**The relationship between the legal principle of autonomy and strategic autonomy. Conceptions, limits, normative assessments**

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1. **Introduction**

The question moving the inquiry of this article is the relationship between two principles of ‘autonomy’.[[1]](#footnote-1) The first autonomy is what the Court of Justice of the European Union (CJEU) calls the principle of autonomy of EU law. In this ‘self-perception’ (Odermatt, 2021, p. 10) of the EU, autonomy derives from the fact that EU law stems from a distinctive source of law (the fundamental Treaties), separating it from international law and domestic law of Member States; and from the fact that the EU has special characteristics (including supremacy over national law, the direct effect of certain provisions, etc (Lenaerts and Gutiérrez-Fons, 2018, p. 106)). While the principle has not been definitively articulated in the case law, and therefore its ramifications are yet to be fully explored in academic writings, it can be stated that that the principle of autonomy recognises and preserves the distinctive features of EU law. For example, the legal principle of autonomy shields the EU legal order from actual or potential interference from international law or domestic law of Member States which affect the essential characteristics of the EU legal order; and frames the essential characteristics of the EU enabling it to act as ‘as a self-sufficient system of norms’ (Lenaerts and Gutiérrez-Fons, 2018, p. 106).

The second autonomy is what (other) EU institutions refer to as strategic autonomy. In the November 2016 Council conclusion, it was circularly defined as the ‘capacity to act autonomously when and where necessary and with partners wherever possible’ (Council of the EU, 2016). The phrase was initially used in the context of security and defence, where it was employed jointly by France and the UK to refer to ‘means of regaining political space vis-à-vis the United States’ (according to the more recent formulation by Borrell 2020), in other words, to the idea that the EU should have common decision-making and action, backed up by credible military forces, in order to respond to international crises even when NATO was not involved. More recently, the concept has been widened to other subjects, including technology or economics. The concept now features in strategic documents such as the 2016 Global Strategy, the 2021 Trade Policy Review (An Open, Sustainable and Assertive Trade Policy), the 2021 Strategic Foresight Report ‘The EU’s capacity and freedom to act’, and the 2022 Strategic Compass, albeit its meaning remains undefinable.

Both the legal principle of autonomy and the notion of strategic autonomy recognise that the EU has certain essential characteristics, that these characteristics ought to be preserved, and that the EU should have the instruments to preserve those characteristics. While legal autonomy is presented by the Court as a constitutional feature (that is, ‘a given’), strategic autonomy is presented as a policy choice. But what is the precise relationship between the two? Are the autonomy of EU law and strategic autonomy, in fact, an expression of the same autonomy? Or is strategic autonomy perhaps a characteristic of the EU protected, tolerated, or necessitated by the legal principle of autonomy? Or perhaps it is the other way round: does strategic autonomy *permit* (refers to ‘the factual underpinnings of’ (‘Editorial Comments: Keeping Europeanism at Bay? Strategic Autonomy as a Constitutional Problem’, 2022, p. 315)) the legal principle of autonomy? To attempt an answer, this article considers three sets of issues: various conceptions of these principles; their limits; and the normative assessment offered in the scholarly literature.

This article offers a synthetic view of the conceptions of autonomy as they are articulated in EU law (section 2) and in EU strategic documents respectively (section 3) (and on which the other papers in this panel zoom in).

It is necessary to start with ‘conceptions’ because any principle operates at a level of abstraction, and so does autonomy.[[2]](#footnote-2) It does not refer to a ‘fact of the matter’ which may be true or false, but to a concept. The abstract nature of a principle is a characteristic which makes it inevitable that there exist different conceptions thereof. Sometimes, especially in EU documents, the ambiguity is ‘constructive’ and deliberate, precisely in order to allow interpretation of the concept to be shaped by political priorities as they evolve: ‘strategic autonomy does not owe its popularity to its explanatory power as a theoretical concept, but to its practical versatility as a slogan that unites a panoply of instruments with which the EU tries to cope with the vanishing reliability of its connections and of its place in the world to its best advantage’ (‘Editorial Comments: Keeping Europeanism at Bay? Strategic Autonomy as a Constitutional Problem’, 2022, p. 315).

Both legal and strategic autonomy can be understood in a purely negative fashion (autonomy as negative freedom: what EU law is not; independence from external dominion), and in a positive fashion, as enabler of action (autonomy as positive freedom: what EU law is; what the EU can do in the international order) and, within this conception of autonomy as enabler of action, the article distinguishes a procedural and a substantive dimension. Procedurally, autonomy identifies conditions enabling action. In their substantive dimension, one may define autonomy as conditional openness: a principle of behaviour allowing the other systems to interact with, and affect, the EU, provided that certain core characteristics of the EU are not forfeited. This article contends that that autonomy protects both formal characteristics of the EU legal system and substantive choices of the EU legislature.

The article then moves on to consider conceptual limits of (legal or strategic) autonomy as providing substantive guidance into the EU’s policy choices (section 4). Even if an understanding of autonomy as conditional openness is correct, it does not solve the issue that it does not determines how much the EU should protect public interests, or, in other words, not even a substantive conception of autonomy gives concrete guidance as to how the EU should rank interests/objectives which are mutually incompatible. That is a (political?) choice, for the legislature to make.

These problems are different from the normative question – which often implicitly (unconsciously?) underlies discussions on the topic – of whether, and if so how much, autonomy is good for the EU. To normative anxieties on too much fragmentation of international law (Koskenniemi and Leino, 2002), functional grounds such as better protection of fundamental rights are contraposed. While debates on the desirability of legal autonomy often focus on fundamental rights, those on strategic autonomy involve the efficiency of international security systems and of Member States’ international commitments. The article then considers views precisely on these normative questions (section 5). It does so by reference to views of other authors, rather than weighing in on the debate.

1. **Different conceptions of the principle of autonomy of EU law**

As a matter of EU law, the principle of autonomy developed in the case law of the Court can be defined negatively (what EU law is not) and positively (what EU law is) (Lenaerts and Gutiérrez-Fons, 2018).

Negative autonomy clarifies that EU law is not (just) international law and that it is separate from the law of Member States (de Witte, 2010, p. 142). This is because the EU stems from an autonomous source of law constituting a new legal order (*Costa*), it is enforced by individuals and not exclusively by States (*Van Gend*), and other important principles of public international law are not applied, such as the *lex posterior* principle (Case 6/64 *Costa*) or retaliation (EU law does not allow states to adopt counter-measures for violation of EU obligations by the other parties: Joined Cases 90/63 and 91/63 *Commission v Belgium and Luxembourg* (de Witte, 2011, p. 39; Lenaerts and Gutiérrez-Fons, 2018)). Other principles of international law are not entirely given up, but rather transformed when applied to the EU legal order: it is the case of *pacta sunt servanda*, which is ‘adopted by and at the same time transformed into the more vibrant EU law principle of loyalty’ (Klamert, 2017, p. 821). It follows that some international legal obligations may be set aside when they clash with EU law (Joined Cases C-402/05 P and C- 415/05 P, Kadi and Al Barakaat v. Council para 282).

Defined in positive terms, the legal principle of autonomy recognises certain essential characteristics which endow the EU with a constitutional identity, and which cannot be adversely affected lest the autonomy of EU law be breached. The blueprint of this positive autonomy was articulated in Opinion 2/13, in which the Court explained why the draft accession of the EU to the ECHR would not be compatible with the essential characteristics of the EU. Elements of the ‘identity’ of the EU as a ‘common legal order’ (to use the phrasing of Case C‑156/21 *C v Hungary* para 127) are, for example, the EU values referred to in Article 2 TEU (see also *Wightman*), the principle of mutual trust between the Member States, the system of protection of fundamental rights provided by the Charter, the original institutional arrangements such as the preliminary ruling procedure, and others mentioned in Opinion 2/13 at paragraphs 165-176 (Lenaerts and Gutiérrez-Fons, 2018, p. 106).

The principle of autonomy of EU law resulted, inter alia, in the decision that a tribunal outside the legal system of the EU cannot bind EU institutions to a certain interpretation of EU law (Opinion 2/13); that a tribunal outside the legal system of the EU cannot call into question the democratic choice of EU institutions who determined a given level of protection of public interests (and, since the tribunal established by the EU-Canada agreement did not do as much, it was found to be compatible with EU law in Opinion 1/17). A maximalist and a minimalist conceptions of the principle of autonomy have been identified (Gatti, 2020, p. 93): ‘in *Achmea*, the Court adopted a formalist and allegedly ‘maximalist’ reading of the autonomy of EU, since it focused on the ‘abstract possibility’ of interference with the EU’s autonomy […], By contrast, the Court adopted a more restrained understanding of autonomy in other cases, such as Opinion 1/00’. The distinction would derive from the context (Kassoti and Odermatt, 2020), even though it is not clear what exactly the ‘context’ is, nor how precisely it affects the Court’s understanding of autonomy. More on these difficulties is said later.

Honing in on the conception of autonomy in its positive fashion, another distinction can be made: the legal principle of autonomy protects the integrity of essential characteristics of EU law (Klamert, 2017, p. 823), but are these characteristics of substance, or characteristics of structure? Does the legal principle of autonomy protect the box, or does it determine also the content of the box?

(Shuibhne, 2019, p. 5) identifies a ‘substantive dimension’ of the principle of autonomy. The substantive aspect of it consists of the protection of fundamental rights (citing *Kadi* para 316: ‘the review by the Court of the validity of any [Union] measure in the light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the [TFEU] as an autonomous legal system which is not to be prejudiced by an international agreement’). And, more generally, in the protection of EU (regulatory) standards and objectives vis-à-vis international law (the case law on autonomous interpretation of Charter rights, permitted by the explanations to Article 52(3) of the Charter, could be read as example of this). This appeared to be confirmed also by Opinion 1/17, where the Court found that a tribunal outside the EU legal system could not affect the determination made by the EU legislature of the standard of EU public interest (Kübek, 2020). The autonomy of EU law is adversely affected whenever it is not the EU legislature to set standards. If this view is accepted, autonomy protects matters of substance. It is unclear whether this procedural understanding of permits a regression in the standard of protection, and if so at what conditions, but this follows from the conceptual problems discussed in section 4.

Contrary to NicShuibhne, other authors suggest that ‘the EU standards of protection of [a] public interest do not, as such, fall under the principle of autonomy’ (Neframi, 2020, p. 44) and that ‘[t]he EU legal order provides an enclosed constitutional space where the ECJ, as the supreme court, is committed to respecting principles but not outcomes’ (Tridimas, 2018, p. 261). This is evidenced by the fact that, for example, the EU set (and amend) its standards by negotiating on them with third countries: in this case, the necessary condition is the consent of the European Parliament (Lenaerts *et al.*, 2021, p. 66) (a point of particular relevance because it suggests that it is for the EU legislature to make choices of substance).

In this case, the distinction between procedure and substance is probably too blurred to be meaningful, and for this reason this article suggests that autonomy protects both formal characteristics and substantive choices of the EU legislature, resulting in the EU legal order being conditionally open. In the words of (Lenaerts *et al.*, 2021, p. 48): ‘the concept of autonomy of the EU legal order in no way conveys the message that the EU and its law are euro-centric and that the Court of Justice of the European Union seeks to insulate EU law from external influences by building walls that prevent the migration of legal ideas. Autonomy rather enables the Court of Justice to strike the right balance between the need to preserve the values on which the EU is founded and openness to other legal orders.’ This is in contrast to scholars who have considered Opinion 2/13 as separating completely the EU legal order from international law (Spaventa, 2015, p. 56; Eeckhout, 2015, p. 991).

The concept of conditional openness is elaborated upon in section 4.

1. **The notion of Strategic autonomy seems to be closer to the “substance” concept of legal autonomy**

There is no blueprint of strategic autonomy, as opposed to the articulation of legal autonomy contained in Opinion 2/13. The Commission’s 2021 Strategic Foresight Report ‘The EU’s capacity and freedom to act’ does mention several areas in which the EU should act autonomous capacity, but these are examples of its desirable manifestation, rather than attempts at definition. Unlike legal autonomy, the notion of strategic autonomy has not been further articulated in the case law, at least not in explicit terms. One could argue that there is an implicit stance of the Court on the substance of the things the EU should do – on which see section 3.2 below.

By way of analogy with the legal principle of autonomy, it is possible to affirm that, in the negative, strategic autonomy seeks to distinguish what EU (security and defence) policy is not: it is not NATO, it is not US, and it is independent from external subjugation.

In the positive, strategic autonomy protects certain essential characteristics (ways and instruments) through which the EU determines and sets its objectives in international relations: the ability of the EU ‘to live by its laws and norms both by protecting these internally and by partnering multilaterally in an international order based upon the rules it has contributed to shaping’ (Tocci, 2021, p. 3).

*3..1. Strategic autonomy in a negative fashion: freedom from subjugation*

Given the genesis and context of strategic autonomy, ‘what the EU is not’ means, as a minimum, that the EU does not depend on either US or NATO for its own security and defence. Unlike the legal principle of autonomy, strategic autonomy is generally not defined by reference to autonomy from the Member States. This is because there is, in fact, no such autonomy but rather a high degree of hybridity: in the core of military and defence matters, the EU still acts through Member States capabilities (Koutrakos, 2013).

The use of the term autonomy originated, for EU policies, in the field of defence. In 1998, in St Malo, a seminal Franco-British summit resulted in a declaration that called for the Union to have ‘the capacity for autonomous action’,[[3]](#footnote-3) within the newly created Amsterdam Treaty. The formulation of the St Malo declaration was the result of a compromise: while France would have wanted ‘independent’ action (i.e., independent from the US), the UK wanted a more cautious language (‘complementary’).

Even in the context of security and defence, there is no evidence that strategic autonomy was ever understood exclusively as “freedom from” (for example, indeed, freedom from NATO or from Russia). Granted, security offers a meta-rationale for the very existence of the EU, but the term of (strategic) autonomy has never been used to mean freedom from an external enemy. “To keep the Russians out” was, instead, NATO’s mission, according to the well-known summary by its first Secretary General, Lord Ismay. For that kind of security – closer to independence than autonomy – there is Article 21(2) TEU which provides as first objective of the Union’s external action to “safeguard its values, fundamental interests, security, *independence and integrity*” (emphasis added).

To be sure, strategic autonomy *is* also independence, simply because there can be no autonomy without independence. This dimension of ‘freedom from’ appears, in the proposed anti-coercion instrument.

*3.2. Autonomy in a positive fashion: a question of procedure or of substance?*

Strategic autonomy spilled over from defence to other areas (Helwig and Sinkkonen, 2022; Borrell, 2020) and it acquired a meaning close to the freedom for the EU to make its own choices, the ‘capacity to act autonomously’ mentioned in the November 2016 Council conclusions (Council of the EU, 2016) and further articulated in the Commission’s 2021 Strategic Foresight Report ‘The EU’s capacity and freedom to act’. But is strategic autonomy, so to speak, purely procedural – or does it offer a vision of substance of about what the EU’s choices should be?

In a sense, much like the legal principle of autonomy, strategic autonomy also protects certain essential characteristics of the EU, namely ways and instruments through which the EU can act in its international relations. These ‘ways and instruments’ have certainly a procedural, formal dimension. But they also give an indication of the substance of what the EU can do in its foreign policy.

In its procedural sense, autonomy means equipping oneself with instruments to pursue objectives, ‘an essential enabler of Europe’s shaping power’ (Grevi, 2019). Here, the key word is enabler, which suggests that autonomy is there to help the EU achieve certain objectives, but which does not specify what the objectives are. Grevi therefore identifies autonomy in purely formal terms, in three dimensions (political, institutional, and functional).

Autonomy is procedural in so far as it specifies ‘ways’. For example, institutional decision-making: ‘we understand strategic autonomy as the ability to set one’s own priorities and make one’s own decisions in matters of foreign policy and security, together with the institutional, political and material wherewithal to carry these through – in cooperation with third parties, or if need be alone. Strong strategic autonomy means being able to set, modify and enforce international rules, as opposed to (unwillingly) obey rules set by others’ (Barbara Lippert, Nicolai von Ondarza and Volker Perthes 2019). The legal principle of autonomy also suggests as much: EU institutions are set to carry out their role to enable the EU to act, and in their tasks certain essential characteristics cannot be affected. The CJEU’s jurisdictional monopoly being a prime example: as Opinion 2/13 clarifies, there cannot be a court outside the EU legal system which has jurisdiction over EU acts on which the CJEU itself does not have jurisdiction (such as some acts adopted under Common Foreign and Security Policy).

Strategic autonomy is procedural in so far as it specifies ‘instruments’, meaning how the EU mobilises resources: money and defence equipment. The most important of defence equipment are military means. In the aftermath of the St Malo declaration, Tony Blair insisted that it would not entail the creation of an European army, and so did Federica Mogherini after the 2016 Global Strategy (Howorth, 2018, p. 525), but ‘if the concept of ‘strategic autonomy’ is ever to move beyond the level of discourse, it is difficult to imagine how it would not eventually lead to some form of highly coordinated, multi-national, joint and tightly integrated defence capacity’ (ibid 526).

The notion of strategic hedging also points to this direction of strategic autonomy as a procedural concept. If the EU cannot fully trust its transatlantic partner, ‘strategic hedging can be seen as a way to ensure that EU defence structures and policies are autonomous and effective enough to take on a range of military tasks should the US gradually withdraw from Europe over time. In this regard, “strategic hedging behavior sic is meant to serve as a sort of insurance policy that guards against”[[4]](#footnote-4)’ (Fiott)

It is procedural in that it does not constrain the substance (i.e. the actual choices of the EU) as it appears to be confirmed by the case law of the Court on EU constitutional objectives. Case law of the Court on the choices of EU institutions confirms that they enjoy ‘broad discretion in areas which involve the making by that institution of political, economic and social choices, and in which it is called upon to undertake complex assessments’.[[5]](#footnote-5) In light of the ‘primordial importance of maintaining peace’[[6]](#footnote-6) only ‘manifestly inappropriate’[[7]](#footnote-7) measures would be struck down.

But is strategic autonomy value-neutral, or is there an indication of what those choices should be? Is there an indication of the substance of what the EU should choose? Arguably, there is: it is about safeguarding EU values, which are also values of substance. This is conditional openness. As a side note, the Trade Policy Review of 2021 mentions requisites of procedure (openness and assertiveness) but also one of substance: sustainability.

To begin with, one should note that the fact that this autonomy is ‘strategic’ is not decisive either way. In the context of this article’s enquiry, the addition of the word strategic does not add anything meaningful because a strategy is about expected outcomes: by definition, a strategy is purely procedural and says nothing about the substance of the outcome.

Further, the distinction between (formal) process and (substantive) value is untenable. For example, fairness is a procedural requirement, but it is not value neutral. Some of the ‘ways’ that the previous section listed as procedural are in fact not value-neutral, but are instead wedded to a liberal view (Juncos, 2017, p. 13).

Turning now to EU strategic documents, the Commission’s 2021 Strategic Foresight Report ‘The EU’s capacity and freedom to act’ mentions several areas in which the Commission hopes the EU would strengthen its strategic autonomy. These involve also some choices of substance: a sufficient supply of decarbonized and affordable energy and access to outer space. In the 2022 Strategic Compass it is only mentioned in a short passage, without further articulation (‘This Strategic Compass will enhance the EU’s strategic autonomy and its ability to work with partners to safeguard its values and interests’[[8]](#footnote-8)), suggesting that the entire Strategic Compass gives expression to the concept. If this reading is correct, then the notion to which the Strategic Compass refers comprises a substantive dimension. This reading could be confirmed by the reference in the 2016 EU Global Strategy to the aspiration of obtaining an ‘appropriate level of strategic autonomy’. It is possible to read the sentence as implying that strategic autonomy is a substantive requirement, because an ‘appropriate level of’ something purely procedural is a meaningless formulation.

Manners argued that the EU has a normative strategy centred on the promotion of sustainable peace (Manners, 2008). Even those who criticise the EU for having the strategy of a small power admit that there is a ‘colour’ to the strategy, that is a substantive dimension, namely the promotion of international norms and institutions and the preference not to use force (Toje, 2010). (Tocci, 2021, p. 25) considers democratic and economic resilience to fall under strategic autonomy: research on technological advancements in order to keep up with US and China refers to a vision of substance of what the EU should do. Legal scholars appear to support this view, as confirmed by the recent literature on the normative value of EU constitutional objectives. Many authors have stressed that EU constitutional objectives offer (binding) legal standards for the EU’s conduct of its international relations (Kassoti and Wessel, Forthcoming; Sommermann, 2013, p. 160; Cannizzaro, 2021). Reference is typically made to Article 3(5) TEU[[9]](#footnote-9) as well as to Article 21(1) TEU.[[10]](#footnote-10)

1. **Autonomy as conditional openness – and its conceptual difficulties**

Autonomy is not autarchy. It is openness, subject to the condition that the core character of the EU is not affected. Both the legal principle of autonomy and the notion of strategic autonomy recognise that the EU has certain essential characteristics, that these characteristics ought to be preserved (this is the ‘condition’), and that the EU should have the instruments to preserve those characteristics. Since the relationship between the concepts is intricate and highly self-referential, one could go as far as to say that strategic autonomy is, in fact, one of the essential characteristics of the EU.

In principle, EU (law) is open to external influence, cooperation, and even challenges. Even though the EU is in fact set up by international law (de Witte, 2011, p. 21; Pellet, 1997), according to the orthodoxy of the Court, EU law is not (just) international law but rather ‘its own legal system’ (Cases C-6/90 and C-9/90 *Francovich* para 31) with its own ‘identity’ (Case C‑156/21 *C v Hungary* para 127). For this reason, in the legal literature, patterns of divergence from international law in the Court’s case law are often stressed (Gatti, 2020, p. 92; Lenaerts *et al.*, 2021; Weiler and Haltern, 1998, p. 342). However, while EU law is not (just) international law, EU Treaties are formally international legal instruments: rules on ratification and amendments follow international law (de Witte, 2011, p. 33). The Court has no difficulties in acknowledging that EU legal order is also open to international Treaty law (see the reference to respect for the principles of the UN Charter – Article 3(5) and 21(1) TEU – and the 1951 Refugee Convention – Article 78(1) TFEU), to ius cogens (such as the respect for the principle of self-determination[[11]](#footnote-11)), and to customary international law (C-308/06 *Intertanko*). The EU legal order is also linked to international law by way of ‘aspiration’, in the sense that the EU is constitutionally committed to accede to the ECHR (Article 6 TEU). Some have even argued that the way the relationship between EU law and national law is not in fact one of autonomy, but reflects the structure of international law because ‘[t]here is no single set of constitutional principles that determines the application of EU law by the Member States’ (Eleftheriadis, 2010, p. 121). EU law is also open to some challenges from external actors, such a third country, as the Court admitted in *Venezuela*.

But even if (legal or strategic) autonomy is about substance, if it captures a vision of ‘conditional openness’ for the EU, this does not solve two conceptual difficulties: a choice between mutually incompatible (strategic) objectives – which, in its legal translation, is the question on the level of protection to be afforded to fundamental rights or public interests. In other words, autonomy preserves certain essential characteristics of the EU, and it gives an indication as to the substance of those characteristics (what fundamental rights, what values, what norms are worthy of protection): but it does not go as far as to determine ‘how much’ those characteristics are to be protected. These problems are conceptual, in the sense that they are independent from the normative debate over the desirability, and the extent of the desirability, of the EU’s autonomy. The following serve as illustration in the context of strategic autonomy first, and legal autonomy then.

An example of mutually incompatible strategic objectives is identified by (Cottey, 2020): ‘the EU has since the 1990s pursued a policy that has sought to combine a relatively open door enlargement policy, assistance to the former Soviet states and building a strategic partnership with Russia’. A related question, possibly to be explored by the other papers, is whether it make a difference if the EU is acting under CFSP or CCP? In both cases the EU has potentially contradictory objectives, without the principle of autonomy (nor any strategy) providing guidance to rank them in order of preference or of likelihood of external actor’s behaviour. Cottey (Cottey, 2020, p. 283) states that the decision-making rules in CFSP make it more difficult to define common positions than in CCP, where qualified majority voting is the rule.

As a matter of legal autonomy, it shall be recalled that the principle of autonomy is more or less encompassing – it expands and contracts – depending on the context. Some authors have tried to identify what exactly is the context (Kassoti and Odermatt, 2020). It is akin to the nature of an agreement whose compatibility with the autonomy of EU law is at stake (Kassoti and Odermatt, 2020). Or it could be the existence of EU legislation (see AG Hogan opinion in C-336/19 para 86 reference to EU legislation providing a ‘more specific level of protection’ of a fundamental right in EU legislation to distinguish it from the same right as protected under the ECHR); or something else (see AG Bot in Melloni, para 110). But the case law does not provide decisive guidance to know what the context is, nor how it influences the Court’s understanding of (positive) autonomy (Moreno-Lax, 2019, p. 71) and therefore, a fortiori, autonomy does not set the substantive level of protection guaranteed by the EU. In fact, on balancing of public interests (and, possibly, the level of protection of fundamental rights), Opinion 1/17 explained that the CETA agreement, ‘together with its Joint Interpretation Instrument, made it clear that it was not for the envisaged tribunals to adjudicate on the *level of protection* of a public interest that led to the introduction by the EU legislator of regulatory restrictions in the sphere of the internal market’(Lenaerts *et al.*, 2021, p. 65). Presumably, pursuant to the democratic principle (which is still part of autonomy…), that is a decision for the EU legislator alone. So autonomy cannot, not even in its substantial dimension, be the determining factor to determine the level of protection of fundamental rights.

The same is true for strategic autonomy. The principle operates at such a level of abstraction that its manifestations are context-dependent, and the principle does not provide guidance on the absolute or relative value of each objective (‘how much’ to pursue it, whether to pursue one over another). In this limited sense, one could go as far as to venture that strategic autonomy is nothing else but one of the essential characteristics (albeit, admittedly, not mentioned in Opinion 2/13) of the EU protected by the legal principle of autonomy. Strategic autonomy, in other words, protects “ways and means” for the EU to make its own foreign policy choices: on these institutional arrangements, resources (monetary, military, and industrial) it should be only for the EU legislature to have the final word, either through the adoption of internal acts, or through the negotiation of an international agreement.

1. **The normative assessment: doctrinal debates**

A final set of issues is the normative debate on the desirability of autonomy, and on the degree of tolerable or necessary autonomy for the EU. Arguments in favour of autonomy concern efficiency: in the protection of fundamental rights, and of the EU more broadly. The EU’s distinctive system (that, the Charter), adds a further layer of protection in addition to national constitutions and ECHR. This is, in turn, positive because one could take the view that fundamental rights are best served by competition between courts (Tridimas, 2018, p. 261), as it has occasionally been the case (Lonardo, 2021, p. 708). The Russian invasion of Ukraine gives a new urgency to the debate on strategic autonomy in defence matters (Helwig and Sinkkonen, 2022, p. 6).

Arguments against (too much) autonomy concern the inefficiency deriving from duplication, as well as axiological concerns. To the first category belong considerations such as the fact that if the ECJ and the ECtHR diverge, this may create a conflict of allegiances for national courts who may be asked to choose between two standards of fundamental rights protection (Tridimas, 2018, p. 261). Similarly, repeated voices remind that NATO already exists, Member States defence equipment already exists (Strauß and Lux, 2019)(Kramp-Karrenbauer, 2020), and the autonomy of the EU only leads to further fragmentation of international law (Odermatt, 2021, p. 14) and needless duplications of collective security regimes.

Axiological concerns derive from the fact that autonomy justifies selective engagement with international law (Kassoti, 2019). It is, for example, unclear why and when the ECJ relies on international law, including principles such as self-determination. Further, as a matter of fact, there has not been more protection of fundamental rights (Tridimas, 2018, p. 261 providing the examples of N and Opinion 2/13; Spaventa, 2015, p. 36 providing examples of cases in which the Court has not analysed the compatibility of national rules falling within the Treaty with the Charter)

This is not a question on which this article takes a position. It is argued here that views on this matter do not depend on technicalities, but rather on political views on the role of the EU (this is true for legal autonomy as well). The technicalities are open, as the analysis above tried to show, to a spectrum of reasonable interpretations.

1. **Conclusion**

The question moving the inquiry was what relationship exists between the legal principle of autonomy as expressed in the case law of the Court, and the notion of strategic autonomy featuring in other EU official documents.

Legal and strategic autonomy can both be understood in a negative fashion (EU law is not international law; and EU should be able to carry out action outside the NATO framework, without US approval) and in a positive fashion (the EU has certain core characteristics, including certain institutional arrangements, values, norms, and constitutional objectives).

They have in common that they offer a vision of ‘conditional openness’ of the EU (and its legal system) to the world (and international law), provided that essential characteristics are safeguarded and enabled. In this sense, autonomy is not merely procedural but gives *some* indication of substance: some principles the EU should pursue (self-determination and other liberal internationalist norms), fundamental values including the protection of fundamental rights and the rule of law. For this reason, it may be possible to conceptualise the fact that EU possesses *strategic* autonomy as one of the core characteristics of the EU protected by the *legal* principle of autonomy.

The legal principle of autonomy and strategic autonomy also have in common conceptual limits. The article has highlighted in particular the conceptually difficulties of the ‘conditional openness’ model: the ranking of EU objectives, and the determination of the level of protection. These cannot be captured by strategic thinking, and are left to the democratic process of the EU legislature.

The article also considered a third issue: the normative question on whether there should be autonomy in the first place, or of how much autonomy is tolerable, desirable, or necessary: on this point, obviously, the differences of views ‘are differences in starting position’ (Klabbers and Koutrakos, 2019, p. 2).

1. **Bibliography**

Borrell, J. (2020) ‘Why European Strategic Autonomy Matters’, EEAS Website.

Cannizzaro, E. (2021) ‘The Value of the EU International Values’. In Douma, W. Th., Eckes, C., Van Elsuwege, P., Kassoti, E., Ott, A., and Wessel, R. A. (eds) *The Evolving Nature of EU External Relations Law* (The Hague: T.M.C. Asser Press), pp. 3–18.

Cottey, A. (2020) ‘Astrategic Europe’. *JCMS: Journal of Common Market Studies*, Vol. 58, No. 2, pp. 276–291.

Council of the EU (2016) ‘Council Conclusions on Implementing the EU Global Strategy in the Area of Security and Defence’.

de Witte, B. (2010) ‘European Union Law: How Autonomous is its Legal Order?’ *Zeitschrift für öffentliches Recht*, Vol. 65, No. 1, pp. 141–155.

de Witte, B. (2011) ‘The European Union as an International Legal Experiment’. In de Búrca, G. and Weiler, J. H. H. (eds) *The Worlds of European Constitutionalism* (Cambridge: Cambridge University Press), pp. 19–56.

‘Editorial Comments: Keeping Europeanism at Bay? Strategic Autonomy as a Constitutional Problem’ (2022). *Common Market Law Review*, pp. 313–326.

Eeckhout, P. (2015) ‘Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky’. *Fordham International Law Journal*, Vol. 38, No. 4, p. 955.

Eleftheriadis, P. (2010) ‘The Structure of European Union Law’. *Cambridge Yearbook of European Legal Studies*, Vol. 12, pp. 121–150.

Gatti, M. (2020) ‘The EU and International Investment Agreements: To Diverge Is to Converge’. In *Framing Convergence with the Global Legal Order* (Hart).

Grevi, G. (2019) ‘Strategic Autonomy for European Choices: The Key to Europe’s Shaping Power’.

Helwig, N. and Sinkkonen, V. (2022) ‘Strategic Autonomy and the EU as a Global Actor: The Evolution, Debate and Theory of a Contested Term’. *EUROPEAN FOREIGN AFFAIRS REVIEW*, Vol. 27, p. 20.

Howorth, J. (2018) ‘Strategic Autonomy and EU-NATO Cooperation: Threat or Opportunity for Transatlantic Defence Relations?’ *Journal of European Integration*, Vol. 40, No. 5, pp. 523–537.

Juncos, A. E. (2017) ‘Resilience as the New EU Foreign Policy Paradigm: A Pragmatist Turn?’ *European Security*, Vol. 26, No. 1, pp. 1–18.

Kassoti, E. (2019) ‘The ECJ and the Art of Treaty Interpretation: *Western Sahara Campaign UK*’. *Common Market Law Review*, Vol. 56, No. 1.

Kassoti, E. and Odermatt, J. (2020) ‘The Principle of Autonomy and International Investment Arbitration: Reflections on Opinion 1/17’, QIL QDI.

Kassoti, E. and Wessel, R. A. (Forthcoming) ‘The Normative Effect of Article 3(5) TEU: Observance and Development of International Law by the European Union’. In Garcia Andrade, P. (ed) *Interacciones entre el Derecho de la Unión Europea y el Derecho Internacional Público* (Tirant lo Blanch).

Klabbers, J. and Koutrakos, P. (2019) ‘Introduction: An Anatomy of Autonomy: Guest Editors’. *Nordic Journal of International Law*, Vol. 88, No. 1, pp. 1–8.

Klamert, M. (2017) ‘The Autonomy of the EU (and of EU Law): Through the Kaleidoscope’. *European Law Review*, Vol. 42, No. 6, pp. 815–830.

Koskenniemi, M. and Leino, P. (2002) ‘Fragmentation of International Law? Postmodern Anxieties’. *Leiden Journal of International Law*, Vol. 15, No. 3, pp. 553–579.

Koutrakos, P. (2013) *The EU Common Security and Defence Policy* (Oxford University Press).

Kramp-Karrenbauer, A. (2020) *Europe Still Needs America*, POLITICO. Available at «https://www.politico.eu/article/europe-still-needs-america/».

Kübek, G. (2020) ‘Autonomy and International Investment Agreements after Opinion 1/17’. *Europe and the World: A law review*, Vol. 4, No. 1.

Lenaerts, K. and Gutiérrez-Fons, J. A. (2018) ‘A Constitutional Perspective’. In *Oxford Principles Of European Union Law: The European Union Legal Order: Volume I* (Oxford University Press).

Lenaerts, K., Gutiérrez-Fons, J. A. and Adam, S. (2021) ‘Exploring the Autonomy of the European Union Legal Order’. *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht / Heidelberg Journal of International Law*, Vol. 81, No. 1, pp. 47–88.

Lonardo, L. (2021) ‘The Veiled Irreverence of the Italian Constitutional Court and the Contours of the Right to Silence for Natural Persons in Administrative Proceedings: Judgment of the Court (Grand Chamber) 2 February 2021, Case C-481/19, *DB* v *Consob* , ECLI:EU:C:2021:84’. *European Constitutional Law Review*, Vol. 17, No. 4, pp. 707–723.

Manners, I. (2008) ‘The European Union’s Normative Strategy for Sustainable Peace’. In *Strategies for Peace: Contributions of International Orga- nisations, States, and Non-state Actors* (Leverkusen: Barbara Budrich), pp. 130–151.

Moreno-Lax, V. (2019) ‘The Axiological Emancipation of a (Non-)Principle: Autonomy, International Law and the EU Legal Order’. In *The Interface Between EU and International Law: Contemporary Reflections* (Hart).

Neframi, E. (2020) ‘Permanent Investment Courts and the EU Legal Order’. In *European Yearbook of International Economic Law* (Springer).

Odermatt, J. (2021) *International Law and the European Union*, 1st edn, (Cambridge University Press).

Pellet, A. (1997) *Les Fondements Internationaux Du Droit Communautaire*.

Shuibhne, N. N. (2019) ‘What Is the Autonomy of Eu Law, and Why Does That Matter?’ *Nordic Journal of International Law*, Vol. 88, No. 1, pp. 9–40.

Sommermann (2013) ‘Article 3’. In Blanke, H.-J. and Mangiameli, S. (eds) *The treaty on European Union (TEU): a commentary* (Berlin Heidelberg: Springer).

Spaventa, E. (2015) ‘A Very Fearful Court?: The Protection of Fundamental Rights in the European Union after Opinion 2/13’. *Maastricht Journal of European and Comparative Law*, Vol. 22, No. 1, pp. 35–56.

Strauß, L. and Lux, N. (2019) *European Defence - Debates in and about Poland and France: Think Tank Publications 2017/2018* (Berlin: Stiftung Wissenschaft und Politik -SWP- Deutsches Institut für Internationale Politik und Sicherheit).

Tocci, N. (2021) ‘European Strategic Autonomy: What It Is, Why We Need It, How to Achieve It’. *Istituto di Affari Internazionali*, p. 39.

Toje, A. (2010) *The European Union as a Small Power* (London: Palgrave Macmillan UK).

Tridimas, T. (2018) ‘The Principle of Proportionality’. In *Oxford Principles Of European Union Law: The European Union Legal Order: Volume I* (Oxford University Press).

Weiler, J. H. H. and Haltern, U. (1998) ‘Constitutional or International? The Foundations of the Community Legal Order and the Question of Judicial Kompetenz-Kompetenz’. In *The European Courts and National Courts – Doctrine and Jurisprudence* (Oxford: Hart Publishing, Bloomsbury Publishing Plc), pp. 331–364.

1. \* I am grateful to Gesa Kübek, Isabella Mancini, Enrico Tinti and Alberto Vecchio for their comments.

   By ‘relationship’ it is meant how the two principles interact with each other. This article is not a comparative exercise, if not indirectly. [↑](#footnote-ref-1)
2. Things are further complicated when one considers the word ‘strategy’, a word which this article considers only tangentially because the notion of strategy is only indirectly relevant to autonomy. [↑](#footnote-ref-2)
3. Joint Declaration on European Defence Joint Declaration issued at the British-French Summit (Saint-Malo, 4 December 1998), https://www.cvce.eu/obj/franco\_british\_st\_malo\_declaration\_4\_december\_1998-en-f3cd16fb-fc37-4d52-936f-c8e9bc80f24f.html [↑](#footnote-ref-3)
4. Emphasis in the original. Brock Tessman and Wojtek Wolfe, “Great Powers and Strategic Hedging: The Case of Chinese Energy Security Strategy”, International Studies Review, vol. 13, no. 2 (2011), p. 216. [↑](#footnote-ref-4)
5. Rosneft para 113. [↑](#footnote-ref-5)
6. *Bank of Industry and Mine v Council* (C-358/15) EU:C:2016:338 at [57]. [↑](#footnote-ref-6)
7. *Rosneft*  (C-72/15) EU:C:2017:236 at [146]. [↑](#footnote-ref-7)
8. Strategic Compass 23. [↑](#footnote-ref-8)
9. According to which the EU, in its relations with the wider world, ‘shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter’ [↑](#footnote-ref-9)
10. Pursuant to which ‘The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.’ [↑](#footnote-ref-10)
11. Case C-266/16 *Western Sahara Campaign UK* EU:C:2018:118. [↑](#footnote-ref-11)