, enabling budgetary commitments and expenditure necessary for its implementation.

47 Anthea Roberts, Henrique Choer Moraes and Victor Ferguson, 'Toward a Geoeconomic Order in International Trade and Investment' (2019) 22 Journal of International Economic Law 655.

48 Farrell and Newman (n 11).

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3. THE ROLE OF LAW IN ECONOMIC SECURITY

In and of itself, none of this is unprecedented. EU law has always evolved in response to geopolitical pressures. The EU, or rather, its predecessor, was arguably born not only as an internal peace project to end centuries of conflict, most notably the *Erbfeindschaft* between France and Germany, but also as a strategic move to ensure Western integration during the early days of the Cold War – having an underlying security rationale.[49] While NATO provided the institutional framework for military cooperation, the EU's predecessors, through their participation in the General Agreement on Tariffs and Trade (GATT),[50] laid the foundation for deep economic integration among Western states and served as a counterweight to the influence of European communism.[51]

However, given the historical significance of law in the context of European integration, it should not be viewed merely as a by-product of geopolitical forces.[52] While the exercise of geopolitical power may broadly underpin the Economic Security Strategy, its implementation within a complex system of multilevel governance such as the EU fundamentally depends on legal frameworks.[53] In this light, the distinct legal bases underpinning the legislative acts of the strategy, and the ways in which they have been operationalised in the past, offer some insight with regard to the role of law in EU economic security.

In theory, one might envision a binary assessment: either EU law provides the Union with strong competences to exercise the powers the Economic Security Strategy deems necessary in today's geopolitical landscape, or it does not. This dichotomy is rooted in the principle of conferral, as codified in Article 5(2) TEU, which restricts the EU to acting only within the competences explicitly granted by the Member States, thus safeguarding national sovereignty in all other areas.[54] At the same time, it empowers EU institutions to act with legal certainty within those boundaries, reinforcing the autonomy of the EU legal order and maintaining institutional balance through clearly defined legal bases.

In practice, however, there are good reasons to reject such a strict binary between EU law functioning either as a facilitator or a constraint. Over time, the EU's institutional actors have demonstrated a capacity to navigate the legal framework strategically, enabling adaptation to evolving challenges without formally revising the Treaties.[55] As institutions cannot unilaterally create new decision-making practices, they must operate within the constraints of the Treaties and subsequently, in accordance with the foundational principles of EU law, such as conferral.[56] Although the Court of Justice has occasionally annulled institutional agreements exceeding

49 Jukka Snell and Erkki Aalto, 'Security and Integration in the Context of the Internal Market' in Dimitry Kochenov and others (eds), *The Internal Market and the Future of European Integration: Essays in Honour of Laurence W Gormley* (CUP 2019).

50 The European Economic Community (EEC) never formally acceded to the GATT (entered into force 1 January 1948, 55 UNTS 187). It did, however, progressively assume its Member States' obligations under the agreement by virtue of its exclusive competence in the common commercial policy. The Court of Justice acknowledged this *de facto* succession, whereby the EEC came to act in place of the Member States in the GATT framework despite its absence as a formal contracting party. See Joined Cases C-21/72, C-22/72, C-23/72, C-24/72, *International Fruit Company NV and others v Produktschap voor Groenten en Fruit*, EU:C:1972:115.

51 Although some voices today claim that the EU was founded to 'screw' the US, it was in fact the US that strongly advocated for the admission of the European Coal and Steel Community (ECSC) into the GATT. While GATT permits the creation of customs unions and free trade areas, such arrangements must generally encompass substantially all trade among the members. Given the ECSC's narrow sectoral focus, its inclusion required a waiver under Art XXIV:10 of the GATT. See CVEC, 'Interview with Edmund Wellenstein: The Importance of the GATT for the ECSC' (27 August 2009) <https://www.cvce.eu/en/obj/interview_with_edmund_wellenstein_the_importance_of_the_gatt_for_the_ecsc_the_hague_27_august_2009-en-3828e401-12d7-4877-8a67-45b2c8c19cf8.html> accessed 31 January 2025.

52 Mauro Cappelletti, Monica Seccombe and Joseph Weiler (eds), *Integration Through Law: Europe and the American Federal Experience.* (De Gruyter 1986).

53 Bruno de Witte, 'The European Union as an International Legal Experiment' in Gráinne de Búrca and JHH Weiler (eds), *The Worlds of European Constitutionalism* (CUP 2011) 52; Gráinne de Búrca, 'The Constitutional Challenge of New Governance in the European Union' (2003) 56 Current Legal Problems 403.

54 Loïc Azoulai, *The Question of Competence in the European Union* (OUP 2014); Armin von Bogdandy and Jürgen Bast, 'The Federal Order of Competences' in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (Hart Publishing, CH Beck 2010).

55 Philipp Genschel and Markus Jachtenfuchs, 'From Market Integration to Core State Powers: The Eurozone Crisis, the Refugee Crisis and Integration Theory' (2018) 56 JCMS: Journal of Common Market Studies 178.

56 Case C-294/83, *Les Verts v Parliament*, EU:C:1986:166, para 23.

these legal limits, such interventions remained rather exceptional.[57] More often, the Court showed a degree of deference, particularly when these kinds of legislative innovation were jointly supported by the Commission, the Parliament and the Council, thus accommodating the gradual incorporation of new policy objectives into the Union's legal order.[58]

When examining the role of law in the context of EU economic security, it is thus important to stay mindful of the political dynamics that shape its use. Consequently, one should resist the temptation to make absolute claims about its impact. Rather, one should understand the role of law as one factor among many that shape how economic security is governed in the EU. In the following, I will consider the different legislative instruments in turn, based not on their pillar belonging, but rather, on their underlying legal basis. I will start with those building on Article 114 TFEU, concerning the harmonisation of measures within the internal market. This will be followed by those focusing on the EU's emerging industrial policy based on Article 173(3) TFEU. Lastly, I will consider those legislative acts of the protect pillar that are based on the EU's CCP under Article 207 TFEU.

Other legal foundations appear in the Economic Security Strategy as well, particularly where legislative acts consist of, or combine, a range of targeted measures, as exemplified by STEP.[59] The STEP Regulation draws on a broad array of legal bases, reflecting its role as a coordinating framework that channels funding through multiple pre-existing EU programmes. This multi-basis approach mirrors the hybrid design of the instrument itself, which integrates diverse sectoral objectives under a unified strategic platform. Instead of establishing a new fund, STEP builds on existing instruments: the European Regional Development Fund, the Just Transition Fund, the Recovery and Resilience Facility, InvestEU, Horizon Europe and others.[60] The corresponding legal bases, Articles 164, 173, 175(3), 176, 177, 178, 182(1) and 192(1) TFEU, mirror the legal foundations of these underlying programmes.[61] In the interest of reaching conclusions of broader applicability, I set aside the more specialised legal provisions and instead focus on the implications of grounding instruments in internal market, industrial policy or trade policy competences.

3.1 ECONOMIC SECURITY THROUGH MARKET HARMONISATION

The harmonisation of national laws under Article 114 TFEU is one of the central legal provisions to the establishment and functioning of the EU internal market. It enables the Union to adopt measures that reduce regulatory divergence among Member States, particularly where such differences risk obstructing fundamental freedoms.[62] Originally aimed at facilitating the free movement of goods, persons, services and capital, its scope has broadened over time to govern the conditions under which goods and services are placed on the EU market, notably through sector-specific legislation.[63] The European Court of Justice has emphasised that Article 114 TFEU cannot serve as a general regulatory power but must genuinely pursue the objective of improving the internal market's functioning, rather than merely listing it as an objective.[64]

57 Case T-540/15, *Emilio De Capitani v European Parliament*, EU:T:2018:167.

58 Bruno De Witte, 'Legal Methods for the Study of EU Institutional Practice' (2022) 18 European Constitutional Law Review 637, 647.

59 The Internal Market Emergency and Resilience Act (n 31) also lists the more specialised legal provisions of Art 21 TFEU on the free movement of persons and Art 46 on the free movement of workers. The Cyber Solidarity Act (n 45) further lists Art 322(1)(a) TFEU, as it introduces specific budgetary carry-over rules that derogate from the principle of annuality under the financial regulation, in order to ensure flexible financial management in response to the exceptional and unpredictable nature of cybersecurity threats.

60 European Commission, 'Explanatory Memorandum – Proposal for a Regulation Establishing the Strategic Technologies for Europe Platform ("STEP")' COM(2023) 335 Final <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52023PC0335> accessed 15 July 2025.

61 ibid.

62 Art 114 TFEU is thus frequently used to realise the objectives of the internal market as outlined in Art 26 TFEU.

63 For a study on the interaction of different harmonisation mechanisms in the area of consumer protection law, see Hannes Unberath and Angus Johnston, 'The Double-Headed Approach of the ECJ Concerning Consumer Protection' (2007) 44 Common Market Law Review 1237.

64 See among others Case C-376/98, *Federal Republic of Germany v European Parliament and Council of the European Union*, EU:C:2000:544, para 83.

Over time, however, the use of Article 114 TFEU has extended beyond traditional market integration goals, often spilling over into other policy fields such as environmental protection, public health and digital regulation. This expansion has raised concerns about a creeping enlargement of EU competences, particularly in areas where the Treaties set limits on harmonisation.[65] Because Article 114 TFEU does not itself impose such constraints, it has occasionally been used to pursue broader policy objectives under the guise of market integration.[66] More recently, this tendency has been at the heart of ongoing debates over the legal basis of legislation like the Digital Markets Act, where the internal market rationale overlaps with broader and more ambitious regulatory aims.[67] A debate that could well continue in the area of economic security legislation, as argued below.

Both the promote and the protect pillar make frequent use of Article 114 TFEU, which is unsurprising given its role as the primary legal basis for internal market harmonisation and its foundational status in European integration.[68] A total of eight legislative measures rely on this provision, either exclusively or in combination with others. While these measures serve a variety of purposes, they are underpinned by different logics: some pursue traditional harmonisation by removing regulatory barriers and aligning national rules, while others adopt a more instrumental approach, edging toward the contours of a nascent industrial policy discussed in the next section. In this section I argue that while Article 114 TFEU continues to underpin conventional harmonisation efforts, it is increasingly being used to pursue strategic economic objectives, blurring the line between market integration and industrial policy.

The traditional harmonisation category is exemplified by the Single Market Emergency Instrument, now renamed the Internal Market Emergency and Resilience Act (IMERA).[69] This legislative framework aims to enhance the EU's capacity to respond to future crises and ensure the continued functioning of the single market under stress.[70] It does so by improving transparency, information exchange and coordination among Member States and with the European level.[71] Through an advisory board the IMERA equips the Commission with tools to request critical data from firms, recommend production of essential goods and coordinate procurement of crisis-relevant supplies.[72] It also permits temporary adjustments to standards, conformity assessments and market surveillance procedures to expedite the availability of crucial products. Most notably, through an Council implementing act,[73] the IMERA equips the supranational level with the power to guide national measures that could fragment the internal market during emergencies thereby mandating a more harmonised response.[74]

Article 114 TFEU is also used to align regulatory frameworks for critical infrastructures – both physical and digital.[75] This is reflected in the Directive on the Resilience of Critical Entities (CER), the Cyber Resilience Act (CRA) and the NIS2 Directive. The CER seeks to safeguard the continuous delivery of essential services by enhancing the operational and physical resilience of key infrastructure operators.[76] The CRA imposes horizontal cybersecurity obligations on all products with digital elements, from hardware to standalone software, to foster a unified framework

65 Garben (n 34) 63–65.

66 ibid 89.

67 For a discussion of this question, see Alfonso Lamadrid de Pablo and Nieves Bayón Fernández, 'Why the Proposed DMA Might Be Illegal under Article 114 TFEU, and How to Fix It' (2021) 12 Journal of European Competition Law & Practice 576.

68 Garben (n 34).

69 Internal Market Emergency and Resilience Act (n 31).

70 ibid.

71 ibid Arts 6–8 and 23–25.

72 ibid Art 5.

73 Unlike other recent crisis instruments based on Art 122(1) TFEU, the IMERA relies on Art 114 TFEU (alongside Arts 21 and 45 TFEU), ensuring adoption through the ordinary legislative procedure and thereby enhancing parliamentary involvement and democratic legitimacy. See Réka Somssich, 'How Resilient Will the Internal Market Emergency and Resilience Act Be?' (2025) 62 Common Market Law Review 797.

74 Internal Market Emergency and Resilience Act (n 31) Arts 14–22.

75 A Lymperopoulos, 'The EU Economic Security Strategy: A Novel Approach or the Re-Emergence of an Old Idea?' (2024) 23 European State Aid Law Quarterly 40, 42.

76 Directive (EU) 2022/2557 (n 42).

for secure design and oversight.[77] NIS2, meanwhile, extends cybersecurity requirements to a broad array of sectors, including digital infrastructure, manufacturing, space and public administration, mandating risk management, incident reporting and reinforced cooperation among EU states.[78]

While grounded in economic security imperatives, these instruments function above all as harmonising tools. They align national rules and compliance obligations, thereby reducing fragmentation and providing legal clarity for cross-border economic activity. The harmonisation of cybersecurity and infrastructure standards ensures a more predictable regulatory environment, creating a level playing field across the Union. In this way, the CER, CRA and NIS2 contribute not only to resilience and security, but also to the integrity and operability of the internal market itself. This approach is closely aligned with the EU's long-established use of internal market law to regulate product and safety standards – now extended to the harmonisation of standards to enhance the economic security of critical sectors.

By contrast, other instruments based on Article 114 TFEU expose the structural limitations of market harmonisation as a regulatory approach for economic security. The CRMA is a case in point.[79] It establishes a comprehensive EU-level framework to ensure secure and sustainable access to materials vital for the green and digital transitions, such as lithium, rare earth elements and cobalt.[80] The CRMA sets ambitious benchmarks: by 2030, the EU aims to extract at least 10%, process 40% and recycle 25% of its annual consumption of strategic raw materials, while limiting dependence on any single third country to a maximum of 65%.[81] To achieve these goals, the CRMA introduces 'Strategic Projects' that benefit from accelerated permitting, legal prioritisation and better access to finance.[82] It also mandates national exploration programmes and creates a European Critical Raw Materials Board to oversee implementation.[83]

The NZIA, adopted under the European Green Deal Industrial Plan, follows a similar logic.[84] It seeks to ramp up domestic production of key clean technologies – including solar panels, wind turbines, batteries and heat pumps – to meet 40% of the EU's annual deployment needs and gain a 15% global market share by 2030.[85] Key features include fast-tracked permitting, the designation of 'Net-Zero Acceleration Valleys'[86] and incentives to incorporate non-price criteria in procurement and energy auctions.[87] However, unlike traditional industrial policy instruments, the NZIA lacks direct EU-level financial support. Its implementation depends heavily on Member State initiatives, leading to variability in outcomes and limited strategic coherence across the Union.

Despite their ambitious goals, both the CRMA and the NZIA underscore the tension between harmonisation-based legislation and the fiscal realities of industrial policy. While both acts include provisions aimed at coordinating and facilitating access to finance (ie, Article 16 of the CRMA and Article 19 of the NZIA), these mechanisms stop short of establishing dedicated EU-level funding streams. Instead, they rely on a patchwork of existing resources, including private capital, Member State programmes, European Investment Bank instruments and various Union initiatives such as the Global Gateway. These coordination efforts, while valuable, highlight the structural limits of relying on Article 114 TFEU: a legal basis designed to align national rules, not to mobilise public investment. The harmonisation it enables is necessary to reduce regulatory

77 For an in-depth analysis, see Pier Giorgio Chiara, 'The Cyber Resilience Act: The EU Commission's Proposal for a Horizontal Regulation on Cybersecurity for Products with Digital Elements' (2022) 3 International Cybersecurity Law Review 255.

78 For an in-depth analysis, see Fabian Teichmann, 'Cybersecurity of Critical Infrastructure in Europe: The NIS2 Directive in Focus' (2025) 6 International Cybersecurity Law Review 207.

79 Critical Raw Materials Act (n 28).

80 ibid Annex I.

81 ibid Article 5.

82 ibid Articles 6–8.

83 ibid Arts 9–19 and 35.

84 Net-Zero Industry Act (n 29).

85 ibid Art 5.

86 ibid Art 17.

87 ibid Art 26.

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barriers and create a common framework, but it is only a first, although vital, step toward achieving the broader economic and strategic objectives set out in these acts.

In this light, the CRMA and NZIA illustrate a shift from market-neutral regulation to market-instrumental governance.[88] Harmonisation is no longer used merely to eliminate trade barriers but to engineer specific economic outcomes, such as securing supply chains or fostering domestic manufacturing capacity. Although grounded in Article 114 TFEU, this approach signals a broader doctrinal evolution. The internal market is increasingly seen as a tool to bolster economic resilience against geopolitical risks, rather than an end in itself.

As several commentators have noted, these developments reflect a paradigmatic shift in the purpose of market regulation.[89] The underlying assumption is no longer that markets are self-sufficient mechanisms for prosperity. Instead, they are reframed as instruments to serve public policy aims, and increasingly those that are related to economic security. The CRMA's choice of Article 114 TFEU is instructive: it casts raw material access not as a security exceptionalism, but as an issue of market integration, thereby enabling EU action through existing competences. By doing so, the strategy is consistent with a broader pattern of using established treaty bases to deliver on evolving policy priorities.[90]

Yet the NZIA simultaneously highlights the limits of this approach. In responding to external challenges, particularly the US Inflation Reduction Act and China's state-led investments, the Regulation is positioned within the EU's broader Economic Security Strategy.[91] But its practical tools fall short of a coordinated EU industrial policy, as it does not establish public production capacity nor mandate a Union-wide investment strategy.[92] Instead, it nudges Member States to adapt procurement and planning frameworks in ways that may benefit EU-based firms.[93] This underscores the legal and institutional constraints of relying solely on Article 114 TFEU, which was never designed for strategic industrial planning.[94]

In sum, the repeated use of Article 114 TFEU in the EU's Economic Security Strategy confirms its continuing utility as a vehicle for market integration. It remains one of the most versatile and robust provisions in EU law, helping to eliminate regulatory fragmentation, uphold legal certainty and facilitate cross-border economic activity. The problem, however, does not seem to lie in the use of Article 114 TFEU *per se*, but in the widening gap between its legal scope and the growing ambitions attached to it. As regulatory instruments take on more explicitly strategic or industrial objectives, the limitations of relying solely on market harmonisation-based rationales become increasingly apparent.[95]

Indeed, while harmonisation can provide the regulatory scaffolding for industrial competitiveness, it is not a substitute for industrial policy. Without adequate funding mechanisms and a cohesive strategic vision, Article 114 TFEU risks being overextended. This is particularly problematic

88 This trend of market-instrumentalism was described in the context of the CRMA, see Ioannis Kampourakis, 'Unpacking the Critical Raw Materials Act' (*Verfassungsblog*, 18 January 2024) <https://verfassungsblog.de/unpacking-the-critical-raw-materials-act/> accessed 15 July 2025.

89 Christopher Jones, 'The Net-Zero Industry Act and the Reform of the Green Deal State Aid Rules: A Convincing Reaction to the Inflation Reduction Act?' (*EUI Policy Brief*, May 2023) <https://cadmus.eui.eu/server/api/core/bitstreams/b0f6d522-03c1-528c-8c55-eb8107ce1d05/content> accessed 15 July 2025; David Kleimann and others, 'Green Tech Race? The US Inflation Reduction Act and the EU Net Zero Industry Act' (2023) 46 The World Economy 3420; Kampourakis (n 88); Nils Redeker, 'Chasing Shadows' (*Verfassungsblog*, 27 February 2024) <https://verfassungsblog.de/chasing-shadows/> accessed 15 July 2025.

90 See recently Viktor Szép and Lukas Schaupp, 'Energy Sanctions Reloaded' (*Verfassungsblog*, 25 June 2025) <https://verfassungsblog.de/energy-sanctions-russia-eu/> accessed 15 July 2025.

91 Jones (n 89).

92 Redeker (n 89).

93 ibid.

94 According to the European Parliament, industrial policy is characterised by deliberate and targeted government efforts to develop specific industries, such as by subsidising emerging technologies or correcting market failures. In contrast, market harmonisation, based on Art 114 TFEU, seeks to align legal standards across Member States to ensure a seamless internal market, lacking the proactive financial and strategic tools characteristic of true industrial policy. The Parliament's website does however mention both the CRMA and the NZIA as examples for industrial policy under Art 173 – illustrating the proximity, and perhaps confusion, between both legal regimes. See Anne Ploeger and Markus Josef Prutsch, 'General Principles of EU Industrial Policy' (*European Parliament Fact Sheet*, 31 March 2025) <https://www.europarl.europa.eu/factsheets/en/sheet/61/general-principles-of-eu-industrial-policy> accessed 15 July 2025.

95 An issue also discussed in the context of the Draghi Report, see Francesco Costamagna, 'The Long March of Competitiveness in the EU Legal Order' (2024) 3 European Law Open 221.

in sectors like green technology, where other global actors are investing heavily in state-led industrial policy.[96] In contrast, the EU's reliance on market integration reflects not just legal ingenuity, but a more profound institutional shortfall: the absence of a more comprehensive industrial policy competence. This brings me to the next section, which examines the EU's emerging industrial policy architecture under Article 173 TFEU.

3.2 THE EU'S EMERGING INDUSTRIAL POLICY

As discussed above, the EU has, in recent years, increasingly embraced interventionist policies in response to the twin challenges of the green and digital transitions, as well as the growing use of global economic interdependencies as geopolitical leverage. This shift has sparked a new interest in industrial policy at the EU level. In March 2020, the European Commission launched its EU Industrial Strategy,[97] which was updated in 2021 considering the Covid-19 pandemic to address mounting concerns about the Single Market's resilience to external shocks.[98] This industrial strategy also forms a core part of the promote pillar of the Economic Security Strategy.[99]

The fact that industrial policy was a relatively dormant pillar of the EU economic constitution until recently is rooted in the history of European integration. The 1951 Treaty of Paris on the European Community of Steel and Coal (ECSC) already equipped the High Authority with the power to control national state aid policies and other extensive financial and fiscal powers in the coal and steel sectors.[100] However, these far-reaching industrial policy powers were not carried over into the Treaty of Rome, which established the European Economic Community (EEC) in 1958.[101] Instead, the sectoral focus gave way to the broader objective of creating a comprehensive internal market.

Rather than developing a joint industrial policy, the EU pursued economic integration primarily through negative integration.[102] Initially, integration focused on harmonising existing national regulatory frameworks, but increasingly it involved the creation of new rules at the EU level, shifting not just the application, but also the initiation of regulatory measures to the supranational sphere, particularly in the area of the internal market.[103] Absent a clear objective for a common industrial policy, this meant that this area was most influenced by the common state aid provisions, and more specifically, the general prohibition thereof as enshrined by Article 107(3)(b) TFEU. This EU-wide state aid framework served both as a complement to the evolving EU competition law regime, supporting the vision of a well-functioning internal market, and as a safeguard against distortions that could arise from unequal state support.[104] Without such control, Member States with greater fiscal capacity would have gained an unfair advantage by disproportionately supporting their domestic industries within the liberalised internal market.[105]

96 As the 2023 IEA report highlighted, the EU remains highly dependent on imports for both key green tech components as well as for the raw materials needed to manufacture those. While it holds technological leadership in some areas, the EU remains a net importer in several sectors. See International Energy Agency, 'The State of Clean Technology Manufacturing' (2023) <https://iea.blob.core.windows.net/assets/710264f6-0cb8-4f5c-8c95-4ae2ea64998a/TheStateofCleanTechnologyManufacturing_November2023Update.pdf> accessed 15 July 2025.

97 European Commission, 'A New Industrial Strategy for Europe' COM (2020) 102 final <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020DC0102> accessed 15 January 2025.

98 European Commission, 'Updating the 2020 New Industrial Strategy: Building a stronger Single Market for Europe's recovery' COM/2021/350 final.

99 European Commission, 'Joint Communication to the European Parliament, the European Council and the Council on "European Economic Security Strategy"' (n 1) 6.

100 Edoardo Traversa and Pierre M Sabbadini, 'Industrial Policy and EU State Aid Rules' in Jean-Christophe Defraigne and others (eds), *EU Industrial Policy in the Multipolar Economy* (Edward Elgar Publishing 2022).

101 Juan Jorge Piernas López, 'The Concept of State Aid under EU Law : From Internal Market to Competition and Beyond' (PhD thesis, European University Institute 2013) 65 <https://cadmus.eui.eu/handle/1814/28047> accessed 15 July 2025.

102 Negative integration involves the European Court of Justice removing barriers to the internal market through judicial rulings, contrasting with positive integration, which refers to the creation of secondary laws by the European legislature.

103 Giandomenico Majone, *Regulating Europe* (Routledge 1996) 59.

104 Traversa and Sabbadini (n 100).

105 Francesco Martucci, 'Level playing field: Une antienne protectrice du droit de l'Union' (2023) 59 Revue trimestrielle de droit europeen 605.

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It was not until the Treaty of Maastricht in 1993 that a dedicated legal basis for an EU industrial policy was introduced.[106] Although the addition of these competences under Articles 6(b) and 173 TFEU marked a novelty, it was still reflective of the original political compromise among Member States, which resisted a centrally coordinated industrial policy in favour of maintaining national control. The EU's industrial competence remains relatively weak due to both the limited scope and the restrictive design of Article 173 TFEU. Rather than granting the Union strong legislative powers to shape or direct national industrial policies, the provision confines the EU to supporting and coordinating measures, explicitly excluding harmonisation.

Whether caused by these design limitations or other factors, these acquired industrial policy competence were not used extensively during the early years of their existence,[107] and were therefore largely disregarded by the discourse or deemed irrelevant altogether.[108] The EU's Economic Security Strategy, however, signals a revival of this long-overlooked aspect of EU competence. While the established cornerstones of integration (ie, based on Article 114 TFEU) suited an EU focused on removing barriers to economic integration, they seem at times less fit for the emerging pursuit of a more interventionist industrial policy aimed at enhancing strategic autonomy, sovereignty and economic security – as the discussion in the previous section demonstrated.

The interplay between EU law and domestic policy intervention thus reveals a structural tension. While harmonisation under EU law has traditionally limited the scope of national industrial policies, the complementary provisions specifically addressing industrial policy remain comparatively weak, explicitly excluding harmonisation in the strict sense. As a result, the legal framework acts as a constraint on industrial action – not an absolute prohibition, but one that meaningfully narrows the range of possibilities. Yet, this very tension has also spurred adaptation within the EU's legal architecture. Driven by political necessity, several legislative acts and proposals have been adopted to strengthen the industrial policy dimension of this agenda.[109]

The example of the Chips Act illustrates this point.[110] It aims to foster innovation through the Chips for Europe Initiative, supporting investment in manufacturing to enhance supply security, and establishing a European Semiconductor Board to coordinate efforts and manage shortages, backed by a total investment of €43 billion.[111] The Chips Act was adopted in view of the vital role that semiconductors play for the digital and green economy, and their foundational importance in underpinning key sectors of strategic importance, such as automation and defence.[112] Acknowledging that the countries of the EU had fallen behind global competitors in semiconductor development and production, the Chips Act makes an attempt to address these shortcomings by developing a sector-specific industrial policy. Adopted in September 2023, it is based on Articles 173(3) and 114 TFEU, meaning that it builds on the corresponding legal bases of the auxiliary competence for industrial policy, as well as the already discussed central treaty provision for the approximation of national laws.

In addition to relying on funds provided by the Digital Europe and Horizon Europe programmes, implemented through the renamed Chips Joint Undertaking, the Chips Act incentivises private investment, attracted by means of public support. Although the Member States may offer public

106 [1992] OJ C191/1.

107 See for example Decision 96/413/EC3 setting up an action programme to strengthen the competitiveness of European industry [1996] OJ L167/55.

108 Dariusz Adamski, 'Europe's (Misguided) Constitution of Economic Prosperity' (2013) 50 Common Market Law Review 47, 78.

109 European Commission, 'Joint Communication to the European Parliament, the European Council and the Council on "European Economic Security Strategy"' (n 1) 6.

110 Chips Act (n 27). Other legal instruments in the Economic Security Strategy based on Art 173 TFEU include Regulation (EU) 2025/38 (the Cyber Solidarity Act), which channels EU funding through the Digital Europe Programme, as well as Regulation EU 2024/795 (STEP), which pools resources from 11 EU funding programmes to support investment in strategic technologies and related skills, aiming to enable individual projects to benefit from combined EU funding instruments. They are thus structurally similar to the Chips Act, in that they involve funding mechanisms (in contrast to those measures discussed in Section 3.1).

111 Pauline Weil and Niclas Frederic Poitiers, 'Fishing for Chips: Assessing the EU Chips Act' (*French Institute of International Relations*, 8 July 2022) <https://www.ifri.org/en/publications/briefings-de-lifri/fishing-chips-assessing-chips-act> accessed 11 April 2024.

112 Chips Act (n 27).

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support to such facilities, 'without prejudice'[113] to the EU's State aid rules, certain tensions arise. Irrespective of the assertion that this support is not to be interpreted as a restriction of state aid law, the determination of such aid as being in the public interest seems to pursue precisely this purpose.[114] This reading is supported by both the fact that the 'first-of-a-kind' requirement for subsidies is framed broadly and by the reference to Important Project of Common European Interest, an exception to the general prohibition of state aid as enshrined by Article 107(3)(b) TFEU.

While this constitutes an easing of restrictions on national funding and state aid for the semiconductor industry, this does not, on its own, constitute nor replace a comprehensive and independently funded EU industrial policy. Such a relaxation might enable Member States with deep pockets to attract investment into the semiconductor industry but comes at the cost of serious distortions of the EU's internal market, ie, by engaging in costly subsidy races among one another. This may further result in geographic asymmetries within the single market. In addition to relying largely on reallocated funding, the Chips Act gives Member States a central role in the new European Semiconductor Board, inviting political bargaining over fund distribution.[115]

Significantly changing this would require the transfer of more new powers, such as budgetary competences through the creation of own resources,[116] or by rooting a more robust legal basis in the framework of the Treaties – one that foresees a more dominant role for the supranational level.[117] For the time being, the EU's industrial policy competence under Article 173 TFEU remains relatively weak, although it can, in some cases, restrict the space available for national legislation.[118] As a result, industrial policy relies on internal market provisions like Article 114 TFEU to support substantive EU action. Because of these limitations, the mix of strategic forbearance in enforcing state aid law, combined with the reallocation of some substantial funding, still falls short of equipping the Union with the instruments needed to pursue an industrial policy comparable to that of a nation-state.[119] Consequently, it cannot transform the EU into a heavy weight in semiconductor manufacturing overnight.

The argument is not that an industrial policy capable of meeting today's challenges is impossible under the current framework. Rather, the law shapes and limits what is imaginable in terms of industrial policy, operating as a constraint when compared to other areas that rely on stronger and more established legal competences.[120] Historically, this challenge has frequently arisen when new responsibilities were to be exercised under the existing body of EU law, and the discussion of how to align the law better with the emerging geopolitical objectives is already gaining speed.[121]

Further, this does not preclude that such an embryo of an EU industrial policy may not bear fruits one day. In fact, a certain pattern of initially incomplete policy solutions became apparent over the diverse crises the EU faced during the past two decades. These included the

113 ibid Arts 16(2) and 17(3).

114 ibid Arts 16(1) and 17(3).

115 Daniel Gros, 'The European Chips Initiative' (*CEPS*, 10 February 2022) <https://www.ceps.eu/the-european-chips-initiative-industrial-policy-at-its-absolute-worst/> accessed 15 July 2025.

116 The post-pandemic debt-based recovery and resilience facility is considered a potential blueprint for future ambitions in that regard. See Regulation (EU) 2021/241 establishing the Recovery and Resilience Facility [2021] OJ L57/17.

117 Paul Dermine and Maria Patrin, 'Legal Foundations for a New EU Industrial Policy' (29 October 2024) LUHNIP Working Paper Series 3/2024 <https://leap.luiss.it/wp-content/uploads/2024/10/WP3.24-Legal-Foundations-for-a-New-EU-Industrial-Policy.pdf> accessed 19 November 2024.

118 ibid 3.

119 Matías Dewey and Donato Di Carlo, 'Governing through Non-enforcement: Regulatory Forbearance as Industrial Policy in Advanced Economies' (2022) 16 Regulation & Governance 930.

120 A similar argument can be made with regard to the question of funding. While past crises have shown that integrating this into the realm of the Union is not impossible, this does raise questions with regard to the limits to legal flexibility. See Matthias Ruffert and Päivi Leino-Sandberg, 'Next Generation EU and Its Constitutional Ramifications: A Critical Assessment' (2022) 59 Common Market Law Review 433.

121 For instance, this could involve placing greater emphasis on investment and innovation in merger assessments under EU competition law, as recommended by the Draghi Report. See Mario Draghi, 'The Future of European Competitiveness' (*European Commission*, 2024) <https://commission.europa.eu/topics/strengthening-european-competitiveness/eu-competitiveness-looking-ahead_en#paragraph_47059> accessed 15 July 2025.

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Eurozone crisis and the migration crisis, as well as the Covid-19 pandemic. As a result, European integration through crisis emerged as one of the better understood evolutionary paths of the EU.[122] Described in brief, these crises initially prompted incomplete legal innovations, driven by the inherent necessity created by the crisis itself.[123] In the medium to long term, these developments have – despite initially being incomplete – nevertheless served as the nucleus for further, more complete integration within the specific policy domains. These patters are referred to as 'integration by stealth'[124] or as 'spillovers'[125] by neo-functionalist theories of European integration.

Reflecting on the role of law in the industrial policy dimension of EU economic security, the structural impact of recent economic activism in the field of industrial policy may deepen integration in the medium to long term. For now, however, the lack of more comprehensive supranational powers means that the industrial policy dimension of the Economic Security Strategy must rely on the EU legal framework's capacity for innovation, rather than benefiting from more established procedural tools to advance its economic security objectives. While this certainly does not entirely stall the industrial policy agenda, this part of the strategy requires a more burdensome bargaining process owed to the lesser degree of integration in this area. While the fundamental logic of law as both the object and the agent of European integration remains intact, the current focus on mobilising law as an agent of change to establish an industrial policy seems to absorb much of the available political capital.[126] As a result, the actual objective of developing a robust industrial policy to underpin the economic security paradigm – the law as an object – remains comparatively underachieved.

3.3 THE EU'S EXTERNAL ECONOMIC AUTHORITY

As in other areas, the EU's external economic relations law under Article 207 TFEU has supported a series of legislative innovations in recent years. Many of these developments have been driven by what has been identified as an 'unilateral turn'[127] in the EU's trade policy. The Economic Security Strategy further reflects this unilateral turn, in calling for a 'rigorous use of Trade Defence Instruments to address such unfair practices and policies',[128] emphasising the need for deterrence through the relatively recently adopted ACI,[129] underlining the importance of inbound (and potentially outbound) Foreign Direct Investment Screening[130] as well as improving coordination on EU export control rules.[131]

Unlike industrial policy, the EU's conferred competences in trade and investment are strongly institutionalised under the CCP. Already in the early days of the ECSC, the blueprint for such a common policy arose out of a functional necessity: the establishment of a common market for coal and steel necessitated the harmonisation of external tariffs on these goods.[132] Following the same functional rationale as the ECSC, the Treaty of Rome entrusted the newly established

122 Genschel and Jachtenfuchs (n 55); Federico Fabbrini, 'The Legal Architecture of the Economic Responses to COVID-19: EMU beyond the Pandemic' (2022) 60 JCMS: Journal of Common Market Studies 186.

123 Erik Jones, R Daniel Kelemen and Sophie Meunier, 'Failing Forward? : Crises and Patterns of European Integration' (2021) 28 Journal of European Public Policy 1519.

124 Giandomenico Majone, *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth* (OUP 2005).

125 Ben Rosamond, *Theories of European Integration* (Macmillan 2000) 60.

126 Dehousse and Weiler (n 3).

127 Thomas Verellen and Alexandra Hofer, 'The Unilateral Turn in EU Trade and Investment Policy' (2023) 28 European Foreign Affairs Review 1; Ferdi De Ville, Simon Happersberger and Harri Kalimo, 'The Unilateral Turn in EU Trade Policy? The Origins and Characteristics of the EU's New Trade Instruments' (2023) 28 European Foreign Affairs Review 15.

128 European Commission, 'Joint Communication to the European Parliament, the European Council and the Council on "European Economic Security Strategy"' (n 1) 7.

129 ibid 8; Regulation (EU) 2023/2675 (n 39).

130 European Commission, 'Joint Communication to the European Parliament, the European Council and the Council on "European Economic Security Strategy"' (n 1) 8; Regulation (EU) 2019/452 (n 38).

131 European Commission, 'Joint Communication to the European Parliament, the European Council and the Council on "European Economic Security Strategy"' (n 1) 10; Regulation (EU) 2021/821 (n 41).

132 Treaty constituting the European Coal and Steel Community and connected documents (signed 18 April 1951, entered into force 23 July 1952) Art 72.

EEC in 1958 with the responsibility of developing a CCP.[133] Initially focused on tariffs, this authority gradually expanded, following a transitional period, to encompass broader aspects of trade.[134] This transfer of sovereignty to the supranational level, rooted in the need for an external policy aligned with internal harmonisation, remains in effect to this day. Article 3(1) TFEU stipulates that the CCP falls under the exclusive competence of the Union, meaning that only the EU may legislate and adopt legally binding acts under Article 207 TFEU.

As was the case for the provisions governing the internal market, the exact scope of the CCP remained contested and developed over the history of European integration. Landmark cases and opinions by the Court of Justice established legal doctrines that defined and, in some cases, expanded the exact scope of the CCP. This meant that the exclusive competences were gradually extended through the jurisprudence of the Court. The integration through law trajectory *inter alia* established the broad scope of the CCP in international commodity trade,[135] exclusive competence for trade in goods,[136] a shared competence for trade in services,[137] exclusive competence for issues covered by the Agreement on Trade Related Aspects of Intellectual Property Rights[138] and the exclusive competence for sustainable development provisions in free trade agreements.[139]

The development of the CCP was thus closely tied to the broader integration process driven by the internal market and was progressively codified through successive amendments to the Treaties, reflecting its expanding mandate and the political circumstances at the time. The Single European Act (1986) strengthened the EEC's ability to leverage its economic clout by introducing qualified majority voting and broadening the CCP's scope through the doctrine of implied external competence.[140] Although the subsequent Treaty reforms of Maastricht (1992), Amsterdam (1997) and Nice (2001) introduced only incremental rather than substantive changes to the CCP, the broader expansion of international trade following the decline of European communism laid the foundations for the EU's current policy.[141]

Building on the momentum of the Uruguay Round negotiations (1986–1993), the establishment of the WTO in 1995 institutionalised a comprehensive framework for global trade governance. For the first time, multilateral trade rules extended significantly beyond tariff reductions to cover areas such as services (through the General Agreement on Trade in Services, GATS), intellectual property rights (through the Agreement on Trade-Related Aspects of Intellectual Property Rights, TRIPS), technical barriers to trade and government procurement.[142] The WTO also introduced a binding dispute settlement mechanism, ensuring more consistent enforcement of international trade commitments.[143] These developments shaped the liberal orientation of the CCP as codified in the Treaty of Lisbon.[144] In addition, the changes to the EU's mandate conferred competence over a broader range of 'deep' trade measures extending beyond at-

133 Cae-One Kim, 'The Common Commercial Policy of the EEC' (1970) 4 Journal of World Trade 20.

134 ibid.

135 Opinion 1/78, *International Agreement on Natural Rubber*, EU:C:1979:224.

136 Opinion 1/94, *WTO Agreement*, EU:C:1994:384.

137 Opinion 1/08, *General Agreement on Trade in Services (GATS)*, EU:C:2009:739.

138 Case C-414/11, *Daiichi Sankyo*, EU:C:2013:520.

139 Opinion 2/15, *Singapore FTA*, EU:C:2017:376.

140 Mark Pollack and Gregory Shaffer, 'Transatlantic Governance in Historical and Theoretical Perspective' (2004) University of Minnesota Law School Legal Studies Research Series, Research Paper No. 10-25, 13.

141 These changes have been referred to 'patchwork adaptations' of the legal framework to the dramatically changing realities of the 1990s. See Sieglinde Gstohl and Dirk De Bievre, *The Trade Policy of the European Union* (Palgrave 2018) 36.

142 Peter Van Den Bossche and Denise Prévost, *Essentials of WTO Law* (2nd edn, CUP 2021) 10-29.

143 Petros C Mavroidis, *The WTO Dispute Settlement System: How, Why and Where?* (Edward Elgar Publishing 2022).

144 This liberal mandate is captured in Art 206 TFEU, stating that the 'Union shall contribute … to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers'. See also Marise Cremona, *A Quiet Revolution: The Common Commercial Policy Six Years after the Treaty of Lisbon* (Swedish Institute for European Policy Studies (SIEPS) 2017) 32.

the-border measures,[145] although the precise scope of this competence was frequently subject to debate.[146]

What implications does this have for the role of legal competences in the emerging economic security paradigm? Both procedurally and substantively, a strong and well-established legal foundation exists to advance the trade dimension of the strategy. Procedurally, the CCP mirrors the integration and harmonisation of the internal market: as an exclusive competence of the Union – unlike the CFSP – it is subject to the ordinary legislative procedure, thereby significantly limiting the role of Member States in shaping policy.[147] Substantively, the growing importance of international trade relations throughout the EU's evolution, first under the GATT framework and later within the institutional structure of the WTO, has resulted in the CCP acquiring an increasingly broad and comprehensive scope.[148]

The example of the ACI demonstrates how the dual role of law can have concrete implications for the practice of economic security within the EU. Grounded in Article 207(2) TFEU, the instrument outlines a range of economic sanctions designed to address instances of economic coercion that threaten to interfere with the sovereign choices of the EU or its Member States.[149] As the mentioning of the instrument in the EU's Economic Security Strategy makes clear, there is a strong security component to the instrument. Just like economic sanctions under the EU's CFSP competence (referred to as restrictive measures), the ACI serves security objectives by using economic tools. The frequently cited Lithuania example, under the impression of which the instrument was finally adopted, further underscores this point. In brief, the Lithuania saga unfolded as follows: the country permitted Taiwan to open a representative office, leading China to unilaterally suspend customs clearance for Lithuanian goods and pressure multinationals doing business in China to cease operations in the country.[150] Although trade with China amounted to less than 1% of total Lithuanian exports, it underscored how economic instruments can constrain the ability to make independent policy choices, reflecting a deeper strategic context that goes beyond mere trade concerns.[151]

Despite being located at the intersection of trade and security, the ACI – thanks to its CCP legal basis – emerged from a different starting point when compared to the Chips Act. The range of potential countermeasures listed under Annex I of the ACI fully leverages the EU's trade competence, encompassing areas such as restricting the provision of services and protecting intellectual property rights.[152] In turn, such a range of counter measures is only possible because of the historically comprehensive material scope of the CCP. Procedurally, the ACI benefits, unlike CFSP sanctions, from the fact that the determination of economic coercion is made by a Council implementing act,[153] and adopted by a qualified majority of the Member States, while the selection of response measures is carried out through a Commission implementing act that can only be blocked by a qualified majority of the Member States.[154]

Although the procedural elements of the ACI underwent changes during the political negotiations – reflecting the Member States' desire to retain greater control over a trade instrument so closely linked to economic security – the outcome points to a parallel, yet opposite, trend when compared to the industrial policy dimension of economic security.[155] In the case of the Chips

145 Billy Alexis Melo Araujo, *The EU Deep Trade Agenda: Law and Policy* (1st edn, OUP 2016).

146 See among others Opinion 2/15, *Singapore FTA* EU(n 140); Opinion 1/17, *CETA*, EU:C:2019:341.

147 TFEU, Art 3(1)(e).

148 TFEU, Art 207(1).

149 Regulation (EU) 2023/2675 (n 39).

150 Kathrin Hille, 'Lithuania Shows China's Coercive Trade Tactics Are Hard to Counter' *Financial Times* (15 December 2021).

151 Luigi Lonardo and Viktor Szép, 'The Use of Sanctions to Achieve EU Strategic Autonomy: Restrictive Measures, the Blocking Statute and the Anti-Coercion Instrument' (2023) 28 European Foreign Affairs Review 368.

152 Lukas Schaupp, 'Decoding the Intersection of Trade and Security in the EU's Anti-Coercion Instrument' (2024) 29 European Foreign Affairs Review 144.

153 Regulation (EU) 2023/2675 (n 39) Art 5(1).

154 ibid Art 8(1). For the detailed decision-making procedure, see Lukas Schaupp, 'Forging a Geopolitical Union: The EU's Assertive Trade Policy and the Anti-Coercion Instrument' in Marek Neuman and others (eds), *A Geopolitical Europe in the Making? The EU's Actorness in a (De-)Globalising World* (Asser Press 2025) 147–164.

155 Viktor Szép, 'The Legislative History of the EU's Anti-Coercion Instrument' (2024) 25 ERA Forum 127.

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Act, ambitions were constrained from the beginning: rather than establishing a strong common industrial policy framework, it largely resulted in a reallocation of funding controlled by Member States, leaving it vulnerable to national interests and heavily reliant on the relaxation of state aid rules rather than a clear supranational vision. By contrast, the ACI began with both a broad material scope and an ambitious supranational decision-making structure. Although not immune to politically driven changes, the initial Commission proposal defined a different starting point.[156] Of course, this does not mean that any legislative instrument adopted under Article 207 TFEU is necessarily a breakthrough but rather that a more assertive stance appears *prima facie* more likely.[157]

In fact, whether the ACI is really a trade 'bazooka'[158] – a term increasingly used to describe the instrument, which still employs features of the EU's more cautious, intergovernmental CFSP approach – depends on the framing.[159] Is it a bazooka compared to the historically more cautious EU approach, or is it a bazooka compared to the trade and economic security practices of other nation states?[160] There is a difference between both, and any judgement on the matter enters the realm of statecraft and regulatory design. Ultimately, it raises the deeper question of the purpose of economic security – and the means by which it may rightfully be pursued.[161] The mere finding that, despite the *sui generis* nature of the EU,[162] the trade powers of the bloc still allow for a valid analogy to other states, speaks to the relative strength of it.[163]

In this sense, legislative measures adopted under Article 207 TFEU better support the Economic Security Strategy's aspiration to become more than the sum of 27 national efforts – a genuinely supranational EU approach to economic security. Owing to the longstanding integration history in this area, the law is no longer primarily needed as an integrative force or as a means of authorising an initially incomplete policy solution, since significant competence gaps at the European level are absent under the CCP. Therefore, a more functional understanding of its role becomes possible in this area, where the EU possesses state-like powers.

4. CONCLUSION

The role of law in EU economic security can thus be understood as influencing policy outputs through the scope of the underlying legal bases. The foregoing analysis has shown that adopting economic security measures on the basis of strong and well-established legal provisions tends to broaden the scope for legal innovation at the EU level. Considering the evolutionary trajectory of European integration, this is unsurprising. On a theoretical level, the law serves a dual function within the EU: it both authorises action in new areas of policymaking (ie integration through law) and regulates action more substantively in areas that are already firmly integrated. This becomes apparent when looking at the EU's weaker industrial policy competences. Here, authorisation often requires greater political capital, as the EU's competence to act is more contested and must be balanced against national responsibilities. In such cases, the law tends to constrain imagination to tolerated exceptions (such as state aid forbearance). By contrast, EU action in the area of trade is *prima facie* allowed, which reverses this dynamic to some extent. As the ACI demonstrated, political capital was required not to enable supranational

156 European Commission, 'Proposal for a Regulation on the protection of the Union and its Member States from economic coercion by third countries' COM(2021) 775 final.

157 The most powerful legal tools are useless if the political appetite to use them is missing, as the recent confrontation with the US shows. See Alan Beattie, 'A Trumpian Offer You Can Only Refuse' *Financial Times* (14 July 2025).

158 Cecilia Malmström, 'Could the EU's "Big Bazooka" Be Deployed against the US?' (*PIIE*, 14 April 2025) <https://www.piie.com/blogs/realtime-economics/2025/could-eus-big-bazooka-be-deployed-against-us> accessed 15 July 2025.

159 Schaupp (n 156).

160 Alan Beattie, 'EU Ponders How to Respond to a Fresh Trump Onslaught' *Financial Times* (10 February 2025).

161 Mona Paulsen, 'The Past, Present, and Potential of Economic Security' [2024] SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4604958> accessed 20 November 2025; Mona Pinchis-Paulsen, 'Let's Agree to Disagree: A Strategy for Trade-Security' (2022) 25 Journal of International Economic Law 527.

162 Neil Walker, 'Legal Theory and the European Union: A 25th Anniversary Essay' (2005) 25 Oxford Journal of Legal Studies 581, 585.

163 Of course, we can compare everything with everything else in theory. A comparison in other security-related areas, most clearly in foreign and security policy, but also, to some extent, in industrial policy as argued here, would however quickly arrive at the lack of legal competence as a major difference.

action, but rather to limit it through a less centralised decision-making procedure. Finally, economic security pursued through harmonisation displays varying characteristics across different measures. Instruments closely tied to industrial policy continue to suffer from the same limitations, most notably, the lack of comprehensive funding powers. Those genuinely aimed at harmonising regulatory approaches, however, tend to do so comprehensively. Within this latter group, the EU's economic security agenda appears to be pushing harmonisation in a more strategic direction, beyond the traditional focus on ensuring the functioning of the internal market. Consequently, the law does have a shaping effect on EU economic security, though not in an absolute sense. While the instruments developed to advance this agenda are never mono-causal, law appears to define the space of what is politically imaginable.

COMPETING INTERESTS

The author has no competing interests to declare.

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